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ENCYCLOPEDIA

OF

UNITED STATES SUPREME COURT REPORTS

BEING A

Complete Encyclopedia of All the Case Law of the Federal Supreme Court up to and including Volume 206 U. S. Supreme Court Reports (Book 51 Lawyers' Edition)

UNDER THE EDITORIAL SUPERVISION OF

THOMAS JOHNSON MICHIE

Volume VI

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Encyclopedia of United States Supreme Court Reports.

EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL.

BY FRANK MOORE.

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I. Definition, Origin and Purpose.

A. Definition.—A bill of exceptions is a mode of placing the law of the case on the record, which is to be brought before the appellate court by a writ of error.[1]

B. Origin.—At common law, a writ of error lay for error in law, apparent on the record, but not for an error in law, not apparent on the record. If a party alleged any matter of law at the trial, and was overruled by the judge, he was without redress, the error not appearing on the record.[2] To remedy this

1. **Bill of exceptions defined.**—Ex parte Crane, 5 Pet. 190, 8 L. Ed. 92.

2. **Right to bill not derived from common law.**—Ex parte Crane, 5 Pet. 190, 199, 8 L. Ed. 92, citing 2 Inst. 42.

Practice before the statute of Westminster.—"Party aggrieved might, before the enactment of the statute of Westminster, sue out writ of error to correct an error in law apparent on the record, or for an error of fact, where either party had died before judgment; but the writ would not lie for an error in law not apparent on the record, as for a refusal to instruct the jury as requested, or for an erroneous instruction given, or for an erroneous ruling in admitting or rejecting evidence. Consequently, where either party alleged anything ore tenus, which was overruled by the court, the party was without remedy; because, being an error in law, and not apparent in the record, the appellate tribunal could not take judicial knowledge of the proceeding. Statute under consideration was passed to obviate that difficulty, and to prevent the injustice flowing from it, and throughout the long period it has continued in force, it has ever been regarded as an eminently just and highly beneficial regulation." Pomeroy *v.* State Bank, 1 Wall. 592, 599, 17 L. Ed. 638.

injustice the bill of exceptions was given to us by Westminster 2, 13 Edw. I.[3]

The only regulation made by congress as to bills of exceptions is that contained in § 953 of the Revised Statutes, which provides that they shall be sufficiently authenticated by the signature of the presiding judge, without any seal.[4]

C. Purpose or Office of Bill—1. IN GENERAL.—Bills of exceptions are required, in order that the matters to which they relate may be made a part of the record, and that it may appear that the questions involved were raised in the subordinate court.[5] But the bill should only present the rulings of the court upon some matter of law,[6] either in admitting or excluding evidence, or

3. Bill of exceptions given by statute of Westminster.—Jones *v.* Insurance Co., 4 Dall. 246, 1 L. Ed. 819; Sheppard *v.* Wilson, 6 How. 260, 274, 12 L. Ed. 430; Pomeroy *v.* State Bank, 1 Wall. 592, 599, 17 L. Ed. 638.

To remedy this evil, the statute was passed, which gives the bill of exceptions. It is to correct an error in law. Blackstone, speaking of this subject, says: "And if either in his directions or decisions, he (the judge) mistakes the law, by ignorance, inadvertence or design, the counsel on either side may require him publicly to seal a bill of exceptions, stating the point wherein he is supposed to err." "This bill of exceptions is in the nature of an appeal." 2 Bl. Com. 372; Ex parte Crane, 5 Pet. 190, 199, 8 L. Ed. 92.

Early practice under the statute of Westminster.—Evidence is to be given in open court, in the presence of the parties, their attorneys, the counsel, and all bystanders, and before the judge and jury; each party having liberty to except to its competency, which exceptions are publicly stated, and by the judge are openly and publicly allowed or disallowed, in the face of the country; which must curb any secret bias or partiality that might arise in his own breast. If, either in his directions or decisions, he misstates the law, by ignorance, inadvertence or design, the counsel on either side may require him, publicly, to seal a bill of exceptions, stating the point wherein he is supposed to err. 3 Blackstone 372; Buller 310. Robinson *v.* Adams, 4 Dall., appx. xii, 1 L. Ed. 920.

4. The federal statutes regulating bills of exceptions.—Chateaugay Ore, etc., Co., Petitioner, 128 U. S. 544, 555, 32 L. Ed. 508.

5. Purpose or function of bill.—Turnbull *v.* Payson, 95 U. S. 418, 419, 24 L. Ed. 437.

The theory of a bill of exceptions is that it states what occurred while the trial was going on. Railway Co. *v.* Heck, 102 U. S. 120, 26 L. Ed. 58.

It has been frequently held by the federal supreme court, that in passing upon the questions presented in a bill of exceptions, it will not look beyond the bill itself. Norris *v.* Jackson, 9 Wall. 125, 19 L. Ed. 608; Lincoln *v.* Claflin, 7 Wall. 132, 136, 19 L. Ed. 106; Leftwitch *v.* Lecanu, 4 Wall. 187, 18 L. Ed. 388; Russell *v.* Ely, 2 Black 575, 580, 17 L. Ed. 258; Reed *v.* Gardner, 17 Wall. 409, 411, 21 L. Ed. 665.

6. Questions of law alone reviewable.—The Abbotsford, 98 U. S. 440, 25 L. Ed. 168; Lincoln *v.* Claflin, 7 Wall. 132, 19 L. Ed. 106, followed in Laber *v.* Cooper, 7 Wall. 565, 568, 19 L. Ed. 151; Zeller *v.* Eckert, 4 How. 289, 297, 11 L. Ed. 979; The Benefactor, 102 U. S. 214, 26 L. Ed. 157; Graham *v.* Bayne, 18 How. 60, 15 L. Ed. 265; The City of New York, 147 U. S. 72, 37 L. Ed. 84; Chicago *v.* Greer, 9 Wall. 726, 735, 19 L. Ed. 769.

"In its preparation counsel seem to have forgotten that this court does not pass, in actions at law, upon the credibility or sufficiency of testimony; that these are matters which are left to the jury, and for any errors in its action the remedy must be sought in the court below by a motion for a new trial. A bill of exceptions should only present the rulings of the court upon some matter of law—as upon the admission or exclusion of evidence." Lincoln *v.* Claflin, 7 Wall. 132, 136, 19 L. Ed. 106, opinion of Mr. Justice Field.

"To bring all the testimony offered at the trial of a cause at common law, instead of facts, into this court, by a bill of exceptions, or otherwise, is a practice which, to say the least, is extremely inconvenient. Its tendency is to convert this court from a tribunal for the decision of points of law, into one for the investigation of facts, and for weighing evidence. To look into that testimony, for the purpose of inquiring whether the judge has omitted anything material in his charge, would be to yield to this practice, and to sanction it, in its most exceptionable form." Armstrong *v.* Toler, 11 Wheat. 258, 276, 6 L. Ed. 468.

Matters of fact or discretion.—The right of review is limited to questions of law appearing on the face of the record, and does not extend to matters of fact or of discretion; questions of law arising upon the trial of an issue of fact cannot be made part of the record by bill of exceptions, unless the trial is by jury, or by the court after due waiver in writing of a jury trial. Andes *v.* Slauson, 130 U. S. 435, 438, 32 L. Ed. 989.

It is an elementary principle in the

a challenge on some matter of law, arising upon a fact not denied, in which either party is overruled by the court.[7] And this is the rule in admiralty,[8] and in actions at law generally.[9]

Scope of Bill.—The law is equally clear, that a bill of exceptions is not to draw the whole matter into examination again. It is only for a single point.[10] And

common law that a bill of exceptions "is founded on a matter of law or a point of law arising out of a fact not denied." 1 Saund. Pl. and Evid. 640; The Abbotsford, 98 U. S. 440, 444, 25 L. Ed. 168.

Facts bearing upon questions of law.—But the bill of exceptions must be used to bring the facts into review before the appellate court, so far as they bear upon questions of law. Parsons *v.* Bedford, 3 Pet. 433, 7 L. Ed. 732. See the title APPEAL AND ERROR, vol. 1, p. 1005.

7. Questions of law arising upon admission or exclusion of evidence, etc.—Ex parte Crane, 5 Pet. 190, 199, 8 L. Ed. 92; Lincoln *v.* Claflin, 7 Wall. 132, 19 L. Ed. 106; Arthurs *v.* Hart, 17 How. 6, 14, 15 L. Ed. 30; Wetmore *v.* Rymer, 169 U. S. 115, 42 L. Ed. 682.

The bill of exceptions lies only upon some point arising either upon the admission or refusal of evidence, or is a matter of law arising from a fact found, or not denied, and which has been overruled by the court. Arthurs *v.* Hart, 17 How. 6, 15 L. Ed. 30, citing Zeller *v.* Eckert, 4 How. 289, 11 L. Ed. 979.

So far as error is founded upon the bill of exceptions incorporated into the record, it lies only to exceptions taken at the trial to the ruling of the law by the judge, and to the admission or rejection of evidence. 1 Bac. Abr., 779; Bull. N. P., 316. Zeller *v.* Eckert, 4 How. 289, 297, 11 L. Ed. 979.

Beyond this we have no power to look into the bill, on a writ of error, as it is the creature of statute, and restricted to the points stated. Zeller *v.* Eckert, 4 How. 289, 298, 11 L. Ed. 979, citing 13 Edw. I, ch. 31.

8. In admiralty court confined to questions of law.—In admiralty cases the federal supreme court is limited to a determination of questions of law and to the validity of such rulings excepted to at the time, as may be presented by a bill of exceptions prepared as in actions at law. The E. A. Packer, 140 U. S. 360, 35 L. Ed. 453, citing The Abbotsford, 98 U. S. 440, 25 L. Ed. 168; The Benefactor, 102 U. S. 214, 26 L. Ed. 157; The Clara, 102 U. S. 200, 26 L. Ed. 145; The Adriatic, 103 U. S. 730, 26 L. Ed. 605; The Connemara, 108 U. S. 352, 360, 27 L. Ed. 751; Watts *v.* Camors, 115 U. S. 353, 363, 29 L. Ed. 406; The Gazelle and Cargo, 128 U. S. 474, 32 L. Ed. 496; The Annie Lindsley, 104 U. S. 185, 26 L. Ed. 716; The City of New York, 147 U. S. 72, 37 L. Ed. 84. See the title ADMIRALTY, vol. 1, p. 188.

In The Francis Wright, 105 U. S. 381, 26 L. Ed. 1100, Mr. Chief Justice Waite severely condemned the practice of framing a bill of exceptions so as, if possible, to secure a re-examination of the facts in that court.

Conflicting evidence as to seaworthiness of vessel.—Merchants' Ins. Co. *v.* Allen, 121 U. S. 67, 30 L. Ed. 858, citing The Francis Wright, 105 U. S. 381, 26 L. Ed. 1100.

Rule in admiralty as to incidental facts.—It is undoubtedly true that if the circuit court neglects or refuses, on request, to make a finding one way or the other on a question of fact material to the determination of the cause, when evidence has been adduced on the subject, an exception to such refusal taken in time and properly presented by a bill of exceptions may be considered here on appeal. So, too, if the court, against remonstrance, finds a material fact which is not supported by any evidence whatever, an exception is taken, a bill of exceptions may be used to bring up for review the ruling in that particular. In the one case the refusal to find would be equivalent to a ruling that the fact was immaterial; and in the other, that there was some evidence to prove what is found when in truth there was none. Both these are questions of law, and proper subjects for review in an appellate court. But this rule does not apply to mere incidental facts, which only amount to evidence bearing upon the ultimate facts of the case. Questions depending on the weight of evidence are, under the law as it now stands, to be conclusively settled below and the fact in respect to which such an exception may be taken must be one of the material and ultimate facts on which the correct determination of the cause depends. The Francis Wright, 105 U. S. 381, 387, 26 L. Ed. 1100, approved in Merchants' Ins. Co. *v.* Allen, 121 U. S. 67, 71, 30 L. Ed. 858.

9. See the title APPEAL AND ERROR, vol. 1, p. 1005.

10. Scope of the bill.—W. B. *v.* Latimer, 4 Dall., appx. i, xi, 1 L. Ed. 915; Lees *v.* United States, 150 U. S. 476, 37 L. Ed. 1150.

A bill of exceptions is not to draw the whole matter into examination again; it is only for a single point, and the truth of it can never be doubted, after the bill is sealed. Ex parte Crane, 5 Pet. 190, 199, 8 L. Ed. 92.

Indeed, the single function of a bill of exceptions is to bring upon the record so much of the proceedings as will disclose the precise question which the party desires to have ruled upon, and, when prepared by counsel and presented to the

this is the rule in admiralty.[11] The bill, however, only constitutes a proper foundation for a writ of errror; it does not remove the cause into the appellate court without a writ of error.[12]

2. Office of Bill under Montana Code.—The office of a bill of exceptions is evidently the same under the Montana Code as at common law, and whatever brings upon the record, properly verified by the attestation of the judge, the matters of fact occurring at the trial, on which the point of law arises, which enters into the ruling and decision of the court excepted to, answers sufficiently the description of a proper bill of exceptions.[13]

II. What Law Governs.

In regard to bills of exceptions, courts of the United States are independent of any statute or practice prevailing in the courts of the state in which the trial is had.[14] Nor does the uniformity act apply to the preparation, perfecting, set-

court, if it states the facts truly, the judge ought to sign it; and it is unnecessary for it to set forth affirmatively that there was no other error in the proceedings, or to state all the facts of the case in order to disclose that there was no other error. Lewis *v.* United States, 146 U. S. 370, 384, 36 L. Ed. 1011, dissenting opinion of Brewer, J.

11. Scope of the bill in admiralty.—A bill of exceptions must be "prepared as in actions at law," where it is used, "not to draw the whole matter into examination again," but only separate and distinct points, and those of law. Bac. Abr., Bill of Exceptions; 1 Saund. Pl. & Ev. 846. The Francis Wright, 105 U. S. 381, 389, 26 L. Ed. 1100.

A bill of exceptions in admiralty cases must be prepared as in actions at law, where it is used not to draw the whole matter into examination again, but only separate and distinct points at law. The E. A. Packer, 140 U. S. 360, 35 L. Ed. 453, approving The Francis Wright, 105 U. S. 381, 26 L. Ed. 1100.

12. Bill does not dispense with necessity for writ of error.—Turnbull *v.* Payson, 95 U. S. 418, 419, 24 L. Ed. 437.

13. Office of bill under Montana Code.—Kleinschmidt *v.* McAndrews, 117 U. S. 282, 286, 29 L. Ed. 905.

14. Statutes and practice in state courts do not control federal courts.—Missouri Pac. R. Co. *v.* Chicago, etc., R. Co., 132 U. S. 191, 33 L. Ed. 309; Fishburn *v.* Chicago, etc., R. Co., 137 U. S. 60, 34 L. Ed. 585; Van Stone *v.* Stillwell, etc., Mfg. Co., 142 U. S. 128, 133, 35 L. Ed. 961; Indianapolis, etc., R. Co. *v.* Horst, 93 U. S. 291, 23 L. Ed. 898; Newcomb *v.* Wood, 97 U. S. 581, 24 L. Ed. 1085; Chateaugay Ore, etc., Co., Petitioner, 128 U. S. 544, 32 L. Ed. 508. See, also, the title COURTS, vol. 4, p. 861.

The authority of the federal supreme court to review the judgments of the circuit court by bill of exceptions and writ of error is regulated exclusively by the acts of congress and the practice of the courts of the United States, without regard to the statutes of the state or the practice of its courts. Chateaugay Ore, etc., Co., Petitioner, 128 U. S. 544, 32 L. Ed. 508; Andes *v.* Slauson, 130 U. S. 435, 438, 32 L. Ed. 989.

Section 1176 of the Penal Code of California provides: "When written charges have been presented, given, or refused, or when charges have been taken down by the reporter, the questions presented in such charges need not be excepted to or embodied in a bill of exceptions, but the written charges or the report, with the endorsements showing the action of the court, form part of the record, and any error in the decision of the court thereon may be taken advantage of on appeal in like manner, as if presented in a bill of exceptions." They also, by the same code, form part of the judgment roll. Section 1207. These provisions of the Penal Code of California do not control the proceedings in the circuit court of the United States sitting in that state. What is necessary to be done in a circuit court, even in civil cases, in order that its action upon any particular question or matter may be reviewed or revised in this court, depends upon the acts of congress and the rules of practice which this court recognizes as essential in the administration of justice. Such is the result of our decisions. Rev. Stat., § 914; Act of June 1, 1872, c. 255, § 5, 17 Stat. 197; Nudd *v.* Burrows, 91 U. S. 426, 23 L. Ed. 286; Indianapolis, etc., R. Co. *v.* Horst, 93 U. S. 291, 23 L. Ed. 898; Chateaugay Ore, etc., Co., Petitioner, 128 U. S. 544, 553, 32 L. Ed. 508; Southern Pac. Co. *v.* Denton, 146 U. S. 202, 208, 36 L. Ed. 943; Luxton *v.* North River Bridge Co., 147 U. S. 337, 338, 37 L. Ed. 194; Lincoln *v.* Power, 151 U. S. 436, 442, 38 L. Ed. 224. See, also, Logan *v.* United States, 144 U. S. 263, 303, 36 L. Ed. 429; St. Clair *v.* United States, 154 U. S. 134, 153, 38 L. Ed. 936.

Practice as to filing bill.—Practice in the federal supreme court is not regulated by the provisions of state practice, statutes, or rules of court as to filing the

tling and signing of a bill of exceptions.[15] The rules applicable are derived from the common law and ancient English statutes, except so far as the acts of congress control.[16]

III. Necessity for Bill of Exceptions or Statement of Facts.

A. Where the Errors Are Not Apparent on the Record—1. IN GENERAL.—Whatever the error may be and in whatever stage of the cause it may have occurred it must appear in the record or proceedings, or be shown by a bill of exceptions, agreed statement of facts, demurrer, or special verdict;[17]

bill. Chateaugay Ore, etc., Co., Petitioner, 128 U. S. 544, 32 L. Ed. 508.

The statute of Alabama, and the regulation it prescribes to the courts of the state, can have no influence on the practice of a court of the United States, unless adopted by a rule of the court. United States *v.* Breitling, 20 How. 252, 254, 15 L. Ed. 900.

Removal of causes from Louisiana.—"The circuit courts may adopt the forms of pleading and practice of the state courts, but no state legislation can be applied to the practice of this court, and the mode in which causes shall be brought into it for review. The very numerous cases on this subject (from Field *v.* United States, 9 Pet. 182, 9 L. Ed. 94, to Arthurs *v.* Hart, 17 How. 6, 15 L. Ed. 30), show the difficulties we have had to encounter in reconciling our modes of review to the civil code of practice as used in the courts of Louisiana." Graham *v.* Bayne, 18 How. 60, 61, 15 L. Ed. 265.

15. Construction of uniformity act.—"The practice and rules of the state court do not apply to proceedings in the circuit court taken for the purpose of reviewing in this court a judgment of the circuit court, and that such rules and practice, embracing the preparation, perfecting, settling, and signing of a bill of exceptions, are not within the 'practice, pleadings, and forms and modes of proceeding' in the circuit court which are required, by § 914 of the Revised Statutes, to conform 'as near as may be' to the 'practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state' within which the circuit court is held, 'any rule of court to the contrary notwithstanding.'" Chateaugay Ore, etc., Co., Petitioner, 128 U. S. 544, 553, 32 L. Ed. 508.

Mr. Justice Blatchford, after reviewing the cases at some length, uses the following language: "In harmony with the foregoing decisions, we are of opinion that § 914 does not extend to the means of enforcing or revising a decision once made by the circuit court. Section 914 does not extend to proceedings to enforce a judgment, because by § 916 special provisions are made as to a remedy by execution or otherwise, to reach the property of a judgment debtor, by borrowing from the laws of the state only those remedies then already existing, or which should thereafter be adopted by general rules of the circuit court. Lamaster *v.* Keeler, 123 U. S. 376, 31 L. Ed. 238. The object of § 914 was to assimilate the form and manner in which the parties should present their claims and defense, in the preparation for the trial of suits in the federal courts, to those prevailing in the courts of the state. As we have seen, it does not include state statutes requiring instructions to the jury to be reduced to writing, or those which permit such instructions and certain papers read in evidence, to be taken by the jury when they retire, or those which require the jury to be directed, if they return a general verdict, to find specially upon particular questions of fact involved in the issues; and, as it does not apply to a motion for a new trial, nor affect the power of the circuit court to grant or refuse a new trial at its discretion, so it does not cover any other means of enforcing or revising a decision once made by the circuit court." Chateaugay Ore, etc., Co., Petitioner, 128 U. S. 544, 554, 32 L. Ed. 508.

Generally, as to the uniformity act, see the title COURTS, vol. 4, p. 861.

16. What rules do govern federal courts.—The manner or the time of taking proceedings as a foundation for the removal of a case by a writ of error from one federal court to another is a matter to be regulated exclusively by acts of congress, or, when they are silent, by methods derived from the common law, from ancient English statutes, or from the rules and practice of the courts of the United States. Chateaugay Ore, etc., Co., Petitioner, 128 U. S. 544, 555, 32 L. Ed. 508.

The only regulation made by congress as to bills of exceptions is that contained in § 953 of the Revised Statutes, which provides that they shall be sufficiently authenticated by the signature of the presiding judge, without any seal. Chateaugay Ore, etc., Co., Petitioner, 128 U. S. 544, 555, 32 L. Ed. 508.

17. Necessity for bill where errors not apparent of record.—1 Chitty on Pleading, 431; 1 Tidd's Practice, 586; United States *v.* Eliason, 16 Pet. 291, 10 L. Ed. 968; New Orleans Railroad *v.* Morgan, 10 Wall. 256, 261, 19 L. Ed. 892; Claasen *v.* United States, 142 U. S. 140, 147, 35 L.

therefore alleged errors, not presented by a bill of exceptions, nor apparent on the face of the record, are not the proper subjects of re-examination by writ of error in the federal supreme court.[18] And neither the assignment of errors, nor the plea of in nullo est erratum, can give that court jurisdiction of errors not appearing on the face of the record.[19] It may be said, in general, that anything which is not necessary to support the validity of the judgment is, presumptively at least, no part of the record, however material it may have been in the progress of the case.[20]

2. Illustrative Cases—a. *Miscellaneous Examples.*—Accordingly, the rulings of the judge during the progress of a trial,[21] the reasons he assigns there-

Ed. 966. See the title APPEAL AND ERROR, vol. 2, pp. 205, 224.

When the error alleged does not appear on the face of the record, or on a demurrer, a bill of exceptions to the ruling of the court on questions of law, either in admitting or rejecting testimony, or in their instructions to the jury, constitutes the only mode of bringing a case before the supreme court for review. Graham *v.* Bayne, 18 How. 60, 62, 15 L. Ed. 265; Sparrow *v.* Strong, 4 Wall. 584, 18 L. Ed. 410.

When a party is dissatisfied with the decision of his cause in an inferior court, and intends to seek a revision of the law applied to the case in a superior jurisdiction, he must take care to raise the question of law to be revised, and put the facts on the record for the information of the appellate tribunal; and, if he omits to do so in any of the methods known in the practice of courts of errors, he must be content to abide the consequences of his own neglect. Baltimore, etc., R. Co. *v.* Trustees of Sixth Presbyterian Church, 91 U. S. 127, 130, 23 L. Ed. 260; Suydam *v.* Williamson, 20 How. 427, 433, 15 L. Ed. 978; Pomeroy *v.* State Bank, 1 Wall. 592, 600, 17 L. Ed. 638; Garland *v.* Davis, 4 How. 131, 11 L. Ed. 907; Steph. on Plead. 121; Slacum *v.* Pomery, 6 Cranch 221, 3 L. Ed. 205; Storm *v.* United States, 94 U. S. 76, 81, 24 L. Ed. 42.

18. Errors not apparent on the record will not be re-examined.—Storm *v.* United States, 94 U. S. 76, 81, 24 L. Ed. 42; Metropolitan R. Co. *v.* District of Columbia, 195 U. S. 322, 49 L. Ed. 219; Young *v.* Martin, 8 Wall. 354, 19 L. Ed. 418; Baltimore, etc., R. Co. *v.* Trustees of Sixth Presbyterian Church, 91 U. S. 127, 23 L. Ed. 260; Clune *v.* United States, 159 U. S. 590, 40 L. Ed. 269; Nelson *v.* Flint, 166 U. S. 276, 41 L. Ed. 1002.

Where the legal points have not been raised by a bill of exceptions in the lower court, it is not a case for revision in this court. Minor *v.* Tillotson, 2 How. 392, 11 L. Ed. 312.

The court cannot give any opinion upon points not properly before it, from those points not being in the bill of exceptions filed in the record to the court's ruling below. The proper function of a court, on a writ of error, is to pass its judgment upon the points excepted to in the opinion of the court below; and not to decide the law of the case, in anticipation of its trial in the court below. Bradstreet *v.* Potter, 16 Pet. 317, 318, 10 L. Ed. 978.

Where the verdict is general the court may enter judgment on the verdict, or may set it aside and grant a new trial, but the rulings of the court during the trial cannot be revised on writ of error save by a regular bill of exceptions. Judgment also may be rendered on the verdict in a special case, or a new trial may be granted because the verdict is general, and is for plaintiff or defendant. Mumford *v.* Wardwell, 6 Wall. 423, 433, 18 L. Ed. 756.

Municipal taxation.—Assignments of error that a debt due a city is part of its public revenues, and not subject to seizure or levy; that the city was not made a party to the garnishee proceedings; that the supplemental petition does not show that the debt to the city is not public property; that there was no issue raised to be tried by a jury; that the character and origin of the indebtedness of the corporation to the city were not shown to be such as would support the judgment against the corporation; and that the interest included in the verdict was improperly allowed and erroneously computed, if not saved by a bill of exceptions, cannot be considered by this court on a writ of error. Canal, etc., St. R. Co. *v.* Hart, 114 U. S. 654, 29 L. Ed. 226.

Former conviction.—No question in regard to a defense set up of a former conviction can be raised, in the absence of a bill of exceptions raising specific questions. Coffey *v.* United States, 116 U. S. 427, 29 L. Ed. 681. See the title AUTREFOIS, ACQUIT AND CONVICT, vol. 2, p. 751.

19. Assignment of errors or plea of in nullo est erratum.—In re Claasen, 140 U. S. 200, 35 L. Ed. 409; Claasen *v.* United States, 142 U. S. 140, 148, 35 L. Ed. 966.

20. What is not apparent of record.—United States *v.* Taylor, 147 U. S. 695, 700, 37 L. Ed. 335. See the title APPEAL AND ERROR, vol. 2, p. 194.

21. Rulings during progress of trial.—Insurance Co. *v.* Lanier, 95 U. S. 171, 24 L. Ed. 383; United States *v.* Taylor, 147 U. S. 695, 37 L. Ed. 335.

Exceptions to be of any avail must

for[22] the report of the judge who tried the case at nisi prius,[23] the stipulations of the parties,[24] all motions, including motions to quash the writ, to amend the pleadings, for extensions of time, for continuances, for bonds for prosecutions, for bills of particulars,[25] and for the dismissal of a cause removed into a federal court,[26] notices of motions,[27] pleas stricken from the files, and the ruling of the court upon an application to strike out a portion of the pleadings,[28] a power of attorney to confess judgment and affidavit in relation to the death of the maker thereof,[29] or a note, bond or mortgage filed in the case and upon which suit is brought,[30] cannot be considered by the appellate court in the absence of a bill of exceptions.

b. *Proceedings in Criminal Cases.*—In the absence of a rule requiring them to be incorporated, the proceedings before a commissioner form no part of the record,[31] and the same rule applies to warrants, subpœnas, and capiases, except the one upon which the arrest was made.[32]

c. *Affidavits, Depositions, Exhibits and Certificates.*—Affidavits[33] of every

present distinctly the rulings objected to. Insurance Co. *v.* Sea, 21 Wall. 158, 22 L. Ed. 511, citing Pomeroy *v.* State Bank, 1 Wall. 592, 17 L. Ed. 638; Young *v.* Martin, 8 Wall. 354, 19 L. Ed. 418.

Objections assigned and argued to the rulings and instructions at the trial cannot be considered by this court, in the absence of a bill of exceptions. Claasen *v.* United States, 142 U. S. 140, 35 L. Ed. 966.

Report of arbitrators.—When the report is filed in court, the losing party may file objections in writing to the confirmation of the report, and may introduce evidence in support of the objections; and it is well-settled law that the ruling of the court in overruling such objections is the proper subject of a bill of exceptions. New York, etc., R. Co. *v.* Myers, 18 How. 246, 250, 15 L. Ed. 380; Baltimore, etc., R. Co. *v.* Trustees of Sixth Presbyterian Church, 91 U. S. 127, 131, 23 L. Ed. 260.

22. Reasons for the decision.—United States *v.* Taylor, 147 U. S. 695, 37 L. Ed. 335.

When the bill of exceptions does not purport to set forth all the evidence on either of the subjects to which the exception relates, and the judgment states that it was rendered for "reasons orally assigned," and these are not found in the record, there is nothing on which error can be assigned, and the judgment must be affirmed. Generes *v.* Campbell, 11 Wall. 193, 20 L. Ed. 110.

23. Report of judge.—Thus, in Inglee *v.* Coolidge, 2 Wheat. 363, 4 L. Ed. 261, it was held by this court that the report of the judge who tried the case at nisi prius, containing a statement of the facts, is not to be considered a part of the record. It is not like a special verdict or a statement of facts agreed of record, upon which the court is to pronounce its judgment. Approved in United States *v.* Taylor, 147 U. S. 695, 700, 37 L. Ed. 335.

24. Stipulations of the parties must appear by the bill of exceptions. McLaughlin *v.* Swann, 18 How. 217, 15 L. Ed. 257. See the title STIPULATIONS.

25. Motions.—United States *v.* Taylor, 147 U. S. 695, 37 L. Ed. 335.

26. Motions for dismissal of causes removed to federal courts.—The decision of a court upon a motion to dismiss a cause removed into a federal court from a state court, on the ground of diverse citizenship, and the questions presented and decided at the hearing of such a motion cannot be re-examined on a writ of error, unless they are brought into the record by bill of exceptions, or something which is equivalent. England *v.* Gebhardt, 112 U. S. 502, 28 L. Ed. 811, citing and approving Kearney *v.* Denn, 15 Wall. 51, 21 L. Ed. 41.

27. Notices of motions.—United States *v.* Taylor, 147 U. S. 695, 37 L. Ed. 335.

28. Pleas stricken out.—United States *v.* Taylor, 147 U. S. 695, 37 L. Ed. 335.

29. Power of attorney to confess judgment.—United States *v.* Taylor, 147 U. S. 695, 37 L. Ed. 335.

30. Notes, bonds and mortgages.—United States *v.* Taylor, 147 U. S. 695, 37 L. Ed. 335.

31. Proceedings before U. S. commissioner in criminal case.—United States *v.* King, 147 U. S. 676, 37 L. Ed. 328. See the title UNITED STATES COMMISSIONERS.

32. Warrants, subpœnas and capiases.—United States *v.* Taylor, 147 U. S. 695, 37 L. Ed. 335.

33. Affidavits must be placed on the record by bill of exceptions.—United States *v.* 422 Casks of Wine, 1 Pet. 547, 7 L. Ed. 257; Pomeroy *v.* State Bank, 1 Wall. 592, 600, 17 L. Ed. 638; Young *v.* Martin, 8 Wall. 354, 356, 19 L. Ed. 418; Coddington *v.* Richardson, 10 Wall. 516, 518, 19 L. Ed. 981; Baltimore, etc., R. Co. *v.* Trustees of Sixth Presbyterian Church, 91 U. S. 127, 133, 23 L. Ed. 260.

Affidavits form no part of the record, unless made so by a bill of exceptions, or something which is equivalent. England *v.* Gebhardt, 112 U. S. 502, 28 L. Ed. 811, distinguishing Bronson *v.* Schulten, 104 U. S. 410, 26 L. Ed. 797, cited in United States *v.* Taylor, 147 U. S. 695, 37 L. Ed. 335.

sort and description,[34] as, for example, affidavits filed in support of a motion for a new trial,[35] or affidavits of witnesses as to their mileage and attendance,[36] and also depositions, exhibits or certificates,[37] form no part of the record, unless made so by a bill of exceptions, or something which is equivalent,[38] though appearing in the transcript of a common-law court of errors.[39]

d. *Instructions*—(1) *In General.*—Nor are the instructions, given or requested, by the court to the jury, a part of the record, unless made so by a proper bill of exceptions.[40]

34. Miscellaneous affidavits.—Affidavits of claimants, affidavits in relation to the conduct of jurors, and all affidavits taken during the progress of the trial are not matters of record, unless made so by bill of exceptions or by consent, or by order of the court. United States *v.* Taylor, 147 U. S. 695, 37 L. Ed. 335, citing Freeman on Judgments, § 79.

Affidavit for use on motion.—"In the first place, only errors apparent on the record can be considered, and an affidavit filed for use on a motion is not part of the record, any more than the deposition of a witness used on the trial, and only becomes a part of the record by being incorporated in a bill of exceptions. Stewart *v.* Wyoming Cattle Ranche Co., 128 U. S. 383, 32 L. Ed. 439;" Evans *v.* Stettnisch, 149 U. S. 605, 607, 37 L. Ed. 866.

35. Affidavits filed in support of a motion for a new trial are no part of the record on error, unless made so by bill of exceptions. Stewart *v.* Wyoming Cattle Ranche Co., 128 U. S. 383, 390, 32 L. Ed. 439.

36. Affidavits of witnesses.—"We have already held, in United States *v.* King, 147 U. S. 676, 37 L. Ed. 328, that, in the absence of a rule requiring them to be incorporated, the proceedings before a commissioner form no part of the record, and we think the same rule applies to affidavits. England *v.* Gebhardt, 112 U. S. 502, 28 L. Ed. 811." United States *v.* Taylor, 147 U. S. 695, 700, 37 L. Ed. 335. See the title WITNESSES.

37. Depositions, exhibits and certificates.—"In passing upon the questions presented in a bill of exceptions this court will not look beyond the bill itself. The pleadings and the statements of the bill, the verdict and the judgment are the only matters that are properly before it. Depositions, exhibits, or certificates not contained in the bill, cannot be considered by the court. The court declares its intention to adhere to what is above presented as its practice; and declares further that the case of Flanders *v.* Tweed (9 Wall. 425, 19 L. Ed. 678), was exceptional." Reed *v.* Gardner, 17 Wall. 409, 21 L. Ed. 665.

In a jury case depositions and exhibits of every description constitute no part of the record on which the judgment of an appellate court can be exercised, unless made a part of it by a bill of exceptions, in some other manner recognized by law. Williams *v.* Norris, 12 Wheat. 117, 6 L. Ed. 571.

38. Baltimore, etc., R. Co. *v.* Trustees of Sixth Presbyterian Church, 91 U. S. 127, 23 L. Ed. 260.

39. Merely appearing in transcript not sufficient.—Neither depositions nor affidavits, though appearing in the transcript of a common-law court of errors, can ever be regarded as a part of the record, unless the same are embodied in an agreed statement of facts, or are made so by a demurrer to the evidence, or are exhibited in a bill of exceptions. Matters of parol evidence in such a case can never be made a part of the record so as to become reexaminable in a court of errors, unless it be in one of four ways: (1) By an agreed statement of facts. (2) By a bill of exceptions. (3) By a special verdict. (4) By a demurrer to the evidence; which latter mode is seldom or never adopted in modern practice. Baltimore, etc., R. Co. *v.* Trustees of Sixth Presbyterian Church, 91 U. S. 127, 130, 23 L. Ed. 260, cited and approved in Metropolitan R. Co. *v.* District of Columbia, 195 U. S. 322, 49 L. Ed 219.

"Exceptions may be taken by the opposite party to the introduction of depositions or affidavits; and the party introducing such evidence in a subordinate court may insist that the court shall give due effect to the evidence, and, in case of refusal to comply with such request, may except to the ruling of the court, if it be one prejudicial to his rights. Where neither party excepts to the ruling of the court, either in respect to its admissibility or legal effect, the fact that such a deposition or affidavit is exhibited in the transcript is not of the slightest importance in the appellate court, as nothing of the kind can ever constitute the proper foundation for an assignment of error." Suydam *v.* Williamson, 20 How. 427, 433, 15 L. Ed. 978; Metropolitan R. Co *v.* District of Columbia, 195 U. S. 322, 331, 49 L. Ed. 219.

40. Bill necessary to put instructions on record.—Suydam *v.* Williamson, 20 How. 427, 433, 15 L. Ed. 978; Reed *v.* Gardner, 17 Wall. 409, 21 L. Ed. 665; Storm *v.* United States, 94 U. S. 76, 77, 24 L. Ed. 42.

Instructions to become part of the record must be incorporated in the bill of exceptions, and thus authenticated by

(2) *Other Methods than Bill of Exceptions Considered*—(a) *In General.*—Further than this, a bill of exceptions is the only mode by which the instructions given or requested can be made a part of the record;[41] it cannot be accomplished by the clerk merely marking a copy of the charge as filed in his office among the papers in the case,[42] nor by referring to exhibits annexed and

the signature of the judge. Clune *v.* United States, 159 U. S. 590, 40 L. Ed. 269.

Errors in the charge of the court which do not appear in the bill of exceptions, will not be considered, but the judgment will be affirmed. Bannon *v.* United States, 156 U. S. 464, 39 L. Ed. 494.

Where there is no bill of exceptions in the record showing that the court below was asked to and refused to give instructions upon which the assignments of error depend, this court cannot pass upon the errors embraced in the assignments of error. Metropolitan R. Co. *v.* District of Columbia, 195 U. S. 322, 49 L. Ed. 219.

"Instructions requested or given rest in parol and do not, in the practice of this court, or in any other court where the common law prevails, become a part of the record, unless made so by a regular bill of exceptions, sealed by the judge who presided at the trial." Pomeroy *v.* State Bank, 1 Wall. 592, 598, 17 L. Ed. 638; Thompson *v.* Riggs, 5 Wall. 663, 675, 18 L. Ed. 704.

Although the transcript of the record contains what purports to be the charge of the court in full with a memorandum at the close, stating that defendant's counsel excepted to certain portions thereof, yet if it is not verified, or included in any proper bill of exceptions, this court is not at liberty to treat it as a part of the record for any purpose. Struthers *v.* Drexel, 122 U. S. 487, 30 L. Ed. 1216.

41. Bill of exceptions is exclusive mode of putting instructions on the record.—Insurance Co. *v.* Lanier, 95 U. S. 171, 24 L. Ed. 383; Claasen *v.* United States, 142 U. S. 140, 35 L. Ed. 966; United States *v.* Taylor, 147 U. S. 695, 37 L. Ed. 335.

Error to supreme court of the District of Columbia.—This court cannot pass upon an assignments of error to the action of the supreme court of the District of Columbia in refusing to give instructions, where there is no bill of exceptions in the record showing that the supreme court of the District of Columbia was asked to and refused to give the alleged instructions upon which the assignments of error depend, and where it does not appear from a bill of exceptions or in any other appropriate mode, upon what the supreme court of the District of Columbia acted in considering the exceptions. "True it is that the transcript contains what purport to be certain instructions asked and refused, marked filed by the clerk. True also is it that there is in the printed transcript a petition and other papers concerning the evidence given before the jury, to which we have referred in the statement of the case. And it is also true that there is in the printed transcript an agreement between counsel, reciting that the court allowed the prayer of the petition. But in the absence of a bill of exceptions, allowed and authenticated by the judge, these documents form no part of the record in this court, which we have alone the right to consider in determining the merits of the errors assigned. Young *v.* Martin, 8 Wall. 354, 19 L. Ed. 418; Baltimore, etc., R. Co. *v.* Trustees of Sixth Presbyterian Church, 91 U. S. 127, 23 L. Ed. 260; Clune *v.* United States, 159 U. S. 590, 593, 40 L. Ed. 269; Nelson *v.* Flint, 166 U. S. 276, 279, 41 L. Ed. 1002." Metropolitan R. Co. *v.* District of Columbia, 195 U. S. 322, 330, 49 L. Ed. 219.

42. Marking charges filed by clerk insufficient.—A claim of error in the instructions is not legally before this court where there appears in the transcript that which purports to be a copy of the charge, marked by the clerk as filed in his office among the papers in the case, because it is well settled that instructions do not in this way become part of the record. Clune *v.* United States, 159 U. S. 590, 40 L. Ed. 269.

"Finally, there is a claim of error in the instructions, but the difficulty with this is that they are not legally before us. True, there appears in the transcript that which purports to be a copy of the charge, marked by the clerk as filed in his office among the papers in the case; but it is well settled that instructions do not in this way become part of the record. They must be incorporated in a bill of exceptions, and thus authenticated by the signature of the judge. This objection is essentially different from that of the lack or the sufficiency of exceptions." Metropolitan R. Co. *v.* District of Columbia, 195 U. S. 322, 332, 49 L. Ed. 219, citing Clune *v.* United States, 159 U. S. 590, 593, 40 L. Ed. 269.

There are, for instance, in some states statutes directing that all instructions must be reduced to writing, marked by the judge "refused" or "given," and attested by his signature, and that when so attested and filed in the clerk's office they become a part of the record. But in the absence of that or some other statutory provision a bill of exceptions has been recognized as the only appropriate method of bringing onto the record the instructions given or refused. Supreme Court Rules No. 4, 108 U. S. 574; Phœnix Life Ins. Co. *v.* Raddin, 120 U. S. 183, 193, 30

marked "charge,"[43] nor can an entry of the ruling in the minutes be of any benefit to the party, unless he seasonably reduces the same to form and causes it to be sealed by the judge.[44] This is also the rule in Georgia.[45]

(b) *Affidavits of Counsel.*—A refusal of the court to instruct the jury, because the request was not given the court until after the court had instructed the jury, will not be considered, where there is nothing in the bill of exceptions showing how long after the court had finished its charge to the jury this instruction was asked; nor can this be accomplished by an affidavit filed with the clerk but not incorporated into any bill of exceptions.[46]

(3) *Review of Criminal Cases from Utah.*—But instructions requested and refused, and instructions given, are matters of record and subjects of appeal under the provisions of the Utah code of criminal procedure, without any bill of exceptions.[47]

e. *Evidence*—(1) *In General.*—The evidence given on the trial of an issue at common law is no part of the record, unless made a part of it by bill of exceptions, demurrer to evidence, or case agreed by the parties, and entered of record.[48] And this is necessary for a review of the rulings of the court below in

L. Ed. 644; Struthers *v.* Drexel, 122 U. S. 487, 491, 30 L. Ed. 1216; Clune *v.* United States, 159 U. S. 590, 593, 40 L. Ed. 269.

A bill of exceptions authenticated in these words, "The defendants claiming that they are entitled to a bill of exceptions to review the ruling upon their motion for a new trial and having presented the foregoing as such bill, the same is hereby allowed and settled as a correct statement of the proceedings had on the trial so far as it goes," is not in such condition as to present for review any portion of the instructions of the court. Clune *v.* United States, 159 U. S. 590, 40 L. Ed. 269.

43. Reference to exhibits.—"The bill of exceptions, instead of stating distinctly, as required by law and by the fourth rule of this court, those matters of law in the charge which are excepted to, and those only, does not contain any part of the charge, or any exception to it, and undertakes to supply the want by referring to exhibits annexed, containing all the evidence introduced at the trial, the whole charge to the jury, and notes of a desultory conversation which followed between the judge and the counsel on both sides, leaving it to this court to pick out from those notes, if possible, a sufficient statement of some ruling in matter of law." Hanna *v.* Maas, 122 U. S. 24, 26, 30 L. Ed. 1117, distinguished in Ward *v.* Cochran, 150 U. S. 597, 37 L. Ed. 1195.

Although the transcript of the record contains what purports to be the charge of the court in full with a memorandum at the close, stating that defendant's counsel excepted to certain portions thereof, yet if it is not verified, or included in any proper bill of exceptions, this court is not at liberty to treat it as a part of the record for any purpose. Struthers *v.* Drexel, 122 U. S. 487, 30 L. Ed. 1216.

44. Entry of ruling in minutes.—Thompson *v.* Riggs, 5 Wall. 663, 675, 18 L. Ed. 704, citing Pomeroy *v.* State Bank, 1 Wall. 592, 598, 17 L. Ed. 638, approved in Hanna *v.* Maas, 122 U. S. 24, 26, 30 L. Ed. 1117.

45. Rule in Georgia as to incorporating instructions.—A bill of exceptions, allowed and signed or sealed by the judge, is the only mode by which his charge to the jury can be rendered a part of the record. The provisions of the Code of Georgia are in harmony with this rule. Insurance Co. *v.* Lanier, 95 U. S. 171, 24 L. Ed. 383.

46. Refusal of request because not presented in time.—Nelson *v.* Flint, 166 U. S. 276, 41 L. Ed. 1002.

47. Review of criminal cases from Utah.—Hopt *v.* People, 104 U. S. 631, 26 L. Ed. 873, citing Young *v.* Martin, 8 Wall. 354, 19 L. Ed. 418.

48. The evidence must be placed on the record by bill of exceptions.—De Le Croix *v.* Chamberlain, 12 Wheat. 599, 600, 6 L. Ed. 741; Prentice *v.* Stearns, 113 U. S. 435, 445, 28 L. Ed. 1059.

When a party is dissatisfied with the decision of his cause in an inferior court, and intends to seek a revision of the law applied to the case in a superior jurisdiction, he must take care to raise the questions of law to be revised, and put the facts on the record for the information of the appellate tribunal; and, if he omits to do so in any of the methods known in the practice of such courts, he must be content to abide the consequences of his neglect. Evidence, whether written or oral, and whether given to the court or to the jury, does not become a part of the record, unless made so by some regular proceeding at the time of the trial and before the rendition of the judgment. Whatever the error may be, and in whatever stage of the cause it may have occurred, it must appear in the record, else it cannot be revised in a court of error exercising jurisdiction according to the course of the common law. Suydam *v.* Williamson, 20 How. 427, 433, 15 L. Ed. 978; Baltimore, etc., R. Co. *v.*

admitting or excluding evidence,[49] whether the evidence is written or oral,[50] and whether given to the court or to the jury,[51] or introduced on a preliminary motion, such as a motion to remand a cause removed from a state court.[52]

(2) *Cross-Examination.*—The party objecting must cause the cross-examination to be brought up on the bill of exceptions.[53]

(3) *Manner of Incorporation.*—Moreover, the evidence must be contained in the bill of exceptions or made part thereof; it is not sufficient that it be merely appended thereto,[54] or that it appears in the transcript of the proceedings of a

Trustees of Sixth Presbyterian Church, 91 U. S. 127, 130, 23 L. Ed. 260.

"This court has also held, in Suydam *v.* Williamson, 20 How. 427, 15 L. Ed. 978, that the evidence and the exceptions thereto constitute no part of the record, unless incorporated in a bill of exceptions signed and sealed by the presiding judge. See, also, Pomeroy *v.* State Bank, 1 Wall. 592, 17 L. Ed. 638." United States *v.* Taylor, 147 U. S. 605, 700, 37 L. Ed. 335.

49. Rulings of the court in admitting or excluding evidence are not a part of the record, unless made so by a proper bill of exceptions. Storm *v.* United States, 94 U. S. 76, 24 L. Ed. 42, citing Suydam *v.* Williamson, 20 How. 427, 433, 15 L. Ed. 978; United States *v.* Taylor, 147 U. S. 695, 37 L. Ed. 335.

Whatever error of the court is apparent in the record, whether it be in the foundation, proceedings, judgment, or execution of the suit, may be re-examined and corrected; but neither the rulings of the court in admitting or excluding evidence, nor the instructions given by the court to the jury, are a part of the record, unless made so by a proper bill of exceptions. Suydam *v.* Williamson, 20 How. 427, 433, 15 L. Ed. 978; Storm *v.* United States, 94 U. S. 76, 77, 24 L. Ed. 42.

Errors in the admission of testimony which do not appear in the bill of exceptions at all, will not be considered but the judgment will be affirmed. Bannon *v.* United States, 156 U. S. 464, 39 L. Ed. 494.

50. Affidavits, depositions, and matters of parol evidence, though appearing in the transcript of the proceedings of a common-law court, do not form a part of the record unless they are made so by an agreed statement of facts, a bill of exceptions, a special verdict, or demurrer to the evidence. Baltimore, etc., R. Co. *v.* Trustees of Sixth Presbyterian Church, 91 U. S. 127, 23 L. Ed. 260.

51. Trials by court without a jury.—Undoubtedly, the general rule is that, upon a writ of error, only matters of law appearing on the face of the record can be considered, and that evidence, whether written or oral, and whether given to the court or to the jury, does not become a part of the record unless made so by some regular proceeding at the time of the trial and before the rendition of the judgment. Whatever the error may be, and in whatever stage of the cause it may have occurred, it must appear in the record, else it cannot be revised in a court of error exercising jurisdiction according to the course of the common law; and ordinarily a bill of exceptions lies only upon some point arising either upon the admission or rejection of evidence; or is a matter of law arising from a fact found, or not denied, and which has been overruled by the court. Arthurs *v.* Hart, 17 How. 6, 15 L. Ed. 30; Wetmore *v.* Rymer, 169 U. S. 115, 119, 42 L. Ed. 682. This same rule applies where issues of fact are submitted by the parties to court under § 700 of the Revised Statutes.

An objection to the admission or exclusion of evidence, or to such ruling or propositions of law as the party may ask, must appear by bill of exceptions. Norris *v.* Jackson, 9 Wall. 125, 19 L. Ed. 608.

52. Motion to remand.—If either party, in an action at law, is desirous of preserving the evidence, either at the trial or on preliminary motion, in order to raise a question of law upon it, he must ask to have it incorporated in a bill of exceptions. This is the only way in which it can be done, unless the parties choose to make an agreed statement of facts. Knapp *v.* Railroad Co., 20 Wall. 117, 121, 22 L. Ed. 328. See, in accord, Kearney *v.* Denn, 15 Wall. 51, 21 L. Ed. 41; England *v.* Gebhardt, 112 U. S. 502, 28 L. Ed. 811.

53. Cross-examination of witnesses.—Where a witness in a suit against an insurance company for the value of goods lost in the burning of a store, when examined in chief, testifies apparently to the correctness of an abstract made from papers burnt in the fire, and is cross-examined upon the subject of that correctness, the party cross-examining cannot, where he has not caused the cross-examination to be brought up on the bill of exception, object, on a question, on error as to the admissibility of the abstract, that the witness has not testified sufficiently to the correctness. He should have caused the cross-examination to appear on the bill if he wish to show this. "The testimony is not given, but, if the evidence of the witness had not been satisfactory, it should have been placed upon the record." Insurance Co. *v.* Weide, 9 Wall. 677, 681, 19 L. Ed. 810. See the title WITNESSES.

54. Merely appending evidence to bill not sufficient.—Evidence or statements of fact not contained in the bill of exceptions, nor made a part thereof, though ap-

common-law court.[55]

(4) *Exclusiveness of Remedy by Bill of Exceptions*—(a) *When the Facts Are Disputed.*—Where the facts are disputed,[56] the rulings of the court below, in admitting or rejecting evidence, can be brought to the supreme court for revision only by a bill of exceptions.[57] Such rulings in such case are never properly included in a special verdict, any more than in an agreed statement of facts,[58] and this is the rule in Georgia.[59]

(b) *When the Facts Are Undisputed.*—On the other hand, where there is no dispute in regard to the facts, and consequently no necessity for any ruling of the court in admitting or rejecting evidence, the same purpose may be safely accomplished by a special verdict, or, according to the rule established in the federal supreme court, by an agreed statement of facts.[60] It should be observed, however, that the rulings previously made by the court, in admitting or rejecting evidence during the progress of the trial, are no more revisable on a special case, as it is called, when the verdict is taken subject to the opinion of the court on an agreed state of facts, than where the agreed statement is submitted directly to the court, without the intervention of the jury; and for the obvious reason that, in the one case as much as in the other, the foundation laid for the action of the revisory tribunal is based upon the consent of the parties to the suit, and consequently the action of the appellate court must be confined to the facts as they were agreed, and as they appear in the record of the case.[61] At one time an attempt was made to introduce a different practice into this court; but it was distinctly disclaimed, and has never been sanctioned in writs of error to any of the circuit courts in states where the proceedings are according to the course of the common law.[62]

(c) *Other Methods Considered*—aa. *In General.*—Other modes are known to the practice of the federal supreme court, by which the evidence produced against a party may in certain cases be put on the record either in whole or in part, according to the circumstances, so as to secure the right to have the questions of law arising upon it revised on a writ of error; but every proceeding of

pended thereto, will not be regarded by the court. Bank *v.* Kennedy, 17 Wall. 19, 21 L. Ed. 551.

55. That evidence appears in transcript is not alone sufficient.—Baltimore, etc., R. Co. *v.* Trustees of Sixth Presbyterian Church, 91 U. S. 127, 23 L. Ed. 260.

56. Bill alone can be used where facts are disputed.—A bill of exceptions, undoubtedly is the safest method, as it is the most comprehensive one in its operation; and where the facts are disputed, and cannot be arranged except from evidence admitted under the ruling of the court as to its admissibility, often-times it becomes the only effectual mode by which all the rights of the complaining party can be preserved. Suydam *v.* Williamson, 20 How. 427, 433, 15 L. Ed. 978.

57. Bill exclusive remedy for reviewing rulings on the evidence.—Suydam *v.* Williamson, 20 How. 427, 15 L. Ed. 978.

58. Rulings on evidence not reviewable on special verdict or agreed statement.—Suydam *v.* Williamson, 20 How. 427, 432, 15 L. Ed. 978.

59. Rule in Georgia where facts are disputed.—A bill of exception is the only mode by which exceptions to the admission of evidence can be made a part of the record. This is the rule in Georgia. Insurance Co. *v.* Lanier, 95 U. S. 171, 24 L. Ed. 383.

60. Where facts are undisputed other methods than bill may be used.—United States *v.* Eliason, 16 Pet. 291, 10 L. Ed. 968; Stimpson *v.* Baltimore, etc., R. Co., 10 How. 328, 329, 13 L. Ed. 441; Graham *v.* Bayne, 18 How. 60, 15 L. Ed. 265; Suydam *v.* Williamson, 20 How. 427, 434, 15 L. Ed. 978.

Where the facts are without dispute, and agreed between the parties, a statement of the same may be drawn up and entered on the record, and submitted directly to the court, for its decision, without the intervention of a jury; or a general verdict may be taken, subject to the opinion of the court upon the facts so agreed; and in either case, the aggrieved party may bring error after final judgment, and have the questions of law, arising upon the facts thus spread upon the record, re-examined, as in the case of a special verdict. Faw *v.* Roberdeau, 3 Cranch 174, 2 L. Ed. 402; Brent *v.* Chapman, 5 Cranch 358, 3 L. Ed. 125; Suydam *v.* Williamson, 20 How. 427, 434, 15 L. Ed. 978.

61. Rulings previously made by court.—Suydam *v.* Williamson, 20 How. 427, 15 L. Ed. 978, citing Arthurs *v.* Hart, 17 How. 6, 15 L. Ed. 30.

62. Suydam *v.* Williamson, 20 How. 427, 434, 15 L. Ed. 978, citing Shankland *v.* Washington, 5 Pet. 390, 8 L. Ed. 166.

that kind is either so limited in its application or so tied up by conditions, that they are seldom of much practical importance.[63]

bb. *Demurrer to the Evidence.*—Formerly it was considered that a party might always demur to the evidence produced against him, as a matter of right; and while that was so, a demurrer to evidence was equally effectual with a bill of exceptions to the extent of its operation.[64] The bill of exceptions, however, was always the more comprehensive remedy, because it extended, as it still does, not only to the facts in the case, but also to the rulings of the court in admitting or rejecting evidence, and to the instructions given to the jury upon its legal effect. A demurrer to the evidence, while its operation in one respect is nearly the same as that of the bill of exceptions, in another is very different. It extends only to the evidence produced, as the term imports, and has no effect at all upon the rulings of the court by which it was received; and as a necessary consequence, where the error of the court consists in having admitted improper evidence, the effect of a demurrer to it would be to waive the objection to the ruling, instead of laying the foundation to correct the error.[65] Accordingly, this mode is seldom or never adopted in modern practice.[66]

cc. *Oyer.*—Another method by which certain evidence may be incorporated into the record at the nisi prius trial is by oyer, which occurs where the plaintiff in his declaration, or the defendant in his plea, finds it necessary to make a profert of a deed, probate, letters of administration, or other instrument, under seal, and the other party prays that it may be read to him, which in such a case cannot, as a general rule, be denied by the court; and the effect of the proceeding, in certain cases, is to make the instrument a part of the pleadings, and, consequently, to place it within the operation of a writ of error, which, in every case where the proceeding is according to the course of the common law, brings up the whole record; and in all these cases, as well as in the one first named, it is because the evidence, whatever it may be, is made a part of the record by the proceeding, that the questions of law arising upon it become a proper subject of revision on the writ of error.[67]

(d) *Causes Removed from Louisiana.*—The evidence in the cause was usually brought up from Louisiana by a statement of facts, which, however, could not be supplied by the mere agreement of counsel.[68]

63. Other methods of putting evidence on record.—Suydam *v.* Williamson, 20 How. 427, 435, 15 L. Ed. 978.

64. Demurrer to evidence as means of putting evidence on the record.—Suydam *v.* Williamson, 20 How. 427, 435, 15 L. Ed. 978, citing 4 Chitt. Gen. Prac., 7; 2 Inst., 427. See the title DEMURRER TO THE EVIDENCE, vol. 5, p. 289.

65. Objection to a demurrer to evidence.—Suydam *v.* Williamson, 20 How. 427, 435, 15 L. Ed. 978.

66. Demurrer to evidence seldom used in modern practice.—Baltimore, etc., R. Co. *v.* Trustees of Sixth Presbyterian Church, 91 U. S. 127, 23 L. Ed. 260.

67. Oyer as a means of putting evidence on the record.—Suydam *v.* Williamson, 20 How. 427, 436, 15 L. Ed. 978, citing, 1 Chitt. on Plead., 10th Am. Ed., 431; 1 Tidd. Prac., 3d Am. Ed. 586. See the title PROFERT AND OYER.

68. Statement of facts in causes from Louisiana.—"Other cases have been decided by this court, asserting the same general principle, that nothing can be considered upon a writ of error except what appears upon the record; and one in particular, which, in that point of view, bears a very close analogy to the case under consideration. We allude to the cases of Minor *v.* Tillotson, 2 How. 392, which was a writ of error to the Circuit Court of the Eastern District of Louisiana, under the 22d section of the Judiciary Act. A mass of evidence in that case was received from both parties, consisting of concessions and grants under the Spanish Government, intermediate conveyances, documents showing the proceedings in regard to the title under the laws of the United States, and parol testimony; and the cause was submitted to the court under an agreement that those documents, proceedings, and parol testimony, constituted all the evidence on which the cause was tried, and that the agreement was 'made for a statement of the facts in the case.' This court then said, it seems to have been supposed that the agreement of the counsel that the evidence in the cause should be considered as a statement of facts, was a sufficient ground for a writ of error on which a revision of the legal questions might be made, and intimated, very strongly, that if it were so,

f. *Opinions of the Court.*—The opinions of the court given incidentally in the progress of the trial, are no part of the record, unless made a part of it by bill of exceptions.[69] And formerly this was the rule upon a writ of error to a state court.[70]

B. Where the Errors Are Apparent on the Record—1. In General.—On the other hand, since the sole object of a bill of exceptions is to make matter of record what would not otherwise appear as such,[71] if the errors are apparent on the record, no bill of exceptions is necessary.[72]

2. Illustrative Cases—a. *Miscellaneous Examples.*—For example, the pleadings and verdict,[73] the judgments and orders of the court,[74] and the rul-

it would be to require the court to try the cause on its merits, and emphatically declared, 'this is never done on a writ of error, which issues according to the course of common law.'" Suydam *v.* Williamson, 20 How. 427, 15 L. Ed. 978.

69. Bill necessary to put opinion of court on the record.—De La Croix *v.* Chamberlain, 12 Wheat. 599, 6 L. Ed. 741. See the titles APPEAL AND ERROR, vol. 2, p. 199; OPINIONS OF COURT.

70. Formerly upon a writ of error to a state court the opinion of the state court did not constitute a part of the record, unless made a part of it by bill of exceptions. Williams *v.* Norris, 12 Wheat. 117, 6 L. Ed. 571. See the title APPEAL AND ERROR, vol. 1, p. 766.

71. Young *v.* Martin, 8 Wall. 354, 19 L. Ed. 418.

72. No bill necessary where errors are apparent on record.—Slacum *v.* Pomery, 6 Cranch 221, 3 L. Ed. 205; Cohens *v.* Virginia, 6 Wheat. 264, 410, 5 L. Ed. 257; Garland *v.* Davis, 4 How. 131, 11 L. Ed. 907; Bennett *v.* Butterworth, 11 How. 669, 13 L. Ed. 859; Suydam *v.* Williamson, 20 How. 427, 428, 15 L. Ed. 978; Pomeroy *v.* State Bank, 1 Wall. 592, 600, 17 L. Ed. 638; Sparrow *v.* Strong, 4 Wall. 584, 18 L. Ed. 410; Aurora *v.* West, 7 Wall. 82, 19 L. Ed. 42; Young *v.* Martin, 8 Wall. 354, 356, 19 L. Ed. 418; Baltimore, etc., R. Co. *v.* Trustees of Sixth Presbyterian Church, 91 U. S. 127, 130, 23 L. Ed. 260; Gould *v.* Evansville, etc., R. Co., 91 U. S. 526, 527, 24 L. Ed. 416; Storm *v.* United States, 94 U. S. 76, 24 L. Ed. 42; Kerr *v.* Clampitt, 95 U. S. 188, 24 L. Ed. 493; Clinton *v.* Missouri Pac. Railway, 122 U. S. 469, 30 L. Ed. 1214; Moline Plow Co. *v.* Webb, 141 U. S. 616, 623, 35 L. Ed. 879.

Errors of the circuit court resting in parol cannot be re-examined in this court by writ of error. Instead of that, the writ of error addresses itself to the record; and the rule is, that, whenever the error is apparent in the record, whether it be made to appear by bill of exceptions, an agreed statement of facts, or by demurrer, the error is open to re-examination and correction. Storm *v.* United States, 94 U. S. 76, 24 L. Ed. 42.

"It is a mistake, however, to suppose that in such cases the writ of error operates only on the bill of exceptions. Such is never the fact, unless the whole record is set forth in the bill of exceptions; as the operation of the writ of error addresses itself to the record as an entirety, and not to any separate portion of it as distinct from the residue; and when the cause is removed into the appellate court, any error apparent in any part of the record is within the revisory power of such tribunal. The rule is, that whenever the error is apparent on the record, it is open to revision, whether it be made to appear by bill of exceptions, or in any other manner." Bennett *v.* Butterworth, 11 How. 669, 13 L. Ed. 859; Slacum *v.* Pomery, 6 Cranch 221, 3 L. Ed. 205; Garland *v.* Davis, 4 How. 131, 11 L. Ed. 907; Cohens *v.* Virginia, 6 Wheat. 264, 410, 5 L. Ed. 257; Suydam *v.* Williamson, 20 How. 427, 433, 15 L. Ed. 978.

73. Pleadings and verdict need no bill of exceptions.—Reed *v.* Gardner, 17 Wall. 409, 21 L. Ed. 665.

This court can notice a material and incurable defect in the pleadings and verdict as they are represented in the record to have existed in the court below, although such defect is not noticed in the bill of exceptions, nor suggested by the counsel in argument here. Garland *v.* Davis, 4 How. 131, 11 L. Ed. 907.

74. Judgments and orders of court are part of record.—Reed *v.* Gardner, 17 Wall. 409, 21 L. Ed. 665.

A judgment of a court appealed from is never incorporated into a bill of exceptions. It is always a part of the record of the case, and, like the plea and the verdict, it needs no bill of exceptions, but is simply to be transcribed as a part of the record. Clinton *v.* Missouri Pac. Railway, 122 U. S. 469, 474, 30 L. Ed. 1214.

Judgment on special verdict.—Special verdicts having a conditional or alternative finding are the proper foundation of a judgment for either party, as the law of the case on the facts found may require, and consequently the judgment of the subordinate court on such a verdict, whether for plaintiff or defendant, may be re-examined in the appellate tribunal without any bill of exceptions. Suydam *v.* Williamson, 20 How. 427, 432, 15 L. Ed. 978; 3 Blackstone's Commentaries, 378; Mumford *v.* Wardwell, 6 Wall. 423, 433, 18 L. Ed. 756.

Judgment of dismissal.—The ruling of a court upon the question of the dismissal of an appeal may be reviewed in the supreme court without any bill of excep-

ings of the court below in sustaining[75] or overruling a demurrer[76] unless the parties have abandoned their demurrer by filing a replication after it is overruled,[77] may be examined in the appellate tribunal without any bill of exceptions.

b. *The Summons and Process.*—In like manner, where the original process was unauthorized by law, or where the defendant was not served with process, or where the proceedings under the process were irregular and void, such errors are apparent in the record, although they are not shown by a bill of exceptions, and do not appear in an agreed statement of facts or by a demurrer or in a special verdict.[78]

tions, if the facts on which the decision was made are to be found in what may be properly called the record of the case before the judgment when he decided it. Clinton *v.* Missouri Pac. Railway, 122 U. S. 469, 30 L. Ed. 1214.

Judgment setting aside a verdict.—No bill of exceptions is necessary to secure the rights of a party aggrieved by a judgment setting aside a verdict for the plaintiff and ordering a new trial, because such order appears on the record without any bill. Coughlin *v.* District of Columbia, 106 U. S. 7, 27 L. Ed. 74, citing Bennett *v.* Butterworth, 11 How. 669, 13 L. Ed. 859.

Order of court reviving suit.—No exception is necessary to the opinion of the court in ordering a suit to be revived and prosecuted against the heirs of the original defendant who had died pending the writ of error, and proceeding to render judgment against them, upon a summons and count against the original defendant, because all these facts sufficiently appear upon the face of the record. Mackers *v.* Thomas, 7 Wheat. 530, 5 L. Ed. 515.

75. Rulings of court in sustaining demurrer.—Aurora *v.* West, 7 Wall. 82, 19 L. Ed. 42. See, generally, the title DEMURRERS, ante, p. 293.

Where a demurrer to a declaration in the circuit court is improperly sustained, and judgment is rendered accordingly, the case may be re-examined here upon a writ of error without any formal bill of exceptions. Rogers *v.* Burlington, 3 Wall. 654, 18 L. Ed. 79.

Demurrer to plea of performance in suit on replevin bond.—"And so it must have been understood by this court in Gorman *v.* Lenox, 15 Pet. 115, 10 L. Ed. 680, where it was held, in accordance with the principle here advanced, that the action of the circuit court of this district, in sustaining a demurrer to a plea of performance in a suit on a replevin bond, was the subject of revision on a writ of error; and the rule adopted in that case was undoubtedly correct, as the effect of the demurrer was to make the error apparent in the record; and when that is so, it becomes the subject of revision just as much as when it is made to appear by a bill of exceptions or a special verdict." Approved in Suydam *v.* Williamson, 20 How. 427, 436, 15 L. Ed. 978.

76. Ruling of court in overruling demurrer.—And the same effect is produced and the same object is attained when the defendant demurs to the declaration, or when either party demurs to a material portion of the pleadings on which the cause depends, as where a bill of exceptions is taken. Suydam *v.* Williamson, 20 How. 427, 436, 15 L. Ed. 978; New Orleans Railroad *v.* Morgan, 10 Wall. 256, 260, 19 L. Ed. 892.

"Irrespective, therefore, of the bill of exceptions, the writ of error brings here for review the decisions of the court below, in overruling the demurrer of the defendants to the tenth replication of the plaintiffs, and in sustaining the demurrer of the plaintiffs to the rejoinder of the defendants as filed to the first, second, fifth, sixth, and eighth replications of the plaintiffs. The decisions of the court below may be re-examined in this court without any bill of exceptions, as the questions are apparent in the record, and arise upon demurrers to material pleadings on which the cause depends." Suydam *v.* Williamson, 20 How. 427, 436, 15 L. Ed. 978; Gorman *v.* Lenox, 15 Pet. 115, 10 L. Ed. 680; Aurora *v.* West, 7 Wall. 82, 91, 19 L. Ed. 42.

Demurrer to plea to jurisdiction.—Where the only matters tried and decided in the circuit court were demurrers to pleas to the jurisdiction, no bill of exceptions is necessary. Petri *v.* Creelman Lumber Co., 199 U. S. 487, 50 L. Ed. 281.

Information for violation of revenue laws.—Questions arising on a demurrer to the count of an amended information in a revenue case, is open to consideration even in the absence of a bill of exceptions. Coffey *v.* United States, 116 U. S. 427, 29 L. Ed. 681. See the title REVENUE LAWS.

77. Where parties have abandoned their demurrer by filing a replication after it is overruled instead of relying upon its sufficiency, a bill of exceptions is necessary to present to us the rulings of the court. Young *v.* Martin, 8 Wall. 354, 19 L. Ed. 418, citing Aurora *v.* West, 7 Wall. 82, 19 L. Ed. 42.

78. Summons and process.—"Certain errors in judicial proceeding can only be examined in an appellate court when they are shown by a bill of exceptions—as

C. Necessity for Bill or Statement in Particular Cases and Jurisdictions—1. IN ADMIRALTY CASES.—This question has been treated elsewhere.[79]

2. IN CHANCERY CASES—a. *In General.*—A bill of exceptions is unknown to, and is not permitted by, the federal practice in equity cases.[80]

b. *Trial of Feigned Issues*—(1) *In General.*—Nor can a bill of exceptions be taken on the trial of a feigned issue directed by a court of equity,[81] or, if taken, can only be used on a motion for a new trial made to that court.[82] The reason

where proper testimony is rejected or where improper testimony is admitted—but there may be error in the proceedings of a subordinate court apparent in the record for which the judgment will be reversed in an appellate tribunal, although they are not shown by a bill of exceptions and do not appear in an agreed statement of facts or by demurrer or in a special verdict—as where the original process was unauthorized by law, or where the defendant was not served with process, or where the proceedings under the process were irregular and void. Such were the rules of the common law, and they have been adopted and applied in this court in repeated cases." Slacum *v.* Pomery, 6 Cranch 221, 3 L. Ed. 205; Cohens *v.* Virginia, 6 Wheat. 264, 433, 5 L. Ed. 257; Garland *v.* Davis, 4 How. 131, 11 L. Ed. 907; Bennett *v.* Butterworth, 11 How. 669, 13 L. Ed. 859; Suydam *v.* Williamson, 20 How. 427, 433, 15 L. Ed. 978; New Orleans Railroad *v.* Morgan, 10 Wall. 256, 261, 19 L. Ed. 892. See the title SUMMONS AND PROCESS.

79. As to necessity for bill in admiralty, see the title ADMIRALTY, vol. 1, p. 191.

80. **Bill of exceptions not used in chancery practice.**—Ex parte Story, 12 Pet. 339, 9 L. Ed. 1108; Brockett *v.* Brockett, 3 How. 691, 11 L. Ed. 786; Johnson *v.* Harmon, 94 U. S. 371, 372, 24 L. Ed. 271; Watt *v.* Starke, 101 U. S. 247, 25 L. Ed. 826; Wilson *v.* Riddle, 123 U. S. 608, 31 L. Ed. 280.

A bill of exceptions is altogether unknown in chancery practice; nor is a court of chancery bound to inscribe in an order book, upon the application of one of the parties, an order which it may pass in a case before it. Ex parte Story, 12 Pet. 339, 9 L. Ed. 1108.

The case having been on the chancery side of the court and transferred thence to the law docket, a bill of exceptions does not bring into this court for revision any errors alleged to have been committed when it was on the chancery side. Nations *v.* Johnson, 24 How. 195, 16 L. Ed. 628.

81. **Trial of feigned issues.**—Johnson *v.* Harmon, 94 U. S. 371, 372, 24 L. Ed. 271, citing Ex parte Story, 12 Pet. 339, 343, 9 L. Ed. 1108; 2 Dan. Ch. Pr. (3d Am. Ed.) 1106; Brockett *v.* Brockett, 3 How. 691, 11 L. Ed. 786; Watt *v.* Starke, 101 U. S. 247, 25 L. Ed. 826. See, generally, the title ISSUES TO JURY.

In the federal courts a bill of exceptions as such has no part in proceedings to review the findings of fact on issues to the jury in an equity case; or, if taken, can only be used on a motion for a new trial. The verdict is to be presented for reconsideration and re-examination only on a motion for a new trial, based not on mere errors of the judge, but upon a review of the whole case as submitted to the jury. Brockett *v.* Brockett, 3 How. 691, 692, 11 L. Ed. 786; Johnson *v.* Harmon, 94 U. S. 371, 24 L. Ed. 271; Watt *v.* Starke, 101 U. S. 247, 25 L. Ed. 826.

Appeals from District of Columbia.—Brockett *v.* Brockett (3 How. 691, 11 L. Ed. 786), was an appeal from a decree of the circuit court of the District of Columbia. There had been an issue directed, which was tried on the law side of that court. Exceptions were taken at that trial; and it was sought to procure a reversal of the decree upon these exceptions. But this court decided that this could not be done. The court, speaking by Justice McLean, say: "The bills of exceptions are copied into the record, but they do not properly constitute a part of it, as they were not brought to the notice and decision of the court in chancery." This case is directly to the point, that a bill of exceptions is not the proper mode of reviewing the trial of an issue out of chancery. Approved in Watt *v.* Starke, 101 U. S. 247, 253, 25 L. Ed. 826.

Assignments of error to rejection of evidence.—"The defendant assigns for error the rejections of evidence set forth in the bills of exceptions, and the instructions to the jury which were excepted to. No motion for a new trial was made in the circuit court. The submission of the issues to the jury was for the information of the conscience of the chancellor. It is evident, from the terms of the decree, that the chancellor adopted the findings of the jury as being satisfactory to him upon the whole testimony in the case, for the decree states that the court makes its finding 'upon the proof submitted.' Under such circumstances, it is not the practice of an appellate court to consider formal exceptions to rulings in the course of the trial of the issues before the jury. Brockett *v.* Brockett, 3 How. 691, 11 L. Ed. 786; Johnson *v.* Harmon, 94 U. S. 371, 24 L. Ed. 271; Watt *v.* Starke, 101 U. S. 247, 25 L. Ed. 826." Wilson *v.* Riddle, 123 U. S. 608, 615, 31 L. Ed. 280.

82. **Scope of bill when taken on trial of feigned issue.**—Johnson *v.* Harmon, 94 U. S. 371, 24 L. Ed. 271, reaffirmed in

of the practice is obvious; the verdict of a jury upon an issue out of chancery is only advisory, and never conclusive upon the court. It is intended to inform the conscience of the chancellor. It may be disregarded, and a decree rendered contrary to it.[83]

(2) *Trial of Feigned Issues in Patent Cases.*—The fact that by virtue of the recent statute, passed Feb. 16, 1875 (18 Stat., part 3, 315, § 2), the trial of a feigned issue may be had in patent cases, at the bar of the court, makes no difference in the rule stated above, for it is expressly declared that the verdict of the jury in such cases "shall be treated and proceeded upon in the same manner and with the same effect as in the case of issues sent from chancery to a court of law and returned with such findings."[84]

c. *Statement of Facts.*—Under the judiciary act of 1789, in chancery cases, a statement of facts must accompany the transcript. This provision was revived by the repeal of the act of February, 1801, and applied to the District of Columbia.[85] But the act of 1803 repeals that part of the judiciary act which authorizes a statement of facts in chancery cases, and directs that a copy of the bill, answer, depositions and all other proceedings, of what kind soever in the cause, shall be transmitted to the supreme court. The depositions are substituted for that statement.[86]

3. Cases from District of Columbia.—A bill of exceptions is necessary in cases removed to the federal supreme court from the supreme court of the District of Columbia.[87]

Watt *v.* Starke, 101 U. S. 247, 250, 25 L. Ed. 826.

The proper method of presenting a question arising on the trial thereof to the consideration of a reviewing court is by motion for a new trial in the court ordering the issue, and an appeal if the decision be unsatisfactory. By this method, if the proper course has been pursued on the motion for a new trial, the evidence and proceedings become a part of the record, and go up to the appellate court if an appeal is taken. Watt *v.* Starke, 101 U. S. 247, 25 L. Ed. 826.

83. Reason of rule.—Watt *v.* Starke, 101 U. S. 247, 252, 25 L. Ed. 826.

84. Trial of feigned issues in patent cases.—Watt *v.* Starke, 101 U. S. 247, 250, 25 L. Ed. 826. See the title PATENTS.

85. Statement of facts in chancery cases.—United States *v.* Hooe, 1 Cranch 318, 2 L. Ed. 121, citing The Perseverance, 3 Dall. 336, 1 L. Ed. 625.

86. Appeals in chancery under act of 1803.—Conn *v.* Penn, 5 Wheat. 424, 5 L. Ed. 125. This case is discussed at length in Blease *v.* Garlington, 92 U. S. 1, 4, 7, 23 L. Ed. 521. See the title EQUITY, vol. 5, p. 803.

87. Bill necessary to remove cases from District of Columbia.—Thompson *v.* Riggs, 5 Wall. 663, 18 L. Ed. 704; Baltimore, etc., R. Co. *v.* Trustees of Sixth Presbyterian Church, 91 U. S. 127, 23 L. Ed. 260.

A regular bill of exceptions in the usual way, signed and sealed by the judge, is requisite when the rulings of the court in admitting or rejecting evidence or in giving or refusing instructions, are meant to be brought from the supreme court of the District of Columbia to the federal supreme court for review. Thompson *v.* Riggs, 5 Wall. 663, 18 L. Ed. 704.

The eighth section of the act of congress of 1863 (12 Stat. at Large, 764) to reorganize the courts of the District of Columbia, and which says "that if, upon the trial of the cause, an exception be taken, the bill containing it need not be sealed or signed," does not dispense with a regular bill of exceptions in the way usual in circuit courts of the United States when the rulings of the court, in admitting or rejecting evidence, or in giving or refusing instructions, are meant to be brought from the supreme court of the district to this court for review. The provision has reference to carrying such rulings from the special to the general term of the supreme court of the district itself. Thompson *v.* Riggs, 5 Wall. 663, 18 L. Ed. 704, approving Pomeroy *v.* State Bank, 1 Wall. 592.

The eleventh section of the act of congress of 1863 (12 Stat. at Large, 674) provides that any final judgment, order, or decree of the court may be re-examined, and reversed or affirmed, in the supreme court of the United States upon writ of error or appeal in the same cases and in like manner as is now provided by law in reference to the final judgments, orders, or decrees of the circuit court of the United States for the District. Writs of error and appeals were required to be prosecuted under that law, in the same manner, and under the same regulations as in the case of writs of error or appeals from judgments and decrees rendered in the circuit court of the United States. 2 Stat. 106; United States *v.* Hooe, 1 Cranch 318, 2 L. Ed. 121. Conclusion is, that the regulations respecting the removal of cases from the supreme court of the District

4. Cases from Territorial Courts.—Under the act of congress of April 7th, 1874 (18 Stat. at L., p. 27, c. 80), a statement of facts is necessary in case of an appeal from the supreme court of a territory to the supreme court of the United States.[88] But a large liberty of review was given by the statutes of Utah to the supreme court of the territory, even in the absence of a formal bill of exceptions.[89]

5. Cases Tried by Court without a Jury—a. *In General.*—**Prior to the act of 1865,** where the court below decided both law and fact, no bill of exceptions was needed. The case then became like one at common law, where a special verdict is found or a case is stated, in neither of which is there any necessity for a bill of exceptions.[90] Nor in such case was the admission of improper testimony the subject of a bill of exception,[91] and the reason given was, that if the evidence was improperly admitted, the supreme court would reject it, and proceed to decide the cause as if it were not in the record.[92] On the other hand the exclusion of proper testimony was the subject of a bill of exceptions.[93]

Removal of Causes from Louisiana.—But an exception to these rules was always made for cases removed to the federal supreme court from Louisiana.[94]

on writs of error or appeal, are the same as from the circuit courts of the United States. Thompson *v.* Riggs, 5 Wall. 663, 676, 18 L. Ed. 704.

88. Statement of facts on appeals from territorial courts.—Gray *v.* Howe, 108 U. S. 12, 27 L. Ed. 634; Bonnifield *v.* Price, 154 U. S. 672, 26 L. Ed. 1022. See post, "Other Methods than the Bill of Exceptions," III, D; "Filing," VII, A.

"We must have before us a bill of exceptions, or what is equivalent to such bill, upon which the final judgment below was reviewed by the supreme court of the territory, or we cannot examine into any alleged errors except such as are otherwise apparent on the face of the record. The statement in the present case not being one into which we can look, there is no error presented upon which we can pass." Sparrow *v.* Strong, 4 Wall. 584, 18 L. Ed. 410; Kerr *v.* Clampitt, 95 U. S. 188, 190, 24 L. Ed. 493, reaffirmed in Copper King *v.* Johnson, 195 U. S. 627, 49 L. Ed. 351.

89. Practice in supreme court of Utah.—Bassett *v.* United States, 137 U. S. 496, 502, 34 L. Ed. 762, citing Stringfellow *v.* Cain, 99 U. S. 610, 25 L. Ed. 421; Hopt *v.* Utah, 114 U. S. 488, 29 L. Ed. 183; O'Reilly *v.* Campbell, 116 U. S. 418, 29 L. Ed. 669.

90. Necessity for bill when cause tried by the court.—United States *v.* King, 7 How. 833, 12 L. Ed. 934, citing Craig *v.* Missouri, 4 Pet. 410, 427, 7 L. Ed. 903. See the title APPEAL AND ERROR, vol. 1, p. 1025.

91. Admission of testimony.—Arthurs *v.* Hart, 17 How. 6, 15 L. Ed. 30, following Field *v.* United States, 9 Pet. 182, 9 L. Ed. 94.

A bill of exceptions to evidence cannot be taken in the district court of the United States to the admission of evidence, where the cause was not tried by a jury. Field *v.* United States, 9 Pet. 182, 9 L. Ed. 94.

92. Arthurs *v.* Hart, 17 How. 6, 12, 15 L. Ed. 30.

93. "If, upon the rejection of the evidence, no testimony would remain necessary to support the judgment of the court, then the mistake would be one of law, and the proper subject of a writ of error. The case of the refusal of proper evidence on the trial is subject to very different considerations from those applicable to the improper admission of it. The exclusion of the evidence might change the legal features of the cause, and lead to a determination of it upon principles wholly inapplicable, in case the evidence has been admitted; nor can we assume that the testimony offered and rejected would have been proved, if it had not been excluded, and revise the judgment of the court upon that assumption; because the offer of evidence to prove a fact, and the ability to make the proof, are very different matters. If the court, instead of rejecting, had allowed the evidence, the party might have failed in the proof, and the case in the result remain the same as before the improper exclusion. We think, therefore, that the improper rejection of testimony on the trial before the judge, where the jury has been dispensed with, should constitute the subject of review on the writ of error, as in the case of a trial before the jury." Arthurs *v.* Hart, 17 How. 6, 12, 15 L. Ed. 30.

There is one qualification applicable to this peculiar mode of trial, that should be noticed. If the testimony rejected is but cumulative, and relates exclusively to a question of fact involved in the case, the rejection may be immaterial, as the decision of that question upon the evidence already in, by the judge, may be regarded as well-warranted. Arthurs *v.* Hart, 17 How. 6, 13, 15 L. Ed. 30.

94. Removal of causes from Louisiana.—Where testimony is taken, and the cause is submitted to the court with-

Nor since the passage of the act of 1865,[95] is any bill of exceptions necessary to put on the record the general and special findings of the court under that act. They belong to the record as fully as do the verdicts of a jury.[96]

b. *Hearing of Motions.*—On the other hand, the proceedings at the hearing by the court of a motion, such as a motion to remand a cause removed from a state court, must in some proper manner be brought into the record.[97]

c. *Under the Provisions of Special Statutes.*—If a court can only review cases tried without a jury, as it would review cases tried by a jury, it can only review them for errors apparent upon the record, or incorporated in a bill of exceptions.[98]

6. Direct Appeals under Court of Appeals Act.—A bill of exceptions is necessary, on a direct review of a question of jurisdiction under the act of 1891, for the consideration of extraneous matter, such as the testimony of the plaintiff.[99]

7. Appeals from Intermediate Appellate Courts.—On appeals from intermediate appellate courts, a new bill of exceptions is unnecessary. The bill originally filed will suffice.[1]

D. Other Methods than the Bill of Exceptions—1. In General.—It is well settled that the rulings of the court during the progress of a trial, or the court's charge to the jury, can be placed on the record for re-examination in

out the intervention of a jury, although there was no jury trial, still the rulings of the court, under the peculiar practice in the Louisiana district, may be examined in this court upon writ of error, and the judgment reversed or affirmed by a bill of exceptions, in the same manner as if there had been a jury trial. They may also be revised here upon a state of facts found by the court, but the question presented in the court below and decided by the court must be clearly stated. Arthurs *v.* Hart, 17 How. 6, 15, 15 L. Ed. 30; Newell *v.* Nixon, 4 Wall. 572, 581, 18 L. Ed. 305. See the title APPEAL AND ERROR, vol. 1, p. 1027.

95. For the provisions of this statute, see the title APPEAL AND ERROR, vol. 1, p. 1028.

96. See the title APPEAL AND ERROR, vol. 1, p. 1051, for a complete treatment of this question.

97. Hearing by the court of motions.—England *v.* Gebhardt, 112 U. S. 502, 505, 28 L. Ed. 811, citing Kearney *v.* Denn, 15 Wall. 51, 21 L. Ed. 41.

Before questions presented and decided at a hearing by the court can be re-examined on the writ of error, they must be brought into the record by bill of exceptions, or an agreed statement of facts, a special finding in the nature of a special verdict, or in some other way known to the practice of courts of error for the accomplishment of that purpose. England *v.* Gebhardt, 112 U. S. 502, 28 L. Ed. 811, citing Storm *v.* United States, 94 U. S. 76, 24 L. Ed. 42; Suydam *v.* Williamson, 20 How. 427, 15 L. Ed. 978; Baltimore, etc., R. Co. *v.* Trustees of Sixth Presbyterian Church, 91 U. S. 127, 23 L. Ed. 260.

98. Review of causes from territory of New Mexico.—Grayson *v.* Lynch, 163 U. S. 468, 475, 41 L. Ed. 230.

99. Direct appeals under act of March 3d, 1891.—"Whilst we must consider, on a direct review of a question of jurisdiction under the act of 1891, the record for the purpose of determining the question of jurisdiction which the certificate shows adequately to have been raised, we may not consider, in passing upon that question, in the absence of a bill of exceptions, the extraneous matter, such as the testimony of the plaintiff, etc., which forms no part of the record." Nichols Lumber Co. *v.* Franson, 203 U. S. 278, 282, 51 L. Ed. 181. See the title APPEAL AND ERROR, vol. 1, p. 433.

1. Appeals from intermediate appellate courts.—Turnbull *v.* Payson, 95 U. S. 418, 24 L. Ed. 437.

Appeals in bankruptcy cases.—It has been held where a bankruptcy cause was removed from the district into the circuit court, where the parties were again heard, and the circuit court affirmed the decree of the district court, and the defendant accordingly sued out a writ of error, and removed the cause to the supreme court for re-examination, that cases of the kind may be re-examined in the supreme court as well as in the circuit court upon the bill of exceptions filed in the district court. Turnbull *v.* Payson, 95 U. S. 418, 24 L. Ed. 437.

Appeals from territorial courts.—On writ of error sued out from the supreme court of the territory of Utah, the original bill of exceptions, signed by the trial judge, certified by the clerk of the trial court and by the clerk of the supreme court of Utah, transmitted with and filed with the record of the case, was held sufficiently authenticated and identified. Bassett *v.* United States, 137 U. S. 496, 34 L. Ed. 762.

the supreme court in no other manner than by bill of exceptions.[2] Accordingly it has been held by the federal supreme court that statements or entries in the minutes of the case,[3] such as the notes or entries of the judge,[4] or

2. Rules of court only reviewable by bill of exceptions.—Suydam *v.* Williamson, 20 How. 427, 432, 15 L. Ed. 978; Pomeroy *v.* State Bank, 1 Wall. 592, 602, 17 L. Ed. 638; Thompson *v.* Riggs, 5 Wall. 663, 675, 18 L. Ed. 704; Insurance Co. *v.* Lanier, 95 U. S. 171, 24 L. Ed. 383.

"True it is that the transcript contains what purport to be certain instructions asked and refused, marked filed by the clerk. True also is it that there is in the printed transcript a petition and other papers concerning the evidence given before the jury, to which we have referred in the statement of the case. And it is also true that there is in the printed transcript an agreement between counsel, reciting that the court allowed the prayer of the petition. But in the absence of a bill of exceptions, allowed and authenticated by the judge, these documents form no part of the record in this court, which we have alone the right to consider in determining the merits of the errors assigned. Young *v.* Martin, 8 Wall. 354, 19 L. Ed. 418; Baltimore, etc., R. Co. *v.* Trustees of Sixth Presbyterian Church, 91 U. S. 127, 23 L. Ed. 260; Clune *v.* United States, 159 U. S. 590, 593, 40 L. Ed. 269; Nelson *v.* Flint, 166 U. S. 276, 279, 41 L. Ed. 1002." Metropolitan R. Co. *v.* District of Columbia, 195 U. S. 322, 330, 49 L. Ed. 219.

3. Statements or entries in the minutes.—"Where exceptions are taken to the ruling of the court in the course of a trial to the jury, such an entry is frequently made in the minutes of the case, or of the presiding justice, as evidence of the fact, and as a means of preserving the rights of the party in case the verdict should be against him and he should desire to have the case re-examined in the appellate tribunal, but it was never supposed that such an entry could be of any benefit to the party unless he seasonably availed himself of the right to reduce the same to writing, and took proper measures to have the bill of exceptions sealed by the judge presiding at the trial, or, in other words, such an entry in the minutes can only be regarded as evidence of the right of the party seasonably to demand a bill of exceptions, but it is not the same thing, and has never been so considered in the Federal courts, or in any other jurisdiction where the rules and practice of the common law prevail." Pomeroy *v.* State Bank, 1 Wall. 592, 598, 17 L. Ed. 638, quoted with approval in Insurance Co. *v.* Lanier, 95 U. S. 171, 172, 24 L. Ed. 383, and cited in Hanna *v.* Maas, 122 U. S. 24, 26, 30 L. Ed. 1117. See Friedenstein *v.* United States, 125 U. S. 224, 230, 31 L. Ed. 736.

Unless an exception is reduced to writing and sealed by the judge, it is not a bill of exceptions within the meaning of the statute authorizing it, and it does not become part of the record. Were it otherwise, then a bill of exceptions would never be necessary; because if the statement in the minutes is sufficient in one case, it must be in all, which cannot for a moment be admitted, as it would overturn the unbroken practice in courts of error from the passage of the Statute of Westminster to the present time. Pomeroy *v.* State Bank, 1 Wall. 592, 600, 17 L. Ed. 638.

Refusal of instructions.—Where prayers for instructions to the jury are duly presented by the plaintiffs and refused by the court, and other and different instructions were given in their place, but no bill of exceptions in that behalf was tendered by the plaintiffs, or signed or sealed by the court, a statement in the minutes that the plaintiffs excepted in law as well to the refusal of the court to instruct the jury as requested, as to the instructions given, and that the exceptions and the evidence are hereby made record, cannot be of any benefit to the party. Thompson *v.* Riggs, 5 Wall. 663, 18 L. Ed. 704, citing Pomeroy *v.* Bank, 1 Wall. 592, 598, 17 L. Ed 638.

Instructions requested or given rest in parol and do not, in the practice of the federal supreme court, or in any other court where the common law prevails, become a part of the record, unless made so by a regular bill of exceptions, sealed by the judge who presided at the trial; and it is the well-settled practice in this court that an entry of the ruling in the minutes cannot be of any benefit to the party unless he seasonably reduces the same to form and causes it to be sealed by the judge. Pomeroy *v.* State Bank, 1 Wall. 592, 598, 17 L. Ed. 638; Thompson *v.* Riggs, 5 Wall. 663, 675, 18 L. Ed. 704, cited in Hanna *v.* Maas, 122 U. S. 24, 26, 30 L. Ed. 1117.

4. Judge's notes do not constitute a bill of exceptions.—United States *v.* Morgan, 11 How. 154, 13 L. Ed. 643; Pomeroy *v.* State Bank, 1 Wall. 592, 17 L. Ed. 638; Generes *v.* Bonnemer, 7 Wall. 564, 19 L. Ed. 287; Avendano *v.* Gay, 8 Wall. 376, 19 L. Ed. 422.

"And it has been ruled that the judge's notes do not constitute a bill of exceptions. They are but memoranda from which a formal bill may afterwards be drawn up and sealed. Pomeroy *v.* State Bank, 1 Wall. 592, 17 L. Ed. 638. There it was said: 'When exceptions are taken to the ruling of the court, in the course of a trial, to the jury, such an entry is frequently made in the minutes of the case, or of the presiding justice, as evidence of the fact, and as a means of pre-

clerk,[5] or a certificate of the clerk,[6] the notes of a stenographer,[7] the affidavits,

serving the rights of the party in case the verdict should be against him, and he should desire to have the case re-examined in the appellate tribunal; but it was never supposed that such an entry could be of any benefit to the party unless he seasonably availed himself of the right to reduce the same to writing, and took proper measures to have the bill of exceptions sealed by the judge presiding at the trial, or, in other words, such an entry in the minutes can only be regarded as evidence of the right of the party seasonably to demand a bill of exceptions; but it is not the same thing, and it has never been so considered in the federal courts.'" Insurance Co. *v.* Lanier, 95 U. S. 171, 172, 24 L. Ed. 383, cited in Hanna *v.* Maas, 122 U. S. 24, 26, 30 L. Ed. 1117

The entries on a judge's minutes, the memoranda of an exception, taken, are not themselves bills of exception, but are only evidences of the parties right seasonably to demand a bill of exceptions; memoranda, in fact, for preserving the rights of the party in case the verdict should be against him, and he should desire to have the case reviewed in an appellate tribunal. Pomeroy *v.* State Bank, 1 Wall. 592, 17 L. Ed. 638, cited in Hanna *v.* Maas, 122 U. S. 24, 26, 30 L. Ed. 1117.

5. Statements or entries of the clerk.—Even if the facts occurred as certified by the clerk, his statement that they occurred does not bring them upon the record so as to make them the subject of review. There is but one mode of bringing upon the record and making a part of it the rulings of a judge during the progress of a trial, or his charge to the jury, and that is by a bill of exceptions allowed and sealed or signed by the judge. Insurance Co. *v.* Lanier, 95 U. S. 171, 24 L. Ed. 383.

It is no part of the duty of the clerk to note in his entries the exceptions taken, or to note any other proceedings of counsel, except as they are preliminary to, or the basis of, the orders or judgment of the court. Young *v.* Martin, 8 Wall. 354, 19 L. Ed. 418, cited in Hanna *v.* Maas, 122 U. S. 24, 26, 30 L. Ed. 1117.

It is no part of the clerk's duty, nor has he authority as clerk, to state upon the record what was offered in evidence on the trial, or what opinions were expressed by the court in relation to the evidence, otherwise than is stated in the bill of exceptions. The statements of the clerk, so far as they are contrary to the statements verified by the seal of the judge, must be wholly disregarded. De La Croix *v.* Chamberlain, 12 Wheat. 599, 6 L. Ed. 741.

Statements of clerk as to filing of demurrer.—In Young *v.* Martin, 8 Wall. 354, 19 L. Ed. 418, where entries had been made by the clerk in his minutes, stating the filing of a demurrer, argument thereon and overruling of the demurrer, and that exception had been taken by plaintiff, it was held that the exception was not available. The court said (p. 356): "These entries do not present the action of the court and the exceptions in such form that we can take any notice of them. It is no part of the duty of the clerk to note in his entries the exceptions taken, or to note any other proceedings of counsel, except as they are preliminary to, or the basis of, the orders or judgment of the court." Metropolitan R. Co. *v.* District of Columbia, 195 U. S. 322, 330, 49 L. Ed. 219.

Mere memorandum made by clerk.—The entries of a clerk of a territorial district court, stating in a general way the proceedings had in that court, and that they were excepted to by counsel, do not present the action of the court and the exceptions taken in such form that they can be considered by this court. Young *v.* Martin, 8 Wall. 354, 19 L. Ed. 418, cited in Lewis *v.* Wilson, 151 U. S. 551, 554, 38 L. Ed. 267; Hanna *v.* Maas, 122 U. S. 24, 26, 30 L. Ed. 1117.

6. Certificate of clerk on hearing of motion.—In determining a question whether a circuit court had erred in denying a motion to remand a case removed to it from the state court, and giving judgment as if the case had been rightly removed to it, this court cannot pay any attention to a certificate of the clerk of such circuit court, certifying that on the hearing of the motion in the circuit court certain things "appeared," "were proved," or "were admitted," or "agreed to" by the parties respectively; such facts not appearing by bill of exception nor by any case stated. Neither party can gain any advantage by such a statement. "It is true, the clerk makes a recital, running through nearly three pages of the transcript, of the various matters which, he says, were proved on the hearing of this motion, and of certain stipulations and admissions. These recitals form no part of the record and cannot be considered by us. They are not even authenticated by the signature of the judge, nor could they be, to be made available here, except through the mode of a bill of exceptions." Knapp *v.* Railroad Co., 20 Wall. 117, 121, 22 L. Ed. 328.

7. Notes of stenographer.—"Minutes of the judge or clerk, or notes of a stenographer, cannot take the place of a bill of exceptions, but are only memoranda by the aid of which one may afterwards be drawn up." Hanna *v.* Maas, 122 U. S. 24, 26, 30 L. Ed. 1117, citing Pomeroy *v.* State Bank, 1 Wall. 592, 17 L. Ed. 638; Thompson *v.* Riggs, 5 Wall. 663, 18 L. Ed. 704; Young *v.* Martin, 8 Wall. 354,

agreements or stipulations of the parties,[8] a paper in the transcript denominated the "case,"[9] and a paper called an assignment of error, but which refers to no exceptions then taken,[10] do not constitute, and cannot take the place of, a bill of exceptions.

2. Agreed Statement of Facts, Special Verdict and Demurrer—a. *In General.*—While final judgments in a circuit court in some cases may be re-examined in the federal supreme court, and reversed or affirmed upon a writ of error, founded upon an agreed statement of facts, a special verdict, a demurrer to a material pleading, or a demurrer to evidence,[11] yet, as we have already shown, none of these modes enable the complaining party to review or re-examine the rulings of the court, except the bill of exceptions.[12] In other words, there is but one mode of bringing upon the record and making a part of it the rulings of a judge during the progress of a trial, or his charge to the jury, and that is by a bill of exceptions.[13]

b. *Agreed Statement of Facts*—(1) *In General.*—Although, where the record

19 L. Ed. 418; Insurance Co. *v.* Lanier, 95 U. S. 171, 24 L. Ed. 383.

8. Affidavits and stipulations.—A party cannot by merely filing with the clerk an affidavit not incorporated in any bill of exceptions, bring into the record evidence of what took place on the trial. Nelson *v.* Flint, 166 U. S. 276, 279, 41 L. Ed. 1002.

"That parties, by their affidavits or agreements, cannot cause that to become a bill of exceptions which is not such in a legal sense, is settled. Nelson *v.* Flint, 166 U. S. 276, 279, 41 L. Ed. 1002; Malony *v.* Adsit, 175 U. S. 281, 285, 44 L. Ed. 163, and cases cited." Metropolitan R. Co. *v.* District of Columbia, 195 U. S. 322, 49 L. Ed. 219.

Stipulations cannot take the place of a bill of exceptions. South Carolina *v.* Wesley, 155 U. S. 542, 39 L. Ed. 254.

An agreement or stipulation cannot take the place of an agreed statement of facts. Glenn *v.* Fant, 134 U. S. 398, 33 L. Ed. 960.

9. Paper in transcript denominated the "case."—Suydam *v.* Williamson, 20 How. 427, 15 L. Ed. 978; Pomeroy *v.* State Bank, 1 Wall. 592, 17 L. Ed. 638.

Therefore, where a paper was filed in the court below after the writ of error was issued, which paper, purporting to contain all the evidence, both admitted and rejected, was signed by the judge and certified to be correct by the counsel of the appellee, and concluded as follows: "A verdict was then, by direction of the court, taken for the plaintiffs for the premises claimed, subject to the opinion of the court upon the questions of law, with liberty to turn this case into a special verdict or bill of exceptions," this paper cannot be considered a part of the record. In this case, the paper is merely a report of the judge who presided at the trial, and as such must be disregarded by this court. Suydam *v.* Williamson, 20 How. 427, 15 L. Ed. 978.

10. A paper called an assignment of error.—In Insurance Co. *v.* Lanier, 95 U. S. 171, 24 L. Ed. 383, the transcript exhibited a paper dated November 19, 1874, called an assignment of error, signed by the attorney of one of the parties, and filed on that day, setting forth that in the foregoing record and proceedings various errors appeared, and describing them. The paper appears to have been served on the plaintiff's attorney, and on the same day it was indorsed "Exceptions overruled. John Erskine, Judge." Held, this paper is not a bill of exceptions taken or noted at the trial, because it refers to no exceptions then taken.

11. Agreed statement of facts, special verdict and demurrer.—New Orleans Railroad *v.* Morgan, 10 Wall. 256, 260, 19 L. Ed. 892.

12. Rulings of court can be reviewed by the bill of exceptions alone.—Pomeroy *v.* State Bank, 1 Wall. 592, 602, 17 L. Ed. 638; Graham *v.* Bayne, 18 How. 60, 62, 15 L. Ed. 265. See ante, "Other Methods Considered," III, A, 2, e, (4), (c).

"Final judgments in a circuit court may be re-examined in this court and reversed or affirmed upon a writ of error, founded upon an agreed statement of facts, a special verdict, a demurrer to a material pleading, or a demurrer to evidence, as well as by a bill of exceptions; but none of the other modes will enable the appellate court to revise the rulings of the court in refusing to instruct the jury as requested, or the instructions as given, or the rulings of the court in admitting or rejecting evidence. Such rulings rest in parol and can only be incorporated into the record by a bill of exceptions, and of course cannot be re-examined in any other way. None of the other modes suggested, say the court, in the case of Pomeroy *v.* State Bank, 1 Wall. 592, 602, 17 L. Ed. 638, enable the complaining party to review or re-examine the rulings of the court, except that of the bill of exceptions, and we reaffirm that rule." Thompson *v.* Riggs, 5 Wall. 663, 675, 18 L. Ed. 704.

13. Insurance Co. *v.* Lanier, 95 U. S. 171, 24 L. Ed. 383.

contains only an agreed statement of facts, this is not such a transcript as will satisfy the eleventh and thirty-first rules of the supreme court,[14] yet the practice of bringing cases up to the federal supreme court upon an agreed statement of facts is well established by many decisions of that court.[15]

(2) *Form and Sufficiency.*—The agreed statement must state the facts themselves, not merely the evidence of facts,[16] and no mere agreement of counsel can substitute evidence of facts in place of facts.[17] Nor can a paper be used as an

14. Construction of eleventh and thirty-first rules of court.—Keene *v.* Whittaker, 13 Pet. 459, 10 L. Ed. 246; Stimpson *v.* Baltimore, etc., R. Co., 10 How. 328, 13 L. Ed. 441; Curtis *v.* Petitpain, 18 How. 109, 15 L. Ed. 280.

15. Agreed statement of facts used in federal practice.—United States *v.* Eliason, 16 Pet. 291, 10 L. Ed. 968; Stimpson *v.* Baltimore, etc., R. Co., 10 How. 328, 13 L. Ed. 441; Graham *v.* Bayne, 18 How. 60, 62, 15 L. Ed. 265; Pomeroy *v.* State Bank, 1 Wall. 592, 602, 17 L. Ed. 638; New Orleans Railroad *v.* Morgan, 10 Wall. 256, 260, 19 L. Ed. 892; Worthington *v.* Mason, 101 U. S. 149, 152, 25 L. Ed. 848; Supervisors *v.* Kennicott, 103 U. S. 554, 556, 26 L. Ed. 486.

Decisions of the supreme court establish the rule that writs of error will lie where the judgment in the court below was founded upon an agreed statement of facts, as well as when founded upon the verdict of a jury. United States *v.* Eliason, 16 Pet. 291, 10 L. Ed. 968; Stimpson *v.* Baltimore, etc., R. Co., 10 How. 328, 329, 13 L. Ed. 441; Graham *v.* Bayne, 18 How. 60, 15 L. Ed. 265; Pomeroy *v.* State Bank, 1 Wall. 592, 602, 17 L. Ed. 638.

"It is true, that when there is no dispute as to the facts, counsel may agree on a case stated in the nature of a special verdict; and the judgment of the court below on such case stated, or verdict, may be reviewed here on a writ of error. See Stimpson *v.* Baltimore, etc., R. Co., 10 How. 328, 329, 13 L. Ed. 441." Graham *v.* Bayne, 18 How. 60, 62, 15 L. Ed. 265.

16. Agreed statement must give the facts themselves.—Pennock *v.* Dialogue, 2 Pet. 1, 7 L. Ed. 327; United States *v.* Eliason, 16 Pet. 291, 300, 10 L. Ed. 968; United States *v.* King, 7 How. 833, 844, 12 L. Ed. 934; Bond *v.* Brown, 12 How. 254, 256, 13 L. Ed. 977; Weems *v.* George, 13 How. 190, 14 L. Ed. 108; Arthurs *v.* Hart, 17 How. 6, 7, 15 L. Ed. 30; Graham *v.* Bayne, 18 How. 60, 15 L. Ed. 265; Burr *v.* Des Moines, R., etc., Co., 1 Wall. 99, 17 L. Ed. 561; Norris *v.* Jackson, 9 Wall. 125, 127, 19 L. Ed. 608; McClure *v.* United States, 116 U. S. 145, 151, 29 L. Ed. 572.

An agreed statement of facts which merely gives the evidence as it was introduced on the one side and the other, and leaves the results of the evidence to be found by the court, as if sitting as a jury, is insufficient. Pomeroy *v.* State Bank, 1 Wall. 592, 602, 17 L. Ed. 638.

A bill of exceptions which is nothing more than a recapitulation of conflicting evidence is not a sufficient statement of facts by the parties. Raimond *v.* Terrebonne Parish, 132 U. S. 192, 33 L. Ed. 309; Davenport *v.* Paris, 136 U. S. 580, 34 L. Ed. 548.

A cause must be treated as in the nature of a bill of exceptions, and not in the nature of a case stated, that is, a substitute for a special verdict, where the writ of error does not bring up a mere statement of facts, but a mass of testimony. Parsons *v.* Armor, 3 Pet. 413, 7 L. Ed. 724.

The agreed statement of facts on which this court will inquire, if there is or is not error in the application of the law to them, is a statement of the ultimate facts or propositions which the evidence is intended to establish, and not the evidence on which those ultimate facts are supposed to rest. The statement must be sufficient in itself, without inferences or comparisons, or balancing of testimony, or weighing evidence, to justify the application of the legal principles which must determine the case. It must leave none of the functions of a jury to be discharged by this court, but must have all the sufficiency, fullness, and perspicuity of a special verdict. If it requires of the court to weigh conflicting testimony, or to balance admitted facts, and deduce from these the propositions of fact on which alone a legal conclusion can rest, then it is not such a statement as this court can act upon. The paper before us "is evidence of facts, and not the facts themselves as agreed or found." Graham *v.* Bayne, 18 How. 60, 62, 15 L. Ed. 265; Burr *v.* Des Moines R., etc., Co., 1 Wall. 99, 102, 17 L. Ed. 561.

17. No mere agreement of counsel can substitute evidence of facts in place of facts, or require the opinion of this court on an imperfect statement of them. A writ of error cannot by these methods be converted into a chancery appeal, nor a court of error into appellate arbitrators. Graham *v.* Bayne, 18 How. 60, 63, 15 L. Ed. 265. See Hartranft *v.* Wiegmann, 121 U. S. 609, 613, 30 L. Ed. 1012.

"The counsel in this case have agreed, that 'if it should be necessary to a hearing of this cause in the supreme court, to treat the evidence in the nature of a special verdict,' this agreement may be good as between themselves, and point out the source from which the facts for a case stated, or special verdict, may be drawn, but it cannot compel this court to search through the evidence to find out the

agreed statement of facts, which does not contain the rulings of the court which the plaintiff desires to have revised.[18]

(3) *Must Be Made Part of Record.*—The agreed statement of facts must, in some manner in the court below, be made a part of the record of the case.[19]

(4) *Scope of Review.*—Agreed statements rest upon the consent of the parties, and, consequently, the action of the revising tribunal must be confined to the agreed facts; but the facts cannot be said to be agreed while the parties are at issue as to the admissibility or competency of the evidence.[20]

c. *Special Verdict*—(1) *In General.*—Matters resting in parol may also be made a part of the record so as to become re-examinable in a court of errors by a special verdict, if put in due form.[21]

(2) *Form and Sufficiency.*—A special verdict like an agreed statement of facts must find the facts themselves.[22] But though the finding of the jury is not in the usual form of a special verdict, yet if the counsel for both parties in the court below have treated the findings as amounting to a special verdict, the appellate court will overlook any irregularities.[23]

(3) *Rendition and Entry of Judgment.*—Where there is a case stated, or spe-

facts. The record exhibits the testimony and evidence laid before the judge. It is evidence of facts, but not the facts themselves as agreed or found." Graham *v.* Bayne, 18 How. 60, 62, 15 L. Ed. 265.

18. Agreed statement must contain rulings of court.—An agreed statement of facts which does not contain the rulings of the court which the plaintiff desires to have revised, is insufficient. Pomeroy *v.* State Bank, 1 Wall. 592, 602, 17 L. Ed. 638.

19. Agreed statement must be made part of record.—New Orleans Railroad *v.* Morgan, 10 Wall. 256, 260, 19 L. Ed. 892.

"It is very clear that a paper not signed by counsel, nor entered on the record of the court, nor made part of the record of the case by bill of exceptions, or in any other manner, cannot be considered by this court as the foundation on which it is to affirm or reverse the case." Burr *v.* Des Moines R., etc., Co., 1 Wall. 99, 101, 17 L. Ed. 561.

"The case of the United States *v.* Eliason, 16 Pet. 291, 10 L. Ed. 968, shows, that it was strongly urged upon this court that it had been laid down by Sir Wm. Blackstone in his Commentaries, and by Stephen in his Treatise on Pleadings, that error did not lie on such a statement. The court, however, said that the reason for this was, that in the English practice, the agreed statement was not like a special verdict entered on the record, and the appellate court could not therefore notice it. But that in the practice of our courts such agreements are signed by 'the counsel, and spread upon the record at large as part thereof.' And thus they become technically a part of the record, into which the appellate court look, with the other parts of it, to ascertain if there be error." Burr *v.* Des Moines R., etc., Co., 1 Wall. 99, 102, 17 L. Ed. 561, citing Pennock *v.* Dialogue, 2 Pet. 1, 7 L. Ed. 327; United States *v.* Eliason, 16 Pet. 291, 300, 10 L. Ed. 968; United States *v.* King, 7 How. 833, 844, 12 L. Ed. 934; Bond *v.* Brown, 12 How. 254, 256, 13 L. Ed. 977; Weems *v.* George, 13 How. 190, 14 L. Ed. 108; Arthurs *v.* Hart, 17 How. 6, 7, 15 L. Ed. 30; Graham *v.* Bayne, 18 How. 60, 15 L. Ed. 265.

20. Scope of review.—Pomeroy *v.* State Bank, 1 Wall. 592, 603, 17 L. Ed. 638.

21. Special verdict may be used to put matters on the record.—Suydam *v.* Williamson, 20 How. 427, 435, 15 L. Ed. 978, Pomeroy *v.* State Bank, 1 Wall. 592, 602, 17 L. Ed. 638; Mumford *v.* Wardwell, 6 Wall. 423, 18 L. Ed. 756; New Orleans Railroad *v.* Morgan, 10 Wall. 256, 260, 19 L. Ed. 892; Baltimore, etc., R. Co. *v.* Trustees of Sixth Presbyterian Church, 91 U. S. 127, 23 L. Ed. 260; Worthington *v.* Mason, 101 U. S. 149, 152, 25 L. Ed. 848. See, generally, the title VERDICT.

Special verdicts having a conditional or alternative finding are the proper foundation of a judgment for either party, as the law of the case on the facts found may require, and consequently the judgment of the subordinate court on such a verdict, whether for plaintiff or defendant, may be re-examined in the appellate tribunal without any bill of exceptions. Mumford *v.* Wardwell, 6 Wall. 423, 433, 18 L. Ed. 756, citing Suydam *v.* Williamson, 20 How. 427, 432, 15 L. Ed. 978.

22. Form and sufficiency of special verdict.—If a special verdict be ambiguous, or imperfect—if it find but the evidence of facts, and not the facts themselves, or finds but part of the facts in issue, and is silent as to others—it is a mistrial, and the court of error must order a venire de novo. They can render no judgment on an imperfect verdict, or case stated. Graham *v.* Bayne, 18 How. 60, 63, 15 L. Ed. 265, citing Prentice *v.* Zane, 8 How. 470, 484, 12 L. Ed. 1160.

23. When irregularities in special verdict disregarded.—Mumford *v.* Wardwell, 6 Wall. 423, 18 L. Ed. 756; Hartranft *v.* Wiegmann, 121 U. S. 609, 613, 30 L. Ed. 1012.

cial verdict, the court of errors must not only reverse the judgment below, if found erroneous, but enter a correct and final judgment.[24]

d. *Demurrer to the Evidence.*—Matters resting in parol may be made a part of the record so as to become re-examinable in a court of errors, by a demurrer to the evidence; though this mode is seldom or never adopted in modern practice.[25]

e. *Review of Causes from District of Columbia.*—Special verdicts and demurrers to the evidence might well have been substituted for the tedious and embarrassing practice which prevailed in the old circuit court for the District of Columbia.[26] But either a case or bill of exceptions may be used upon appeals from the special to the general term of the supreme court of the District of Columbia.[27]

f. *Disadvantages Attending These Methods Pointed Out.*—Since, it is well settled by the repeated decisions of the supreme court that the rulings of the court below cannot be reviewed or re-examined by an agreed statement of facts,[28] a special verdict,[29] or upon demurrer to evidence,[30] it will be readily

24. Rendering and ordering final judgment.—Graham *v.* Bayne, 18 How. 60, 63, 15 L. Ed. 265.

25. Demurrer to the evidence.—Baltimore, etc., R. Co. *v.* Trustees of Sixth Presbyterian Church, 91 U. S. 127, 130, 23 L. Ed. 260. See the title DEMURRER TO THE EVIDENCE, ante, p. 289.

Judgments of the circuit court may also be revised here upon writ of error, in cases where they were founded upon a special verdict, or upon demurrer to evidence. Suydam *v.* Williamson, 20 How. 427, 435, 15 L. Ed. 978; 4 Chitty's Gen. Prac., 7; 2 Inst., 427; Pomeroy *v.* State Bank, 1 Wall. 592, 602, 17 L. Ed. 638.

Evidence must first be admitted before it is properly the subject of demurrer, and when a party elects that mode of trying the case, he thereby waives all objections to the rulings of the court in respect to evidence rejected, as well as to that previously admitted, so that in no point of view can the paper under consideration be regarded as sufficient to lay the foundation for a revision of the rulings which are the subject of complaint. Pomeroy *v.* State Bank, 1 Wall. 592, 603, 17 L. Ed. 638.

26. Former practice in the District of Columbia.—See Dunlop *v.* Munroe, 7 Cranch 242, 3 L. Ed. 329.

27. Appeals from special to general term of supreme court of district.—Metropolitan R. Co. *v.* Moore, 121 U. S. 558, 563, 30 L. Ed. 1022.

28. Rulings of court not examinable by agreed statement.—Suydam *v.* Williamson, 20 How. 427, 435, 15 L. Ed. 978; Pomeroy *v.* State Bank, 1 Wall. 592, 17 L. Ed. 638.

It is not competent to revise the rulings of the court below by an agreed statement of facts. Pomeroy *v.* State Bank, 1 Wall. 592, 602, 17 L. Ed. 638, citing 2 Tidd's Practice 896.

Rulings upon the evidence.—Where there is no dispute in regard to the facts, and consequently no necessity for any ruling of the court in admitting or rejecting evidence, the case may be brought before an appellate court by a special verdict or an agreed statement of facts. But in such a case, the previous rulings of the court upon questions of evidence do not come before the appellate court, unless brought up by a bill of exceptions. Suydam *v.* Williamson, 20 How. 427, 15 L. Ed. 978.

This court cannot give judgment as on an agreed statement of facts or case stated, except where facts, and facts only, are stated. If there be question as to the competency or effect of evidence, or any rulings of the court below upon evidence to be examined, the court cannot entertain the case as an agreed statement. Pomeroy *v.* State Bank, 1 Wall. 592, 17 L. Ed. 638, affirming Burr *v.* Des Moines R., etc., Co., 1 Wall. 99, 17 L. Ed. 561.

29. Rulings of court not examinable by special verdict.—Suydam *v.* Williamson, 20 How. 427, 435, 15 L. Ed. 978; Pomeroy *v.* State Bank, 1 Wall. 592, 602, 17 L. Ed. 638. See the title VERDICT.

Rulings of court in admitting or rejecting evidence.—Special verdicts are where the jury find the facts of the case, and upon those facts refer the decision of the cause to the court, with a conditional conclusion, that if the court should be of opinion that the plaintiff, upon the facts found, has a good cause for action, then they find for the plaintiff; but if otherwise, then they find for the defendant. Rulings of the court, however, in admitting or rejecting evidence, are never properly included in a special verdict, any more than in an agreed statement of facts; because, when reduced to form, the verdict is then entered on the record, and the judgment of the court is based upon the findings of the jury. Suydam *v.* Williamson, 20 How. 427, 432, 15 L. Ed. 978; Pomeroy *v.* State Bank, 1 Wall. 592, 603, 17 L. Ed. 638.

30. Rulings of court not examinable upon demurrer to evidence.—Suydam *v.* Williamson, 20 How. 427, 435, 15 L. Ed. 978; Pomeroy *v.* State Bank, 1 Wall. 592, 17 L. Ed. 638. See the title DEMURRER TO THE EVIDENCE, ante, p. 289.

seen that none of these methods are near so comprehensive as the bill of exceptions, and hence are seldom used.[31]

3. STATEMENT OF THE CASE—a. *In General.*—It was held in an early case that the federal supreme court will not take cognizance of any suit or controversy brought before them by a statement of the case.[32]

b. *Statement of Case on Appeal from Territorial Courts.*—**In General.**—But in Arizona,[33] Idaho,[34] Montana,[35] Nevada,[36] and Utah,[37] under the territorial practice, a statement of the case takes the place of a bill of exceptions, when the alleged errors of law are set forth with sufficient matter to show the relevancy of the points taken.[38] This statement is only another name for a

A bill of exceptions may include in its scope the rulings of the court as to the admissibility of evidence, which a demurrer to evidence cannot do. Suydam *v.* Williamson, 20 How. 427, 15 L. Ed. 978.

31. Other modes than bill are seldom used.—"Other modes are known to the practice of this court, by which the evidence produced against a party may in certain cases be put on the record either in whole or in part, according to the circumstances, so as to secure the right to have the questions of law arising upon it revised on a writ of error; but every proceeding of that kind is either so limited in its application or so tied up by conditions, that they are seldom of much practical importance, and are only referred to on the present occasion to confirm the proposition already advanced, that no ancillary step in the cause is of any avail to a party as laying the foundation to support a writ of error, any farther than it has the effect to place on the record what otherwise would rest in parol. * * * The bill of exceptions was always the more comprehensive remedy, because it extended, as it still does, not only to the facts in the case, but also to the rulings of the court in admitting or rejecting evidence, and to the instructions given to the jury upon its legal effect." Suydam *v.* Williamson, 20 How. 427, 435, 15 L. Ed. 978.

32. State of the case.—Dewhurst *v.* Coulthard, 3 Dall. 409, 1 L. Ed. 658.

33. Removal of causes from Arizona.—Head *v.* Hargrave, 105 U. S. 45, 26 L. Ed. 1028; Cohn *v.* Daley, 174 U. S. 539, 43 L. Ed. 1077.

If a so-called statement of facts under the Arizona Revised Statutes is not a statement of facts in the nature of a special verdict made and certified by the court below under the act of April 7th, 1874, c. 80, 18 Stat. 27, 28, this court will presume that the evidence supports the judgment. A so-called statement, which merely embodies the evidence, is not a compliance with the statute. Cohn *v.* Daley, 174 U. S. 539, 43 L. Ed. 1077.

34. Removal of causes from Idaho.—Idaho, etc., Land Imp. Co. *v.* Bradbury, 132 U. S. 509, 512, 33 L. Ed. 433.

35. "Statement on appeal" used in Montana.—The code of civil procedure of Montana provides for a statement of the case to be used on appeal, which shall state specifically the particular errors or grounds upon which the appellant intends to rely, and which seems to take the place of an ordinary bill of exceptions. Bogk *v.* Gassert, 149 U. S. 17, 23, 37 L. Ed. 631.

In Montana R. Co. *v.* Warren, 137 U. S. 348, 34 L. Ed. 681, which was an appeal from the supreme court of the territory, the proceedings on the trial were embodied in a statement prepared like that for the purpose of a motion for a new trial; but, in addition, it was authenticated by the trial judge as a correct statement of the proceedings. Further than that, at the trial a bill of exceptions was prepared in respect to the rulings of the court on instructions, signed by the trial judge and filed at the time, which bill of exceptions was incorporated in the statement. Held, that this was a perfect bill of exceptions as to the ruling of the court on the matter of instructions; and a statement of all the proceedings in the trial, approved by counsel and authenticated by the trial judge. This proceeding was authorized by the statutes of Montana, and is sufficient for the purposes of review here, distinguishing Kerr *v.* Clampitt, 95 U. S. 188, 24 L. Ed. 493.

36. Practice in Nevada.—Sparrow *v.* Strong, 4 Wall. 584, 595, 18 L. Ed. 410.

37. Removal of causes from Utah.—Kerr *v.* Clampitt, 95 U. S. 188, 24 L. Ed. 493.

The statute of Utah also provides the mode in which the final judgments of its district courts may be reviewed. It requires a statement of the errors alleged upon which the appellant relies, with so much of the evidence as may be necessary to explain them. Compiled Laws of Utah of 1876, §§ 1413, 1550, and 1555. Kerr *v.* Clampitt, 95 U. S. 188, 190, 24 L. Ed. 493, reaffirmed in Copper King *v.* Johnson, 195 U. S. 627, 49 L. Ed. 351.

38. Sufficiency of statement.—A statement of the case, according to the law regulating civil proceedings in the territory, takes the place of a bill of exceptions, when the alleged errors of law are set forth with sufficient matter to show the relevancy of the points taken. It is not the less available on appeal from the judgment when, by stipulation, it is em-

bill of exceptions, and is subject to similar rules;[39] hence, if it is not in compliance with the statute, the judgment of the lower court will be affirmed.[40]

Stipulations.—It will often embody substantially the same matters which are presented on a motion for a new trial, and it is not uncommon for counsel to stipulate that the statement on the motion shall be treated as a statement or bill of exceptions on appeal from the judgment. But, unless it is so stipulated, the statement intended for the motion cannot be used on appeal from the judgment, or considered by the supreme court.[41]

4. SUMMARY.—We have now adverted to the several methods acknowledged by courts of error, by which matters resting in parol at the trial in the subordinate tribunal may be put on the record, so as to lay a proper foundation for a revision of the legal questions arising out of them in the appellate court, and there are no others which can be recognized in the federal supreme court in cases where the proceedings are required to be according to the course of the common law.[42]

E. Changing Case into Special Verdict or Bill of Exceptions—1. IN GENERAL.—The trial court may give either party the liberty to turn a case made into a special verdict or bill of exceptions.[43]

Agreed Case.—But where the case made, which by the terms of the verdict either party was at liberty to turn into a bill of exceptions, sets forth the entire evidence adduced at the trial, but is not an agreed statement of facts, nor a special verdict, nor a finding of facts by the court, and contains no exceptions, it cannot be treated as the basis for any assignment of errors.[44]

2. NECESSITY FOR MAKING ELECTION.—Where for some reason the right to make the change has never been exercised in the court below, it is too late to make the alteration for the first time in the supreme court.[45]

3. NECESSITY FOR OBTAINING LEAVE OF COURT.—It would seem, however, that the option to turn a case either into a special verdict or a bill of exceptions, cannot be exercised without the assent of the judge who presided at the trial, and irrespective of his authority.[46] On the contrary, where a case shall be made with leave to turn the same into a special verdict or bill of exceptions, the party shall not be at liberty to do either, at his election, but the court may, if they think proper, prescribe the one which he shall adopt.[47]

F. Effect of Absence of Bill of Exceptions, Agreed Statement of Facts or Special Verdict—1. AFFIRMANCE—a. *In General.*—Where a case

bodied in the record for that purpose, though used on the motion for a new trial. Head *v.* Hargrave, 105 U. S. 45, 47, 26 L. Ed. 1028, citing Kerr *v.* Clampitt, 95 U. S. 188, 24 L. Ed. 493.

39. Statement on appeal governed by rules governing bill of exceptions.—Kerr *v.* Clampitt, 95 U. S. 188, 190, 24 L. Ed. 493, reaffirmed in Copper King *v.* Johnson, 195 U. S. 627, 49 L. Ed. 351.

40. Affirmance of judgment.—Thompson *v.* Ferry, 180 U. S. 484, 45 L. Ed. 633.

41. Stipulations as to statement on motion for new trial.—Kerr *v.* Clampitt, 95 U. S. 188, 190, 24 L. Ed. 493, reaffirmed in Copper King *v.* Johnson, 195 U. S. 627, 49 L. Ed. 351.

Where there is a stipulation that the statement of evidence on motion for a new trial shall stand as the statement on appeal, no further statement will be necessary. Head *v.* Hargrave, 105 U. S. 45, 26 L. Ed. 1028.

42. Summary.—See Suydam *v.* Williamson, 20 How. 427, 437, 15 L. Ed. 978.

43. Case may be changed into special verdict or bill of exceptions.—Suydam *v.* Williamson, 20 How. 427, 438, 15 L. Ed. 978; Chateaugay Ore, etc., Co., Petitioner, 128 U. S. 544, 546, 32 L. Ed. 508.

Exceptions to the order of the court in granting a new trial do not lie in any case, and the losing party in case of judgment in a special case cannot except to the rulings of the court during the trial, unless he seasonably reserved the right to turn the special case into a bill of exceptions, because the court has no power, unless otherwise agreed, to render any judgment except upon the verdict of the jury. Mumford *v.* Wardwell, 6 Wall. 423, 433, 18 L. Ed. 756.

44. Agreed case.—Redfield *v.* Ystalyfera Iron Co., 110 U. S. 174, 175, 28 L. Ed 109.

45. Parties must elect to make the change.—Suydam *v.* Williamson, 20 How 427, 438, 15 L. Ed. 978.

46. Option cannot be exercised without authority first obtained.—Suydam *v.* Williamson, 20 How. 427, 438, 15 L. Ed. 978.

47. Suydam *v.* Williamson, 20 How. 427, 438, 15 L. Ed. 978.

is brought to the federal supreme court upon a writ of error, and there is no bill of exceptions, agreed statement, or special verdict in the transcript, the general rule is, that the judgment will be affirmed,[48] without opinion.[49]

b. *Reason of Rule.*—The reason for this rule grows out of another rule[50] equally well settled that the absence of a bill of exceptions, etc., only shows that there is no error in the proceedings.[51]

c. *Rule in Territorial Courts.*—And these rules apply to appeals from the territorial courts.[52]

2. DISMISSAL.—In a few instances orders of dismissal have been entered. But such cases were either special in their circumstances,[53] or the order was

48. **Judgment is affirmed in absence of bill of exceptions, etc.**—Minor *v.* Tillotson, 2 How. 392, 11 L. Ed. 312; Guild *v.* Frontin, 18 How. 135, 15 L. Ed. 290; Stevens *v.* Gladding, 19 How. 64, 15 L. Ed. 569; Suydam *v.* Williamson, 20 How. 427, 441, 15 L. Ed. 978; Kelsey *v.* Forsyth, 21 How. 85, 16 L. Ed. 32; Taylor *v.* Morton, 2 Black 481, 484, 17 L. Ed. 277; Pomeroy *v.* State Bank, 1 Wall. 592, 604, 17 L. Ed. 638; Rogers *v.* United States, 141 U. S. 548, 35 L. Ed. 853; Metropolitan R. Co. *v.* District of Columbia, 195 U. S. 322, 49 L. Ed. 219.

Where no bill of exceptions appears to have been taken during the progress of the trial, the judgment will be affirmed. Bank *v.* Caldwell, 154 U. S., appx., 592, 21 L. Ed. 305.

Where no bill of exceptions is taken in the case, nor is there any finding of facts, nor any case stated by the parties analogous to a special verdict in stating the ultimate facts of the case, presenting questions of law only, the judgment will be affirmed. Glenn *v.* Fant, 134 U. S. 398, 33 L. Ed. 969.

It is well settled that it is no ground to dismiss the writ of error because there is no bill of exceptions, agreed statement of facts, or material demurrer in the record presenting any question of law for the decision of the appellate court, as the absence of every such question is good cause for affirming the judgment, but it is not a good ground for dismissing the writ of error. Minor *v.* Tillotson, 1 How. 287, 11 L. Ed. 134; Suydam *v.* Williamson, 20 How. 427, 441, 15 L. Ed. 978; Taylor *v.* Morton, 2 Black 481, 484, 17 L. Ed. 277; Cook *v.* Burnley, 11 Wall. 672, 677, 20 L. Ed. 84.

49. **Judgment affirmed without opinion in absence of bill of exceptions.**—Where no bill of exceptions appears to have been taken during the progress of the trial the judgment will be affirmed without an opinion. Bank *v.* Caldwell, 154 U. S., appx., 592, 21 L. Ed. 305.

50. See the title APPEAL AND ERROR, vol. 2, p. 392.

51. **Reason of rule.**—Error may be shown in such a case by a bill of exceptions or by a demurrer to the declaration, or a material pleading, or it may appear by an agreed statement of facts, if made a part of the record, or in a special verdict, if put in due form; but even when all these are wanting it is no cause for dismissing the suit, because the writ of error issued to a circuit court under that section brings up the whole record, and their absence only shows that there is no error in the proceedings; and if there is no error in any part of the record the prevailing party in the circuit court is entitled to an affirmance of the judgment. Minor *v.* Tillotson, 1 How. 287, 11 L. Ed. 134; Stevens *v.* Gladding, 19 How. 64, 15 L. Ed. 569; New Orleans Railroad *v.* Morgan, 10 Wall. 256, 260, 19 L. Ed. 892.

Presumptions on appeal.—In the absence of a bill of exceptions the supreme court will presume that all the issues are tried which were presented in due form for trial, or which the parties desire to be disposed of, though the jury were sworn to try only the issue. Brooklyn *v.* Insurance Co., 99 U. S. 362, 24 L. Ed. 416.

52. **Rule in territorial courts where there is no bill of exceptions.**—Armijo *v.* Armijo, 181 U. S. 558, 45 L. Ed. 1000.

53. **Dismissal for want of bill of exceptions, etc.**—"Where a case is brought here upon a writ of error issued under the 22d section of the judiciary act, and there is neither bill of exceptions, agreed statement, nor special verdict brought up, the judgment, generally speaking, will be affirmed; as it was in this case. Burr *v.* Des Moines R., etc., Co., 1 Wall. 99, 17 L. Ed. 561, where the case was "dismissed," simply, was special in its circumstances." Pomeroy *v.* State Bank, 1 Wall. 592, 17 L. Ed. 638.

"Special circumstances induced the court, in Burr *v.* Des Moines R., etc., Co., decided at the present term (ante, p. 99), to dismiss the writ of error, and allow the parties an opportunity to make a further effort to present the case in some proper form; but the court in that case held that the legal presumption was in favor of the correctness of the judgment." Pomeroy *v.* State Bank, 1 Wall. 592, 603, 17 L. Ed. 638.

Statement of case on appeal.—In Peyton *v.* Brooke, 3 Cranch 92, 93, 2 L. Ed. 376, Chief Justice Marshall said: "We wish to give general notice to the gentlemen of the bar, that unless statements of the case are furnished, according to the

entered through inadvertence.[54]

IV. Form and Sufficiency.

A. Of Bill of Exceptions—1. In General.—Authority was conferred, by the seventeenth section of the judiciary act, upon all the courts of the United States, to make and establish all the necessary rules for the ordinary conducting of business in the said courts, provided such rules were not repugnant to the laws of the United States.[55] Pursuant to that authority the several circuit courts, immediately after the judicial system of the United States was organized, adopted the form for bills of exceptions as known at common law, and the practice has been uniformly followed to the present time, without question or any material variation. Bills of exceptions, therefore, in the federal courts, are required to be drawn as at common law, under the statute of Westminster 2 (13 Edw. I, chap. 31), passed in the year 1825.[56] Therefore, the earlier forms under the statute giving the bills of exceptions are models which it would be wise to consult and adhere to.[57]

2. Caption.—Though the transcript should be styled or headed a "Bill of Exceptions" in the caption,[58] it has been held that a paper entitled a "case and exceptions" is a sufficient bill, where it has all the requisites of a bill, except the mere name.[59] In other words, a paper incorporated in the record, and certified to be a part thereof by the court below, if it has all the requisites of a bill of exceptions, will be considered by the supreme court as such, although it be otherwise entitled.[60]

3. Separate Bills—a. *In General.*—While according to the old practice separate bills of exceptions were generally taken for each exception noted at the trial,[61] and while it is still permissible to prepare either one bill containing

rule, the causes must either be dismissed or continued."

54. Cases of dismissal reconciled.—Where there is no bill of exceptions, and nothing upon which error can be assigned, the regular practice is to affirm the judgments, not to dismiss. "Counsel for the appellee has referred us to an order dismissing a writ of error at the last term, under circumstances like those of the case before us. This order must have been entered through inadvertence, and cannot be drawn into a precedent." James *v.* Bank, 7 Wall. 692, 693, 19 L. Ed. 275.

Practice in cases removed from Louisiana.—Whether or not a record contains a bill of exceptions or statement of facts by the court, according to the practice in Louisiana, by which any question of law is brought up for revision in such a form as to enable this court to decide upon it, is a question to be decided only upon the final hearing of the cause. The court will not go into this inquiry upon a motion to dismiss the writ of error, before the cause is taken up for argument. Minor *v.* Tillotson, 1 How. 287, 11 L. Ed. 134.

55. Power of federal courts to make and establish rules.—1 Statutes at Large, 83. See the title RULES OF COURT.

56. Form for bill of exceptions.—Pomeroy *v.* State Bank, 1 Wall. 592, 599, 17 L. Ed. 638.

For the form of a bill of exceptions, see Generes *v.* Campbell, 11 Wall. 193, 194, 20 L. Ed. 110; Kleinschmidt *v.* McAndrews, 117 U. S. 282, 29 L. Ed. 905.

57. Earlier forms should be adhered to.—Zeller *v.* Eckert, 4 How. 289, 11 L. Ed. 979.

58. The bill must be entitled as such.—Kleinschmidt *v.* McAndrews, 117 U. S. 282, 29 L. Ed. 905; Origet *v.* United States, 125 U. S. 240, 31 L. Ed. 743.

The document claimed to be a bill should properly be entitled a "bill of exceptions." Herbert *v.* Butler, 97 U. S. 319, 24 L. Ed. 958.

For the form of a caption, see Bassett *v.* United States, 137 U. S. 496, 502, 34 L. Ed. 762.

59. What is a sufficient entitling.—Herbert *v.* Butler, 97 U. S. 319, 24 L. Ed. 958.

A document which commences as follows: "The following case and exceptions is agreed on by the attorneys for Jasper K. Herbert, plaintiff, and Benjamin F. Butler, defendant," then follow the title of the cause, a record of the proceedings had, and the evidence given at the trial, including the rulings of the judge and the exceptions thereto; and the case thus presented closes with the judge's certificate as follows: "Settled as within, pursuant to the above consent. Sept. 19, 1875. (Signed) Charles L. Benedict," was held a sufficient bill of exceptions, because it has all the requisites of a bill except the mere name. Herbert *v.* Butler, 97 U. S. 319, 24 L. Ed. 958.

60. Herbert *v.* Butler, 97 U. S. 319, 24 L. Ed. 958.

61. Old practice as to number of bills.—Moore *v.* Bank, 13 Pet. 305, 10 L. Ed.

several exceptions, or several bills each containing one exception,[62] yet every exception taken at the trial may be put into one bill of exceptions, which practice makes the record less voluminous. It is not necessary that each exception be embodied in a separate bill;[63] indeed, the practice is very inconvenient and entails unnecessary labor.[64]

b. *Submission of Controversy.*—The correct practice in cases submitted to a court without a jury is for the court to make its finding of facts and its conclusions of law a separate paper from pleadings or bills of exceptions.[65]

4. Definiteness and Certainty in the Bill.—The object of a bill of exceptions is to put on record rulings and instructions in matter of law which could not otherwise be a subject of revision in a court of error. The excepting party, in order to entitle himself to such revision, must not only allege exceptions at the trial or hearing, but he must afterwards draw up and hand to the presiding judge those exceptions in writing, stating distinctly and specifically the rulings or instructions of which he complains.[66] This is also required by a rule of court.[67]

172; Wilkes *v.* Dinsman, 7 How. 89, 12 L. Ed. 618; Washington, etc., Steam Packet Co. *v.* Sickles, 10 How. 419, 13 L. Ed. 479; Philadelphia, etc., R. Co. *v.* Howard, 13 How. 307, 330, 14 L. Ed. 157.

62. Pomeroy *v.* State Bank, 1 Wall. 592, 17 L. Ed. 638.

63. A single bill is sufficient.—Pomeroy *v.* State Bank, 1 Wall. 592, 17 L. Ed. 638, followed in Chateaugay Ore, etc., Co., Petitioner, 128 U. S. 544, 32 L. Ed. 508; Lees *v.* United States, 150 U. S. 476, 37 L. Ed. 1150.

64. A single bill is preferable in practice.—"Several exceptions have been taken to the opinion of the court below, which will be considered in the order in which the objections arising out of them have been presented to us. We are sorry to say, that the practice of filing numerous bills of exception is very inconvenient; for all the points of law might be brought before the court in a single bill, with a simplicity, which would relieve the bar and the bench from every unnecessary embarrassment." Bank *v.* Patterson, 7 Cranch 299, 302, 3 L. Ed. 351.

65. Submission of causes to the court.—Iron Silver Min. Co. *v.* Campbell, 135 U. S. 286, 289, 34 L. Ed. 155.

66. Bill must distinctly state rulings and instructions complained of.—2 Inst. 426; Step. Pl. (1st Am. Ed.) 111; Turner *v.* Yates, 16 How. 14, 29, 14 L. Ed. 824; Young *v.* Martin, 8 Wall. 354, 19 L. Ed. 418; Insurance Co. *v.* Sea, 21 Wall. 158, 22 L. Ed. 511; Hanna *v.* Maas, 122 U. S. 24, 26, 30 L. Ed. 1117; Lees *v.* United States, 150 U. S. 476, 483, 37 L. Ed. 1150, distinguishing Railroad Co. *v.* Varnell, 98 U. S. 479, 25 L. Ed. 233.

Every bill of exceptions must state and point out distinctly the errors of which complaint is made. The Francis Wright, 105 U. S. 381, 389, 26 L. Ed. 1100.

When there is nothing in the record to show specifically what was excepted to, but where all is general—as, for example, when at the end of the bill of exceptions and immediately preceding the signature of the judge, are the words "exceptions allowed," and nothing to indicate the application of the exceptions—so that the exception, if it amounts to anything, covers the whole record—this court will not regard the exception. It should have presented specifically and distinctly the ruling objected to. Insurance Co. *v.* Sea, 21 Wall. 158, 22 L. Ed. 511.

Where the bill of exceptions in so far as it relates to the charge, specifies with distinctness the parts of the charge excepted to and the legal propositions to which exceptions were taken, it is not open to the objection that it is a mere transcript of the entire testimony and of the charge. Ward *v.* Cochran, 150 U. S. 597, 37 L. Ed. 1195, distinguishing Hanna *v.* Maas, 122 U. S. 24, 30 L. Ed. 1117.

The exceptions must not leave it in doubt whether they point to instructions granted and refused to the jury, or to the refusal of the court below to grant a new trial. Because if to the latter, no question is presented upon which error would lie, according to the repeated decisions of the supreme court. Brown *v.* Clarke, 4 How. 4, 11 L. Ed. 850. As to the point that no error can be assigned to the refusal of the court below to grant a new trial, see the title APPEAL AND ERROR, vol. 1, p. 997.

67. Rule of court requiring statements in bill to be distinct.—Stimpson *v.* West Chester R. Co., 3 How. 553, 11 L. Ed. 722; United States *v.* Morgan, 11 How. 154, 158, 13 L. Ed. 643; Johnston *v.* Jones, 1 Black 209, 17 L. Ed. 117; Phœnix Life Ins. Co. *v.* Raddin, 120 U. S. 183, 30 L. Ed. 644; Chicago *v.* Greer, 9 Wall. 726, 735, 19 L. Ed. 769.

Rule 4 of this court provides: "The party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts; and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court." Allis *v.* United States, 155 U. S. 117, 122, 39 L. Ed. 91.

5. COMPLETENESS.—Each bill of exceptions must present a substantial case and be complete in itself,[68] or by appropriate references to other parts of the record.[69] But a failure of the bill to contain any part of the charge to the jury cannot be supplied by referring to exhibits annexed.[70] Moreover, omissions in the bill cannot be supplied by any intendment of the court,[71] because the bill is the creature of statute, and the appellate court is restricted to the points stated.[72]

6. EXCEPTIONS AND OBJECTIONS.—In accordance with the well-settled rule of the federal supreme court, not to consider questions other than those of jurisdiction, which were not presented to the court whose judgment that court is asked to examine,[73] where neither party has objected to the imperfect form of a bill of exceptions, neither can complain.[74]

7. HEARING AND DETERMINATION—a. *In General.*—Where a paper in the transcript is not a good bill of exceptions, it must be wholly disregarded by the court in determining whether the judgment of the court below ought to be reversed or affirmed.[75] But although a bill of exceptions is imperfectly drawn, yet if the supreme court can ascertain the substance of the facts, and the questions on which the judge instructed the jury are apparent, it will proceed to decide the case.[76]

b. *Dismissal or Affirmance.*—And when the defendants have failed to reduce any of their exceptions to such a form that the supreme court can pass upon them, the judgment must be affirmed;[77] the question whether or not the record

68. Each bill must be complete in itself.—"Each bill of exceptions must be considered as presenting a distinct, substantive case; and it is on the evidence stated in itself alone, that the court is to decide. We cannot go beyond it, and collect other facts which must have been in the mind of the party, and the insertion of which in this bill of exceptions could alone have sanctioned the opinion as prayed for." Dunlop *v.* Munroe, 7 Cranch 242, 270, 3 L. Ed. 329, cited in Jones *v.* Buckell, 104 U. S. 554, 556, 26 L. Ed. 841.

69. Bill may contain references to other parts of record.—Jones *v.* Buckell, 104 U. S. 554, 556, 26 L. Ed. 841.

70. Incorporating the instructions.—Where the bill of exceptions, instead of stating distinctly, as required by law and the fourth rule of this court, those matters of law in the charge which are excepted to, and those only, does not contain any part of the charge, or any exception to it, and undertakes to supply the want by referring to exhibits annexed, containing all the evidence introduced at the trial, the whole charge to the jury, and notes of a desultory conversation which followed between the judge and the counsel on both sides, leaving it to this court to pick out from those notes, if possible, a sufficient statement of some ruling in matter of law, the bill of exceptions is insufficient. "To assume to do that would be to take upon ourselves the duty of drawing up a proper bill of exceptions, a duty which belonged to the excepting party, and should have been performed before suing out the writ of error. This we are not authorized to do. Our duty and authority are limited to determining the validity of exceptions duly framed and presented." Hanna *v.* Maas, 122 U. S. 24, 27, 30 L. Ed. 1117.

71. Omissions cannot be supplied by intendment.—Dunlop *v.* Munroe, 7 Cranch 242, 3 L. Ed. 329.

72. Appellate court is restricted to bill.—Zeller *v.* Eckert, 4 How. 289, 297, 11 L. Ed. 979.

73. Exceptions and objections must be taken below.—Bassett *v.* United States, 137 U. S. 496, 501, 34 L. Ed. 762, citing Clark *v.* Fredericks, 105 U. S. 4, 26 L. Ed. 938. See the title APPEAL AND ERROR, vol. 2, p. 83.

74. Objections to form of bill must be taken below.—United States *v.* Morgan, 11 How. 154, 13 L. Ed. 643. See the title APPEAL AND ERROR, vol. 2, p. 83.

75. Irregular bill will be disregarded.—"Having come to the conclusion that the paper in the transcript is not a good bill of exceptions, agreed statement of facts, or a special verdict, the result is that it is not a part of the record, and under the circumstances of this case, it must be wholly disregarded by the court in determining whether the judgment of the court below ought to be reversed or affirmed." Inglee *v.* Coolidge, 2 Wheat. 363, 4 L. Ed. 261; Suydam *v.* Williamson, 20 How. 427, 439, 15 L. Ed. 978; Pomeroy *v.* State Bank, 1 Wall. 592, 603, 17 L. Ed. 638.

The federal supreme court cannot take cognizance of any suit or controversy, which is not brought before them by the regular process of the law. Dewhurst *v.* Coulthard, 3 Dall. 409, 1 L. Ed. 658.

76. United States *v.* Morgan, 11 How. 154, 13 L. Ed. 643.

77. Affirmance of judgment for irregularity.—Suydam *v.* Williamson, 20 How. 427, 15 L. Ed. 978; Insurance Co. *v.* Sea, 21 Wall. 158, 22 L. Ed. 511; Hanna *v.* Maas, 122 U. S. 24, 27, 30 L. Ed. 1117, dis-

contains a proper bill of exceptions or statement of facts, cannot be decided upon a motion to dismiss.[78]

B. Of Agreed Statement of Facts.—By the settled construction of the acts of congress defining the appellate jurisdiction of the supreme court, a statement of facts by the parties is strictly analogous to a special verdict, and must state the ultimate facts of the case, presenting questions of law only, and not be a recital of evidence or of circumstances, which may tend to prove the ultimate facts, or from which they may be inferred.[79] Where the paper in the transcript is not a good agreed statement of facts, it is not a part of the record, and will be disregarded by the appellate court in determining whether the judgment of the court below ought to be reversed or affirmed.[80]

C. Authentication—1. SIGNING—a. *Of Bill of Exceptions*—(1) *In General.*—Except on appeals from the special to the general term of the supreme court of the District of Columbia,[81] a bill of exceptions to be available on appeal, must be signed by the presiding judge.[82] Where a bill of exceptions is not

tinguished in Ward *v.* Cochran, 150 U. S. 597, 603, 37 L. Ed. 1195.

Where there is only one exception in the bill, and that exception is not well taken, this court will affirm the judgment. Morris *v.* Shriner, 131 U. S., appx. xci, 19 L. Ed. 303.

78. Determination of regularity of bill on motion to dismiss.—Whether or not a record contains a bill of exceptions or statement of facts by the court, according to the practice of Louisiana, by which any question of law is brought up for revision in such a form as to enable this court to decide upon it; and whether or not there is a mass of various and conflicting testimony in relation to facts, upon which no jurisdiction can be exercised upon a writ of error, are questions to be decided only upon the final hearing of the cause. The court will not go into this inquiry upon a motion to dismiss the writ of error, before the cause is taken up for argument. Minor *v.* Tillotson, 1 How. 287, 11 L. Ed. 134.

79. Agreed statement must state ultimate facts.—Burr *v.* Des Moines R., etc., Co., 1 Wall. 99, 17 L. Ed. 561; Norris *v.* Jackson, 9 Wall. 125, 19 L. Ed. 608; Martinton *v.* Fairbanks, 112 U. S. 670, 28 L. Ed. 862; Raimond *v.* Terrebonne Parish, 132 U. S. 192, 194, 33 L. Ed. 309; Davenport *v.* Paris, 136 U. S. 580, 34 L. Ed. 548. See the title APPEAL AND ERROR, vol. 1, p. 1056. See ante, "Agreed Statement of Facts," III, D, 2, b.

"The statement of facts on which this court will inquire, if there is or is not error in the application of the law to them, is a statement of the ultimate facts or propositions which the evidence is intended to establish, and the evidence on which those ultimate facts are supposed to rest. The statement must be sufficient in itself, without inferences or comparisons, or balancing of testimony, or weighing evidence, to justify the application of the legal principles which must determine the case. It must leave none of the function of the jury to be discharged by this court, but must have all the sufficiency, fullness, and perspicuity of a special verdict. If it requires of the court to weigh conflicting testimony, or to balance admitted facts, and deduce from these the propositions of facts on which alone a legal conclusion can rest, then it is not such a statement as this court can act upon." Stimpson *v.* Baltimore, etc., R. Co., 10 How. 328, 13 L. Ed. 441; Burr *v.* Des Moines R., etc., Co., 1 Wall. 99, 102, 17 L. Ed. 561; Pomeroy *v.* State Bank, 1 Wall. 592, 17 L. Ed. 638; Crews *v.* Brewer, 19 Wall. 70, 22 L. Ed. 63.

80. Effect of irregularities in agreed statement.—Pomeroy *v.* State Bank, 1 Wall. 592, 17 L. Ed. 638.

81. Bill need not be signed on appeals from general to special term of District of Columbia.—Metropolitan R. Co. *v.* Moore, 121 U. S. 558, 563, 30 L. Ed. 1022.

82. Bill of exceptions must be signed as general rule.—Insurance Co. *v.* Lanier, 95 U. S. 171, 172, 24 L. Ed. 383; Phelps *v.* Mayer, 15 How. 160, 14 L. Ed. 643; Suydam *v.* Williamson, 20 How. 427, 438, 15 L. Ed. 978.

To be of any avail, exceptions must not only be drawn up so as to present distinctly the ruling of the court upon the points raised, but they must be signed by the presiding judge. Unless so signed, they do not constitute any part of the record which can be considered by an appellate court. Williams *v.* Norris, 12 Wheat. 117, 119, 6 L. Ed. 571; Young *v.* Martin, 8 Wall. 354, 357, 19 L. Ed. 418, approved in Malony *v.* Adsit, 175 U. S. 281, 287, 44 L. Ed. 163.

"The exception must be certified or allowed as well as filed, and it is the signature or seal of the judge that certifies or allows it." Insurance Co. *v.* Lanier, 95 U. S. 171, 173, 24 L. Ed. 383.

"A special verdict requires the presence and assent of the court and a bill of exceptions must always be signed and sealed by the judge." Suydam *v.* Williamson, 20 How. 427, 15 L. Ed. 978.

Section 953 of the Revised Statutes enacting that a bill of exceptions allowed in any cause shall be deemed sufficiently au-

signed by the judge who tried the case, so that there is nothing to show that it was submitted to him, or in any way received his sanction, the judgment below will be affirmed.[83] Nor can the signature be dispensed with by an agreement of counsel.[84]

(2) *By Whom Signed*—(a) *In General.*—Whenever a bill of exceptions is necessary,[85] § 953 of the Revised Statutes provides that it shall be authenticated by the judge of the court in which the cause was tried, or by the presiding judge thereof, if more than one judge sat on the trial of the cause.[86]

(b) *By Successor in Office.*—It cannot be signed by a judge who succeeded in office the judge who presided at the trial.[87]

(c) *Where District Judge Presides in the Circuit Court.*—Where the bill of exceptions is signed by the district judge for the circuit court, and it does not appear that the other judges were present at the trial, which ensued after the meeting of the court, the supreme court will presume that it was had before the district judge alone.[88]

thenticated if signed by the judge of the court in which the cause was tried, if more than one judge sat on the trial of the cause, without any seal of court or judge being annexed thereto, merely dispenses with the seal. The necessity for the signature still remains. Origet *v.* United States, 125 U. S. 240, 31 L. Ed. 743.

Instructions to become part of the record must be incorporated in the bill of exceptions, and thus authenticated by the signature of the judge. Clune *v.* United States, 159 U. S. 590, 40 L. Ed. 269.

A bill of exceptions on appeal from the supreme court of Utah territory should contain a proper authentication by the signatures of the trial judge and the clerk of the court. Bassett *v.* United States, 137 U. S. 496, 34 L. Ed. 762.

83. Effect of failure to sign.—Mussina *v.* Cavazos, 6 Wall. 355, 18 L. Ed. 810, cited with approval in Malony *v.* Adsit, 175 U. S. 281, 285, 44 L. Ed. 163.

84. Agreement of parties to dispense with signature.—Malony *v.* Adsit, 175 U. S. 281, 44 L. Ed. 163; Niver *v.* Fields, 179 U. S. 682, 45 L. Ed. 384.

85. Irregularity in signing where no bill necessary.—A motion to dismiss a writ of error because the bill of exceptions filed below was authenticated by a judge other than the trial judge, will not be considered, where it is apparent on the record that the only matters tried and decided in the circuit court were demurrers to pleas to the jurisdiction, and therefore no bill of exceptions was required. Petri *v.* Creelman Lumber Co., 199 U. S. 487, 50 L. Ed. 281.

86. By whom the bill must be signed.—Cooke *v.* Avery, 147 U. S. 375, 384, 37 L. Ed. 209.

"Accordingly, our conclusion is that the errors of the trial court alleged in the bill of exceptions, unauthenticated by the signature of the judge who sat at the trial, cannot be considered by us." Malony *v.* Adsit, 175 U. S. 281, 288, 44 L. Ed. 163, reaffirmed in Niver *v.* Fields, 179 U. S. 682, 45 L. Ed. 384.

87. Signing of bill by successor of trial judge.—"An inspection of this record discloses that the bill of exceptions was not settled, allowed and signed by the judge who tried the case, but by his successor in office, several months after the trial. It is settled that allowing and signing a bill of exceptions is a judicial act, which can only be performed by the judge who sat at the trial. What took place at the trial, and is a proper subject of exception, can only be judicially known by the judge who has acted in that capacity. Such knowledge cannot be brought to a judge who did not participate in the trial or to a judge who has succeeded to a judge who did, by what purports to be a bill of exceptions, but which has not been signed and allowed by the trial judge. Section 953 of the Revised Statutes is as follows: 'A bill of exceptions allowed in any cause shall be deemed sufficiently authenticated if signed by the judge of the court in which the cause was tried, or by the presiding judge thereof, if more than one judge sat at the trial of the cause, without any seal of court or judge being annexed thereto.' We understand this enactment to mean that no bill of exceptions can be deemed sufficiently authenticated unless signed by the judge who sat at the trial, or by the presiding judge if more than one sat." Malony *v.* Adsit, 175 U. S. 281, 284, 44 L. Ed. 163, reaffirmed in Niver *v.* Fields, 179 U. S. 682, 45 L. Ed. 384.

88. Where district judge presides in circuit court, he may sign.—Cooke *v.* Avery, 147 U. S. 375, 37 L. Ed. 209.

Rule as to signing where district judge presides in circuit court.—"Section 953 of the Revised Statutes provides for the authentication of bills of exception by the judge of the court in which the cause was tried, or by the presiding judge thereof, if more than one judge sat on the trial of the cause; and, therefore, if this trial had taken place before the circuit justice and one of the other judges, or before the circuit and district judges, the bill of exceptions would, of course, have been signed by the circuit justice or circuit judge, as

(d) *Stipulation of Parties.*—The failure or omission of the trial judge to sign the bill of exceptions cannot be supplied by an agreement of the parties that another than the trial judge may perform his functions in that regard.[89]

(3) *Manner of Signing.*—Initials only are not a proper signature by the judge.[90]

(4) *Time of Signing.*—The time within which the signature of the judge must be applied for if within the term, is left to the discretion of the judge who noted the excepton when it was made. It may depend much upon the nature of the bills. Some require much more time for preparation than others. When an exception has been taken at the trial and noted, reducing the exception to form afterwards and attesting it is not making a new case; it is merely verifying the case as it appeared on the trial.[91] Moreover, the rule requiring the presentation of bills for the signature of the judge within five days is not a rule which controls his action. He may depart from it in order to effectuate justice.[92]

(5) *Waiver.*—Exceptions are not waived by suing out a writ of error before the judge's signature to the bill has been procured.[93]

(6) *Presumptions on Appeal.*—Where a bill of exceptions appears upon its face to have been regularly taken, the court cannot presume against the record that it was not signed.[94]

the case might be. The motion to strike out the bill of exceptions upon the ground that it must be held that the judges who were present at the opening of the court were present on the trial, is therefore overruled." Cooke *v.* Avery, 147 U. S. 375, 384, 37 L. Ed. 209.

89. Stipulation of parties as to who shall sign.—"The rationale of these cases evidently was that the court of errors could not consider a bill of exceptions that had not been signed by the judge who tried the case, and that such failure or omission could not be supplied by agreement of the parties, but that the only remedy was to be found in a motion for a new trial," reviewing cases from other jurisdictions. Malony *v.* Adsit, 175 U. S. 281, 286, 44 L. Ed. 163, reaffirmed in Niver *v.* Fields, 179 U. S. 682, 45 L. Ed. 384.

"We are referred to no decision of this court on the precise question whether counsel can stipulate the correctness of a bill of exceptions not signed by the trial judge. But we think that on principle this cannot be done, and we regard the cases just cited as sound statements of the law." Malony *v.* Adsit, 175 U. S. 281, 288, 44 L. Ed. 163, reaffirmed in Niver *v.* Fields, 179 U. S. 682, 45 L. Ed. 384.

It certainly cannot be contended that if the trial judge is able officially to sign the bill of exceptions, it would be competent for the counsel to dispense with his action, and rely upon an agreed statement of the facts and law of the case as tried. Nor can they agree that another than the trial judge may perform his functions in that regard. Malony *v.* Adsit, 175 U. S. 281, 287, 44 L. Ed. 163, reaffirmed in Niver *v.* Fields, 179 U. S. 682, 45 L. Ed. 384.

90. Signing bill by initials of judge.—A paper found in the record was headed "Bill of Exceptions." But the paper did not bear the signature of the district judge. The trial took place on the 8th of June, 1883. At the foot of the paper referred to appeared the following: "Allowed and ordered on file November 22, '83. A. B." It was held that this could not be regarded as a proper signature by the judge to a bill of exceptions, nor could the paper be regarded for the purposes of review as a bill of exceptions. The court said: "We cannot regard the initials 'A. B.' as the signature of the judge, or as a sufficient authentication of the bill of exceptions, or as sufficient evidence of its allowance by the judge or the court. Therefore, the questions purporting to be raised by the paper cannot be considered." Origet *v.* United States, 125 U. S. 240, 244, 31 L. Ed. 743, cited with approval in Malony *v.* Adsit, 175 U. S. 281, 287, 44 L. Ed. 163.

91. Time of signing.—Hunnicutt *v.* Peyton, 102 U. S. 333, 354, 26 L. Ed. 113.

92. Construction of rule requiring signature within five days.—Stanton *v.* Embrey, 93 U. S. 548, 23 L. Ed. 983; Hunnicutt *v.* Peyton, 102 U. S. 333, 353, 26 L. Ed. 113.

The rule of court is as follows: "No bill of exceptions will be signed unless presented to the judge within five days after the close of the trial, unless further time be allowed by the court." Hunnicutt *v.* Peyton, 102 U. S. 333, 353, 26 L. Ed. 113.

93. Effect of suing out writ of error before signing bill.—Hunnicutt *v.* Peyton, 102 U. S. 333, 26 L. Ed. 113, disapproving Tidd's Practice, 4th Am. Ed. from the 9th London, 863.

94. Presumptions on appeal as to signature.—It is objected, that it does not appear that the exceptions were taken on the trial, and signed by the judge during the term. The bill of exceptions states, that, "on the trial of the cause, the district attorney requested the court to charge the jury," etc., and at the close,

b. *Of Agreed Statement of Facts.*—An agreed statement of facts must be signed by counsel.[95]

c. *Of Statement of Facts on Appeal.*—A statement of facts on appeal from the supreme court of Arizona territory must be approved and signed by the judge.[96] If the parties or their attorneys agree upon a statement of facts on appeal, they shall sign it.[97]

d. *A Case under the Practice in the District.*—A case, which may be used in place of a bill of exceptions on appeals from the special to the general term of the supreme court of the District of Columbia, need not be signed.[98]

2. SEALING—a. *Necessity for.*—Formerly it was held that the bill of exceptions had to be sealed by the judge presiding at the trial in accordance with the requirements of the statute of Westminster 2 (Edw. I, chap. 31).[99] But in later cases the contrary was held,[1] and this rule has been confirmed by

"to which opinions of the court, refusing to charge as requested, the district attorney excepts, and prays that the bill of exceptions, with the documents referred to therein, be signed, sealed, and made a part of the record, which is accordingly done," and which is signed by the judge. Upon its face, this bill of exceptions appears to have been regularly signed; and the court cannot presume against the record. United States *v.* Hodge, 6 How. 279, 281, 12 L. Ed. 437.

95. Agreed statement of facts must be signed.—Burr *v.* Des Moines R., etc., Co., 1 Wall. 99, 17 L. Ed. 561.

96. Statement of facts on appeal from territorial courts.—Cohn *v.* Daley, 174 U. S. 539, 43 L. Ed. 1077.

A statement of facts on appeal must be approved and signed by the judge, but if the judge does not approve or sign it, the parties may submit their respective statements to the judge, who shall, from his own knowledge, with the aid of such statements, during the term, make out and sign and file with the clerk a correct statement of the facts proven on the trial and such statement shall constitute a part of the record. Cohn *v.* Daley, 174 U. S. 539, 43 L. Ed. 1077.

97. Parties or their counsel may sign statement of facts on appeal.—Cohn *v.* Daley, 174 U. S. 539, 43 L. Ed. 1077.

98. Appeals from special to general term of district.—Metropolitan R. Co. *v.* Moore, 121 U. S. 558, 30 L. Ed. 1022.

99. Formerly sealing of bill was necessary.—Pomeroy *v.* State Bank, 1 Wall. 592, 17 L. Ed. 638, citing 2 Tidd's Practice, 862; 1 Arch. Prac. by Chitty (11th Ed.) 443; 2 Inst., 427; 2 Bac. Abr., by Bouvier, 113; Phelps *v.* Mayer, 15 How. 160, 14 L. Ed. 643; Suydam *v.* Williamson, 20 How. 427, 437, 15 L. Ed. 978; Mussina *v.* Cavazos, 6 Wall. 355, 18 L. Ed. 810; Young *v.* Martin, 8 Wall. 354, 19 L. Ed. 418; Insurance Co. *v.* Lanier, 95 U. S. 171, 24 L. Ed. 383.

"To be of any avail, exceptions must not only be drawn up so as to present distinctly the ruling of the court upon the points raised, but they must be signed and sealed by the presiding judge. Unless so signed and sealed, they do not constitute any part of the record which can be considered by an appellate court." Williams *v.* Norris, 12 Wheat. 117, 119, 6 L. Ed. 571; Young *v.* Martin, 8 Wall. 354, 357, 19 L. Ed. 418.

Justiciarii apponant sigilla sua, is the express command of the statute of Westminster and so is the commentary of Lord Coke, which has always been regarded as of the same authority as the statute on which it is founded. 2 Inst., 428; Pomeroy *v.* State Bank, 1 Wall. 592, 599, 17 L. Ed. 638.

Statements in bill.—Formerly the rule was that the bill of exceptions must state that the judge who signed it "was asked to seal, or did seal a bill of exceptions." Weems *v.* George, 13 How. 190, 14 L. Ed. 108.

Effect of want of seal.—Where a bill of exceptions is neither signed or sealed by the judge who tried the case, so that there is nothing to show that it was submitted to him, or in any way received his sanction, the judgment below will be affirmed. Mussina *v.* Cavazos, 6 Wall. 355, 18 L. Ed. 810.

1. Later rule dispensed with a seal.—Generes *v.* Campbell, 11 Wall. 193, 20 L. Ed. 110; Herbert *v.* Butler, 97 U. S. 319, 320, 24 L. Ed. 958.

Though the statute of Westminster requires bills of exceptions to be sealed, yet as neither an act of congress nor rule of court has made this requirement here, it is sufficient if the bill be signed by the judge. Generes *v.* Campbell, 11 Wall. 193, 20 L. Ed. 110.

Anciently the bill of exceptions was required to be sealed; but it is sufficient, in the practice of this court, if it be signed by the judge. Pomeroy *v.* State Bank, 1 Wall. 592, 599, 17 L. Ed. 638; Generes *v.* Campbell, 11 Wall. 193, 20 L. Ed. 110; Mussina *v.* Cavazos, 6 Wall. 355, 18 L. Ed. 810; Stanton *v.* Embrey, 93 U. S. 548, 555, 23 L. Ed. 983.

"It is not a bill of exceptions until it has been sealed, or, as is now sufficient, signed. The sealing or signature of the judge is essential for its authentication." Insurance Co. *v.* Lanier, 95 U. S. 171, 172, 24 L. Ed. 383.

If the exceptions so drawn up by the

statute.[2]

Practice in District of Columbia.—The case or bill of exceptions, which are used on appeals from the special to the general term of the supreme court of the District of Columbia, need not be sealed.[3]

b. *Sufficiency of Sealing.*—No exceptions not reduced to writing and sealed by the judge, is a bill of exceptions, properly speaking, within the rules and practice of the federal courts. The seal, however, being to the bill of exceptions, and not to each particular exception contained in it, it was sufficient if the bill be sealed, as was the practice in the first and second circuits, at its close only.[4]

c. *Import of Seal.*—The truth of the bill could never be doubted after it was sealed.[5]

d. *Acknowledgment of Seal.*—Where the bill of exceptions was a part of the record, and came up with it, the acknowledgment of the judge's seal was unnecessary.[6] But if the bill of exceptions was not tacked to the record, such an acknowledgment might be proper.[7]

3. Construction of Authentication.—A statement in the last sentence of the bill that at the request of counsel, the judge "did put his seal to this bill of exceptions," shows by his signature and seal that he authenticated the bill of exceptions as prepared and presented to him, although two sentences prior to the last suggest that the purpose of counsel was simply to preserve exceptions to the charge. And all the facts and matters stated in the bill are by such authentication brought into the record for all purposes for which they may legitimately be used.[8]

party in writing are found to be true, they are sealed, or often, in the practice of the federal courts, merely signed by the presiding judge. Herbert *v.* Butler, 97 U. S. 319, 24 L. Ed. 958; Rev. Stat., § 953; Hanna *v.* Maas, 122 U. S. 24, 26, 30 L. Ed. 1117.

2. A seal to the bill was dispensed with by the statute.—"A seal is not required, being expressly dispensed with by the act of 1872 (17 Stat. 197; Rev. Stat., § 953); and we had before decided that a seal is not essential in the courts of the United States. Generes *v.* Campbell, 11 Wall. 193, 20 L. Ed. 110." Herbert *v.* Butler, 97 U. S. 319, 320, 24 L. Ed. 958.

To make it clear that a seal to a bill of exceptions was not necessary to its validity, congress, by § 4 of the act of June 1, 1872, c. 255 (17 St. 197), now § 953 of the Revised Statutes, enacted as follows: "A bill of exceptions allowed in any cause shall be deemed sufficiently authenticated if signed by the judge of the court in which the cause was tried, or by the presiding judge thereof, if more than one judge sat on the trial of the cause, without any seal of court or judge being annexed thereto." Origet *v.* United States, 125 U. S. 240, 31 L. Ed. 743.

"It may be observed in passing that whilst it is not now necessary to seal a bill of exceptions (Rev. Stat., § 953, U. S. Comp. Stat., 1901, p. 696), the other requisites referred to are essential." Metropolitan R. Co. *v.* District of Columbia, 195 U. S. 322, 49 L. Ed. 219.

The only regulation made by congress as to bills of exceptions is that contained in § 953 of the Revised Statutes, which provides that they shall be sufficiently authenticated by the signature of the presiding judge, without any seal. Chateaugay Ore, etc., Co., Petitioner, 128 U. S. 544, 555, 32 L. Ed. 508.

3. Appeals from special to general term of district.—Metropolitan R. Co. *v.* Moore, 121 U. S. 558, 30 L. Ed. 1022.

4. What is a sufficient sealing.—Pomeroy *v.* State Bank, 1 Wall. 592, 17 L. Ed. 638.

Seal, as required, is to the bill of exceptions, and not to each particular exception therein contained. Many exceptions may be inserted in one bill of exceptions, and of course it is sufficient if the bill of exceptions is sealed at the close. Accordingly, the practice, in the first and second circuits, is to put every exception taken at the trial into one bill of exceptions, which makes the records less voluminous. Pomeroy *v.* State Bank, 1 Wall. 592, 600, 17 L. Ed. 638.

5. Seal imports verity to the bill.—Ex parte Crane, 5 Pet. 190, 199, 8 L. Ed. 92.

6. Acknowledgment of seal.—Clarke *v.* Russell, 3 Dall. 415, 1 L. Ed. 660.

7. When acknowledgment of seal necessary.—Clarke *v.* Russell, 3 Dall. 415, 1 L. Ed. 660.

8. Construction of authentication.—The contention that the purpose of counsel in the question of bill of exceptions was to preserve exceptions to the charge, and that the authentication of the judge was requested for that alone, may be overborne by statements in the bill itself. By his signature and seal the judge authenticates the bill of exceptions as prepared and presented to him. And all the facts and matters stated in that bill are by such authentication brought into the record for

V. Scope and Contents of Bill.

A. In General.—So far as error is founded upon a bill of exceptions incorporated into the record, it lies only to exceptions taken at the trial to the rulings of the judge, to the granting or refusing of instructions, and to the admission or rejection of evidence.[9] Beyond this an appellate court has no power to look into the bill, on a writ of error, as it is the creature of statute, and restricted to the points stated.[10] The extent to which a judgment record should go in its recital of the proceedings depends largely upon the purpose for which it is to be used. If it is designed for use in the review by the appellate court of the rulings of the court below, upon the introduction of testimony, or of the validity of the charge to the jury, it must contain in a bill of exceptions so much of the testimony or charge as is necessary to a clear understanding of the questions involved. But if, upon the other hand, it be designed only for the purpose of preserving a record of the conviction in perpetuam rei memoriam, little more is necessary than to set forth the process and return thereto, the pleadings, journal entries, verdict and judgment.[11]

B. Rulings of the Court Below—1. In General.—When an objection is taken to the ruling of the lower court such ruling.[12] and the reasons for the ruling given by the court,[13] must be stated in the bill of exceptions.

2. Materiality of Rulings.—The bill of exceptions must also show the materiality of the rulings complained of.[14]

C. Unnecessary Matter.—Brevity in bills of exceptions is always commended.[15] Unnecessary matter not only has a tendency to involve what is really important in obscurity and confusion,[16] but it serves to perplex and em-

all purposes for which they may legitimately be used. Lees *v.* United States, 150 U. S. 476, 37 L. Ed. 1150.

The verification by the signature of the judge cannot be restrained to the last sentence of the connected history of the case which precedes. Kleinschmidt *v.* McAndrews, 117 U. S. 282, 286, 29 L. Ed. 905.

9. Scope and contents of bill.—Zeller *v.* Eckert, 4 How. 289, 297, 11 L. Ed. 979, citing 1 Bac. Abr., 779; Bull. N. P. 316.

10. Zeller *v.* Eckert, 4 How. 289, 297, 11 L. Ed. 979, citing 13 Edw. I., ch. 31.

11. Scope of judgment record to be used in court below.—United States *v.* Taylor, 147 U. S. 695, 699, 37 L. Ed. 335.

12. Bill must show ruling complained of.—"Where the objection is to the ruling of the court, it is indispensable that the ruling should be stated, and it should also be alleged that the complaining party then and there excepted to the same. Both conditions are wanting, and indeed the paper is irregular or defective, and insufficient in many of the substantial elements of a proper bill of exceptions." Pomeroy *v.* State Bank, 1 Wall. 592, 602, 17 L. Ed. 638.

Exception to ruling of court below in striking out plea of statute of limitations.—Packet Co. *v.* Sickles, 19 Wall. 611, 22 L. Ed. 203.

13. Reasons for ruling must be stated.—Caperton *v.* Bowyer, 14 Wall. 216, 234, 20 L. Ed. 882.

14. Bill must show materiality of rulings.—It has long been settled that abstract questions of law, which may or may not have been ruled in a way to effect the defendant injuriously, will not be considered by the supreme court on a writ of error, unless it appears from the bill of exceptions, or otherwise in the record, that the facts were such as to make them material to the issue which was tried. New York, etc., R. Co. *v.* Madison, 123 U. S. 524, 31 L. Ed. 258.

15. Unnecessary matter in the bill condemned.—Haussknecht *v.* Claypool, 1 Black 431, 17 L. Ed. 172.

16. Unnecessary matter tends to confuse.—A bill of exceptions is prepared by the party, and being prepared by him, he may state, and ought to state, only those facts which present the very question he desires to raise. If the objection is to a ruling on the admission of testimony, he should state only that testimony and enough of the case to show its relevancy. It would be absurd to require him to set out all the testimony, or to state in terms that there was no objection to the balance. Lewis *v.* United States, 146 U. S. 370, 383, 36 L. Ed. 1011, dissenting opinion of Brewer, J.

"In the case before us, the bill of exceptions fills an hundred and twenty-seven printed pages. The points arising for our consideration could have been better presented in a very small part of this space. Such a mass of unnecessary matter has a tendency to involve what is really important in obscurity and confusion. Its presence is a violation of the fourth rule of this court. Its examination consumes our time, increases our labor, and can subserve no useful purpose. The subject was so fully considered in the case

barrass both court and counsel,[17] and is a violation of the fourth rule of the federal supreme court.[18]

D. Objections and Exceptions—1. The Grounds of Objection—a. *In General.*—The bill of exceptions should point out the alleged errors clearly and show the grounds relied upon to sustain the objections presented, so that it may appear that the court below was informed as to the point to be decided.[19] This rule has been applied to objections to the admission of depositions,[20] to the misconduct of the jury,[21] and to many other objections, instances of which will be found in the notes.[22]

referred to, that we deem it unnecessary to pursue it further upon this occasion." Laber *v.* Cooper, 7 Wall. 565, 568, 19 L. Ed. 151. See, in accord, the language of Mr. Justice Field in Lincoln *v.* Claflin, 7 Wall. 132, 136, 19 L. Ed. 106.

"The bill of exceptions (so called) in this case, is a sort of abstract or index to the history of a case tried in the western district of Pennsylvania. Protesting against attempts at mystifying the merits of a case by such records, we shall proceed to notice the single error which it is supposed that the court has committed in the charge to the jury." Evans *v.* Patterson, 4 Wall. 224, 229, 18 L. Ed. 393.

17. Zeller *v.* Eckert, 4 How. 289, 297, 11 L. Ed. 979.

18. **Unnecessary matter in the bill violates a rule of court.**—Laber *v.* Cooper, 7 Wall. 565, 19 L. Ed. 151.

19. **Grounds of objection must be stated.**—The Francis Wright, 105 U. S. 381, 389, 26 L. Ed. 1100; Insurance Co. *v.* Sea, 21 Wall. 158, 22 L. Ed. 511; Caperton *v.* Bowyer, 14 Wall. 216, 234, 20 L. Ed. 882 (exception to refusal to instruct and to instructions given).

20. **Admission of deposition.**—In the absence of any apparent informality, if the objection made by the defendant to the admission of the deposition was made on the ground of an informality, that ground, to avail him here, should appear in the bill of exceptions, with a sufficient statement to enable this court to see that the ground was a valid one; and the informality on which the deposition was ruled out should, to avail him, be stated in the bill of exceptions, with sufficient other matter to enable this court to say that the identical informality on which the rulings of the court proceed existed, and was good ground for the ruling. As the defendant made the objection to the admissibility of the deposition, and it was excluded, it was incumbent on him to make it appear, by the bill of exceptions, what the ground of objection was, and that it was a valid ground. Spaids *v.* Cooley, 113 U. S. 278, 286, 28 L. Ed. 984. See, generally, the title DEPOSITIONS, vol. 5, p. 321.

21. **That the court erred in allowing the jurors to take notes:** "It appears from the bill of exceptions that one of the jurymen asked the court if he 'could take notes and jot down any items on paper,' and that the court responded: 'Certainly, you have a right to assist your memory in any way that is consistent with your conscience;' to which defendant excepted. The court subsequently admonished the jury that this was simply for the personal convenience of the juror; that he wished them to understand that their memory and recollection of the testimony were to control in arriving at a verdict; and that they should not be influenced in the least by the juror's notes. The exception saved was to the permission to take notes and not to the use of them the jury room. But the record does not show that any notes were taken, and there is nothing for the exception to rest on." Agnew *v.* United States, 165 U. S. 36, 45, 41 L. Ed. 624.

22. **Illustrative cases.**—A bill of exceptions which claimed a right of recovery for negligence must state the loss or damage sustained by the act or omission complained of. Dunlop *v.* Munroe, 7 Cranch 242, 3 L. Ed. 329.

Objections to award of arbitrator.—To present a question to the supreme court, the subordinate tribunal must ascertain the facts upon which the judgment or opinion excepted to, is founded. Therefore, where there was a reference in the circuit court, and the bill of exceptions set out the objections to the award together with the testimony of the arbitrator who was examined in open court, and that testimony showed the facts upon which the objections were founded, it was a sufficient exception. New York, etc., R. Co. *v.* Myers, 18 How. 246, 15 L. Ed. 380.

Denial of motion for judgment.—An exception to the ruling of the court in denying a motion for judgment on the pleading, must show the ground upon which the motion is made or denied. Young *v.* Martin, 8 Wall. 354, 19 L. Ed. 418.

Objection to the number of executions.—Where an action is brought on a judgment rendered by the supreme court of Louisiana, and by the law of that state only one execution can issue at a time on the judgment, an assignment of error that at the time suit was brought on the judgment in the circuit court, an execution had been issued on the same judgment in the state court, which is in full force, which is not made a part of the record of

b. *Error to State Court.*—Upon a writ of error to a state court, the grounds of the exception must be stated.[23]

2. TAKING OF EXCEPTIONS—a. *In General.*—Since the power of the Federal supreme court is, as a general rule, confined to exceptions actually taken at the trial, or hearing, it must affirmatively appear from the bill that exceptions were seasonably taken to the rulings of the court on the objections.[24]

b. *Illustrative Cases.*—For example, instructions though objected to are not subject to review, where the bill of exceptions does not show that the party excepted to them.[25] In like manner, it has been frequently held by the federal supreme court that the rulings of the court upon objections to the admissions,[26]

the circuit court by bill of exceptions, cannot be noticed. Lathrop *v.* Judson, 19 How. 66, 15 L. Ed. 553.

Where a deed was objected to in the circuit court on the ground of fraud, but no specific grounds of objection were made, the federal supreme court cannot inquire into the correctness or incorrectness of the objection. Thomas *v.* Lawson, 21 How. 331, 16 L. Ed. 82.

Evidence of market value.—Overruling of objection to testimony upon difference in prices at Rheims and at Paris, of other manufacturers' champagne, is not reviewable in absence of showing of difference in quality and price between that and the champagne in question. "If there were such differences as was assumed by the counsel for the defendant, it should have been made to appear, by setting out either the evidence which proved it, or an admission by the judge to that effect: Either would have been sufficient. Their place cannot be supplied by the allegations of counsel. The silence of the judge does not amount to an admission." Cliquot's Champagne, 3 Wall. 114, 142, 18 L. Ed. 116.

Admissions of agent's acts and declarations.—Overruling of objection to admission of alleged agent's acts and declarations on ground of insufficient proof of agency is not reviewable where bill of exceptions fails to show evidence on the subject and exception on that ground. Cliquot's Champagne, 3 Wall. 114, 18 L. Ed. 116.

Objection that there is no revenue stamp upon bonds as required by the act of congress, or that an insufficient one was upon the contract, will not be noticed by the appellate court unless the bill of exceptions shows what revenue stamp was on the bond. Chambers County *v.* Clews, 21 Wall. 317, 22 L. Ed. 517.

23. Stating grounds of exception upon error to state court.—Caperton *v.* Bowyer, 14 Wall. 216, 234, 20 L. Ed. 882. See the title APPEAL AND ERROR, vol. 1, p. 546.

24. The bill must show that exceptions were taken.—Pomeroy *v.* State Bank, 1 Wall. 592, 602, 17 L. Ed. 638; Young *v.* Martin, 8 Wall. 354, 19 L. Ed. 418; Muller *v.* Ehlers, 91 U. S. 249, 23 L. Ed. 319; Railway Co. *v.* Heck, 102 U. S. 120, 26 L. Ed. 58; Hanna *v.* Maas. 122 U. S. 24, 30 L. Ed. 1117; Lees *v.* United States, 150 U. S. 476, 37 L. Ed. 1150; Metropolitan R. Co. *v.* District of Columbia, 195 U. S. 322, 49 L. Ed. 219.

Where exceptions are not taken in the progress of the trial in the circuit court, and do not appear on the record, there is no ground for the action of the federal supreme court. Lathrop *v.* Judson, 19 How. 66, 15 L. Ed. 553.

A bill of exceptions should show that the party then and there excepted to the rulings of the trial court complained of. Pomeroy *v.* State Bank, 1 Wall. 592, 17 L. Ed. 638.

When bills of exceptions are necessary to bring any matter upon record so that it can be reviewed in error, it must appear by the record that the exception was taken at the trial. A judge cannot afterwards allow one not taken in time. Insurance Co. *v.* Boon, 95 U. S. 117, 127, 24 L. Ed. 395.

Exception to the overruling of a motion in arrest of judgment.—Rodriguez *v.* United States, 198 U. S. 156, 49 L. Ed. 994.

25. Objections to instructions without showing exceptions.—Tucker *v.* United States, 151 U. S. 164, 38 L. Ed. 112, citing United States *v.* Breitling, 20 How. 252, 15 L. Ed. 900.

Nor can it regard any part of the charge as the subject matter of revision, unless the judges, or one of them, certify under his seal, that it was excepted to at the trial. Stimpson *v.* West Chester R. Co., 3 How. 553, 11 L. Ed. 722.

If the omissions of a part of the charge, which was in fact embraced in the exceptions, is a mere clerical error, the party will be entitled to a certiorari, upon producing a copy of the exceptions, properly certified. Stimpson *v.* West Chester R. Co., 3 How. 553, 11 L. Ed. 722.

Judgment affirmed.—Where the record shows various objections to the charge of the court, but it nowhere appears that exceptions were taken to any of these matters, the judgment will be affirmed. Fishburn *v.* Chicago, etc., R. Co., 137 U. S. 60, 34 L. Ed. 585.

26. Objections to admission of evidence must show exceptions.—Santa Anna *v.* Frank, 113 U. S. 339, 28 L. Ed. 978; Clune

exclusion,[27] or weight and sufficiency of the evidence,[28] are not open to revision, unless the bill of exceptions shows that exceptions were taken.[29]

c. *Manner of Showing the Taking of Exceptions.*—But that exceptions were taken cannot be shown by the minutes of the clerk.[30]

E. The Evidence—1. IN GENERAL.—Since each bill of exceptions must be considered as presenting a substantial case, and it is the evidence stated in it alone on which the court will decide,[31] unless the evidence is incorporated in the bill or made part thereof it will not be considered,[32] even though appended thereto.[33] However, evidence may be included in a bill of exceptions by ap-

v. United States, 159 U. S. 590, 40 L. Ed. 269.

In order to make an objection to the admission of testimony available, it is necessary that an exception should be distinctly taken and placed upon the record. If it only appears that the admission of a part of the testimony was objected to by the defendant, but it does not appear that the objection was overruled, and an exception taken, the point cannot be availed of. Laber *v.* Cooper, 7 Wall. 565, 19 L. Ed. 151; Newport News, etc., Valley Co. *v.* Pace, 158 U. S. 36, 39 L. Ed. 887.

The bill of exceptions should state that an exception was taken to the ruling of the court in admitting certain testimony over the defendant's objection. Weems *v.* George, 13 How. 190, 14 L. Ed. 108.

27. Exceptions to the admission or rejection of evidence constitute no part of the record, unless incorporated in a bill of exceptions. Suydam *v.* Williamson, 20 How. 427, 15 L. Ed. 978, cited in United States *v.* Taylor, 147 U. S. 695, 700, 37 L. Ed. 335; Insurance Co. *v.* Lanier, 95 U. S. 171, 24 L. Ed. 383; Clune *v.* United States, 159 U. S. 590, 40 L. Ed. 269.

28. Objections to lack of evidence must show exceptions.—Where the record fails to show that any exception was taken at the trial based upon lack of evidence, the objection is not properly presented to the federal supreme court for consideration. Grand Trunk R. Co. *v.* Ives, 144 U. S. 408, 36 L. Ed. 485.

29. "This bill of exceptions has been framed and allowed in disregard of the settled rules of law upon the subject. No ruling upon evidence is open to revision, because none appears to have been excepted to. Scott *v.* Lloyd, 9 Pet. 418, 442, 9 L. Ed. 178." Hanna *v.* Maas, 122 U. S. 24, 26, 30 L. Ed. 1117.

30. Taking of exceptions not shown by the minutes.—Young *v.* Martin, 8 Wall. 354, 356, 19 L. Ed. 418. See ante, "Other Methods than the Bill of Exceptions," III, D.

Reference to annexed exhibit insufficient.—Where a bill, instead of stating distinctly the matters of law in the charge which are excepted to, refers to an exhibit annexed, containing the evidence, with minutes that certain parts of it were objected to, and another exhibit containing the charge in full, with the stenographer's notes of an ensuing conversation showing that counsel excepted to that part of the charge which bore upon a certain subject, or to the refusal of the court to charge as orally requested in the course of that conversation, the bill is insufficient in form, and will not be considered. Hanna *v.* Maas, 122 U. S. 24, 30 L. Ed. 1117.

31. Evidence must be incorporated in bill.—Dunlop *v.* Munroe, 7 Cranch 242, 270, 3 L. Ed. 329; Jones *v.* Buckell, 104 U. S. 554, 556, 26 L. Ed. 841.

"Each bill of exceptions must be considered as presenting a distinct, substantive case; and it is on the evidence stated in itself alone that the court is to decide. We cannot go beyond it and collect other facts which must have been in the mind of the party, and the insertion of which in this bill of exceptions could alone have sanctioned the opinion as prayed for." Dunlop *v.* Munroe, 7 Cranch 242, 270, 3 L. Ed. 329, approved in New York, etc., R. Co. *v.* Madison, 123 U. S. 524, 526, 31 L. Ed. 258; Jones *v.* Buckell, 104 U. S. 554, 556, 26 L. Ed. 841; Hornbuckle *v.* Stafford, 111 U. S. 389, 393, 28 L. Ed. 468.

32. Evidence not incorporated in bill is not considered.—Russell *v.* Ely, 2 Black 575, 17 L. Ed. 258 (depositions), cited in United States *v.* Copper Queen Min. Co., 185 U. S. 495, 46 L. Ed. 1008; Clune *v.* United States, 159 U. S. 590, 40 L. Ed. 269.

Copies of deeds and stipulations in respect to evidence.—Where certain rights are claimed under the act of August 6, 1861, c. 60, "to confiscate property used for insurrectionary purposes" (12 Stat. 319), but the pleadings nowhere show that the rights of the parties depend on the construction or effect of the act of 1861, and no part of the evidence is set out in the bill of exceptions, the judgment will be affirmed. "Copies of deeds and a stipulation in respect to evidence are found in the transcript, but they are nowhere referred to in the bill of exceptions, and it is not even stated in the record that they were used at the trial. As long ago as Dunlop *v.* Munroe (7 Cranch 242, 270, 3 L. Ed. 329), it was said by this court that 'each bill of exceptions must be considered as presenting a distinct and substantive case; and it is on the evidence stated in itself alone that the court is to decide.'" Jones *v.* Bucknell, 104 U. S. 554, 556, 26 L. Ed. 841.

33. Merely appending evidence to bill insufficient.—Evidence or statements of fact not contained in the bill of excep-

propriate reference to other parts of the record.[34] But merely printing the evidence in the record, without incorporating it in the bill, or so referring to it therein as to make it a part of the record of the case, is not sufficient.[35]

Exceptions to Rules Rendering Evidence Inadmissible.—Where an objection and exception is taken to the action of the court below in excluding evidence, and the party introducing it relies in the appellate court on any special circumstances as an exception to the rule rendering such evidence inadmissible, as that it was part of the res gestæ, that circumstance must appear in the bill of exceptions or by the record in some other manner.[36]

2. Stenographic Reports.—The supreme court has expressed strong disapproval of the practice of incorporating verbatim copies of stenographic reports of evidence in bills of exceptions. In nearly every case the transcript can be much reduced in length by putting the examination of witnesses into narrative form. Both the consideration due to the judges of the appellate courts and the great reduction in expense to the parties should induce counsel to thus shorten the records.[37]

tions, or made a part thereof, though appended thereto, will not be regarded by the court. Bank *v.* Kennedy, 17 Wall. 19, 20, 21 L. Ed. 551.

34. Evidence may be included by references to other parts of record.—Jones *v.* Buckell, 104 U. S. 554, 556, 26 L. Ed. 841.

"Of course, evidence may be included in a bill of exceptions by appropriate reference to other parts of the record, and if that had been done here it might have been enough. But with no issue made directly by the pleadings, and no evidence set forth or referred to in the bill of exceptions showing the materiality of the charge complained of, the case presents to us only an abstract proposition of law which may or may not have been stated by the court in a way to be injurious to the plaintiffs in error. Such a proposition we are not required to consider. Reed *v.* Gardner, 17 Wall. 409, 21 L. Ed. 665." Jones *v.* Buckell, 104 U. S. 554, 556, 26 L. Ed. 841.

Effect of statement of evidence by court.—Where the evidence returned in the bill of exceptions, which does not purport to contain all the evidence given on the trial, is not sufficiently full, but the judge, in his charge to the jury, refers to evidence on the subject which does not appear in the bill, and is not corrected by counsel, and no exception is taken to the statement, the federal supreme court is not only permitted but bound to regard the evidence in the record as supplemented by the statement of the evidence by the court. "It must be assumed that the statements of the court were correct statements of the testimony. If not, the bill of exceptions should have shown it, and some question made at the time in regard to the erroneous character of the charge upon the facts. Error must appear in the record and cannot be presumed." Sharp *v.* United States, 191 U. S. 341, 353, 48 L. Ed. 211.

35. Merely printing evidence in record insufficient.—Russell *v.* Ely, 2 Black 575, 17 L. Ed. 258.

"In Russell *v.* Ely, 2 Black 575, 17 L. Ed. 258, the court, after remarking that the bill of exceptions did not purport to give all that a certain witness had testified to, said that according to a well-known rule the court under such a condition of the record was bound to presume that there was that in the witness's testimony which justified the instruction. It was then added by the court: 'What purports to be the entire depositions of Baker is sent up by the clerk of the district court, and is printed in the record before us, and if properly before us might sustain the exception. But this deposition is not incorporated into the bill of exceptions, nor so referred to in it as to be made a part of the record of the case. It is only a useless encumberance of the transcript, and an expense to the litigating parties.' The court thus refused to look at the deposition which purported to be the entire deposition of the witness because it was not made a part of the bill of exceptions." Approved in United States *v.* Copper Queen Min. Co., 185 U. S. 495, 498, 46 L. Ed. 1008.

36. Exceptions to rule excluding evidence must appear.—Smiths *v.* Shoemaker, 17 Wall. 630, 21 L. Ed. 717.

Admissibility of ex parte declarations.—When a party seeks to justify in a court of review the admission of ex parte declarations of himself or his vendor, against the objection of the other side, he must show by the record some circumstance which would obviate the manifest soundness of the objection. Smiths *v.* Shoemaker, 17 Wall. 630, 638, 21 L. Ed. 717. See the title DECLARATIONS AND ADMISSIONS, vol. 5, p. 214.

37. Mere stenographic reports of evidence condemned.—"The bill of exceptions should not be simply a stenographic report of all that took place at the trial, leaving this court to consider the whole of the evidence and pick out such portions of it

3. Exclusion of Evidence—a. *In General.*—Where an assignment of error is taken to the exclusion of evidence, as, for example, an assignment of error to a refusal to admit in evidence a complaint and answer in another case,[38] or to the rejection of a deposition,[39] the bill of exceptions must show that the evidence excluded was material, or that its exclusion is prejudicial.[40]

b. *Depositions.*—And to accomplish this the record must, in the case of a deposition excluded in whole or in part, set forth the answer or its full substance.[41] Such is the requirement of the twenty-first rule of the federal supreme court,[42] and the rule is not the less applicable because the trial court excludes the answer to the question upon the particular ground stated in the bill of exceptions.[43]

as may be pertinent to the issue." McLeod *v.* Fourth Nat. Bank, 122 U. S. 528, 30 L. Ed. 1237.

38. In order to sustain an assignment of error to a refusal to admit in evidence a complaint and answer in another case offered by the appellants, the court having already admitted the decree rendered in that case, it is necessary that the exception should show what the excluded testimony was, in order that it might appear whether the evidence was material or not. Hornbuckle *v.* Stafford, 111 U. S. 389, 28 L. Ed. 468, citing Dunlop *v.* Munroe, 7 Cranch 242, 3 L. Ed. 329; Reed *v.* Gardner, 17 Wall. 409, 21 L. Ed. 665.

39. Assignment of error to rejection of deposition.—Packet Co. *v.* Clough, 20 Wall. 528, 22 L. Ed. 406.

"The refusal of the court to allow the plaintiff to read the answer of the witness Nash to the question, 'You may state whether or not that check has all the appearance of having passed through the bank in the ordinary course of business,' cannot be assigned as error. The bill of exceptions does not show what answer was made to that question in the deposition of the witness. It does not even state the facts the answer tended to establish. We cannot, therefore, say that the exclusion of the answer was prejudicial to the plaintiff. For aught that appears in the record, the witness may have made an answer that was injurious to the plaintiff, or one that was of no value to either party." Shauer *v.* Alterton, 151 U. S. 607, 616, 38 L. Ed. 286.

40. Bill must show materiality of excluded evidence.—Thompson *v.* First Nat. Bank, 111 U. S. 529, 28 L. Ed. 507, citing Packet Co. *v.* Clough, 20 Wall. 528, 22 L. Ed. 406; Railroad Co. *v.* Smith, 21 Wall. 255, 22 L. Ed. 513; Hornbuckle *v.* Stafford, 111 U. S. 389, 28 L. Ed. 468; Thompson *v.* First Nat. Bank, 111 U. S. 529, 28 L. Ed. 507.

Exclusion of proof of contents of letter.—Thompson *v.* First Nat. Bank, 111 U. S. 529, 28 L. Ed. 507.

41. Record must state full substance of evidence.—Railroad Co. *v.* Smith, 21 Wall. 255, 22 L. Ed. 513; Thompson *v.* First Nat. Bank, 111 U. S. 529, 28 L. Ed. 507; Shauer *v.* Alterton, 151 U. S. 607, 38 L. Ed. 286.

A party who complains of the rejection of evidence must make it appear by his bill of exceptions, that if the evidence had been admitted it might have led the jury to a different result, and that accordingly he has been injured by the rejection. He must therefore have properly before this court the evidence rejected, or some statement of what it tended to prove. "This must be understood as the practice in this court, and such is the requirement of our twenty-first rule. By that rule it is ordered that when the error assigned is to the admission or rejection of evidence, the specification shall quote the full substance of the evidence offered, or copy the offer as stated in the bill of exceptions. This is to enable the court to see whether the evidence offered was material, for it would be idle to reverse a judgment for the admission or rejection of evidence, that could have had no effect upon the verdict." Packet Co. *v.* Clough, 20 Wall. 528, 543, 22 L. Ed. 406.

42. Requirements of twenty-first rule of court.—The party who complains of the rejection of evidence must show that he was injured by the rejection. His bill of exceptions must make it appear that if it had been admitted, it might have led the jury to a different verdict. This must be understood as the practice in the federal supreme court, and such is the requirement of its twenty-first rule. Packet Co. *v.* Clough, 20 Wall. 528, 22 L. Ed. 406; Shauer *v.* Alterton, 151 U. S. 607, 38 L. Ed. 286.

By the 21st rule of the supreme court it may be regarded as settled that an assignment of error based upon the exclusion by the trial court of an answer given in the deposition of a witness to a particular question, will be disregarded by the court if the answer, or the full substance of it, is not set out in the record in appropriate form for examination. Packet Co. *v.* Clough, 20 Wall. 528, 22 L. Ed. 406; Railroad Co. *v.* Smith, 21 Wall. 255, 22 L. Ed. 513; Thompson *v.* First Nat. Bank, 111 U. S. 529, 28 L. Ed. 507; Shauer *v.* Alterton, 151 U. S. 607, 38 L. Ed. 286.

43. Shauer *v.* Alterton, 151 U. S. 607, 38 L. Ed. 286.

Limitations of General Rule.—But this rule that where the answer of a witness to a deposition is excluded, the record must set forth the answer or its full substance, does not apply where the witness testifies in person, and where the question propounded to him is not only proper in form, but is so framed as to clearly admit of an answer favorable to the claim or defense of the party producing him. It might be very inconvenient in practice if a party, in order to take advantage of the rulings of the trial court in not allowing questions, proper in form and manifestly relevant to the issues, were required to accompany each question with a statement of the facts expected to be established by the answer to the particular question propounded.[44]

c. *Rejection of Witnesses over Objection.*—And it has been held that, where a bill of exceptions states that a witness was asserted to be competent by the counsel tendering him, and was rejected by the court, a court of error will infer that the witness was material to sustain the issue, without a direct statement to that effect in the bill of exceptions.[45]

4. WITNESSES—a. *Examination of Witnesses*—(1) *Questions*—(a) *On Direct Examination.*—Where an objection is taken to a question asked a witness, the bill of exceptions must show the character of the evidence previously put in.[46]

(b) *On Cross-Examination.*—Where there is nothing in the bill of exceptions which enables a revising court to say that questions objected to have exceeded the reasonable license which a court, in its discretion, may allow in cross-examination, no error is shown, and the judgment must be affirmed.[47]

(2) *Answers.*—Where the bill of exceptions does not show what answer was made to a question put to a witness, error cannot be assigned upon the question.[48]

b. *Names of Witnesses.*—The failure of the bill of exceptions to give the names of the witnesses whom the defendant proposed or intended to call, or to state their testimony in detail, cannot deprive the defendant of the benefit of his exception to the refusal of the court to hear any evidence whatever.[49]

5. HOW MUCH OF THE EVIDENCE SHOULD BE INCORPORATED—a. *Former Practice*—(1) *In General.*—Formerly, only so much of the evidence as was necessary to present clearly the matters excepted to was properly embodied in

44. When excluded answer to deposition need not be set forth.—Buckstaff *v.* Russell, 151 U. S. 626, 636, 38 L. Ed. 292, distinguishing Shauer *v.* Alterton, 151 U. S. 607, 38 L. Ed. 286; Packet Co. *v.* Clough, 20 Wall. 528, 22 L. Ed. 406; Railroad Co. *v.* Smith, 21 Wall. 255, 22 L. Ed. 513; Thompson *v.* First Nat. Bank, 111 U. S. 529, 28 L. Ed. 507.

45. Materiality of rejected witness need not be stated.—Haussknecht *v.* Claypool, 1 Black 431, 17 L. Ed. 172. See Scotland County *v.* Hill, 112 U. S. 183, 186, 28 L. Ed. 692.

In other words, where a bill of exceptions sets out that a witness was offered, was objected to on the ground of incompetency, and rejected by the court below, but does not state what facts he was called to prove, the federal supreme court will not presume that his testimony would have been immaterial if it had been heard. Vance *v.* Campbell, 1 Black 427, 17 L. Ed. 168.

46. Objections to question to witness on direct examination.—Sire *v.* Ellithorpe Air Brake Co., 137 U. S. 579, 34 L. Ed. 801; Home Benefit Ass'n *v.* Sargent, 142 U. S. 691, 35 L. Ed. 1160.

47. Objections to questions on cross-examination.—Nailor *v.* Williamson, 8 Wall. 107, 19 L. Ed. 348.

48. Objections to answers of witnesses. examination.—Lovell *v.* Davis, 101 U. S. 541, 25 L. Ed. —Nailor *v.* Williams, 8 Wall. 107, 19 L. Ed. 348.

Where a question is asked of a witness, which is illegal only because it may elicit improper testimony, and the court permits it to be answered against the objection of the other party, if the witness knows nothing of the matter to which he is interrogated, or if his answer is favorable to the objecting party, it is not error of which a revising court can take notice. It works him no injury. If it does work the objecting party injury, he can show it by making the answer a part of the bill of exceptions, and unless he does this there is no error of the sort mentioned. Nailor *v.* Williams, 8 Wall. 107, 19 L. Ed. 348.

49. Names of witnesses need not be given.—Carter *v.* Texas, 177 U. S. 442, 499, 44 L. Ed. 839.

the bill of exceptions,[50] consent of counsel to the contrary notwithstanding.[51] All beyond serves to encumber and confuse the record, and to perplex and embarrass both court and counsel.[52] Besides a contrary practice, was a direct violation of a rule of court then existing.[53]

(2) *Admitted and Disputed Facts.*—If the facts upon which the rulings were made are admitted, the bill should state them briefly, as the result of the testimony.[54] If the facts are disputed, it was sufficient if the bill alleged that testimony was produced tending to prove them.[55]

(3) *Weight and Sufficiency of Evidence.*—If a defect in the proofs is the

50. Former practice as to amount of evidence to be put in bill.—Stringer *v.* Young, 3 Pet. 320, 7 L. Ed. 693; United States *v.* Morgan, 11 How. 154, 13 L. Ed. 643; United States *v.* Rindskopf, 105 U. S. 418, 26 L. Ed. 1131; Lincoln *v.* Claflin, 7 Wall. 132, 19 L. Ed. 106 (followed in Laber *v.* Cooper 7 Wall. 565, 568, 19 L. Ed. 151; United States *v.* Rindskopf, 105 U. S. 418, 422, 26 L. Ed. 1131; Lewis *v.* United States, 146 U. S. 370, 383, 36 L. Ed. 1011, dissenting opinion of Brewer, J.); Lees *v.* United States, 150 U. S. 476, 37 L. Ed. 1150; Gregg *v.* Moss, 14 Wall. 564, 568, 20 L. Ed. 740; Hall *v.* Weare, 92 U. S. 728, 23 L. Ed. 500. Compare The City *v.* Babcock, 3 Wall. 240, 18 L. Ed. 31.

"Indeed, it can seldom be necessary for the just determination of any question raised at the trial to set forth the entire evidence given; and the practice in some districts—quite common of late—of sending up to this court bills made up in this way—filled with superfluous and irrelevant matter—must be condemned. It only serves to throw increased labor upon us, and unnecessary expense upon parties. If counsel will not heed the admonitions upon this subject, so frequently expressed by us, the judges of the court below, to whom the bills are presented, should withhold their signatures until the bills are prepared in proper form, freed from all matters not essential to explain and point the exceptions." Lincoln *v.* Claflin, 7 Wall. 132, 136, 19 L. Ed. 106, opinion of Mr. Justice Field.

"A bill of exceptions should not include, nor, as a rule, does it include, all the evidence given on the trial upon questions about which there is no controversy, but which it is necessary to introduce as proof of the plaintiff's right to bring the action, or of other matters of like nature. If such evidence be admitted without objection, and no point be made at the trial with respect to the matter it was intended to prove, we know of no rule of law which would require that even the substance of it should be embodied in a bill of exceptions subsequently taken. On the contrary, to encumber the record with matter not material to any issue involved has been repeatedly condemned by this court as useless and improper. Pennock *v.* Dialogue, 2 Pet. 1, 15, 7 L. Ed. 327; Johnston *v.* Jones, 1 Black 209, 219, 220, 17 L. Ed. 117; Zeller *v.* Eckert, 4 How. 289, 297, 11 L. Ed. 979." Grand Trunk R. Co. *v.* Ives, 144 U. S. 408, 414, 36 L. Ed. 485.

"The record contains, embodied in the bill of exceptions, the whole of the testimony and evidence offered at the trial of the cause, by each party, in support of the issue; it is very voluminous, and as no exception was taken to its competency or sufficiency, either generally or for any particular purpose, it is not properly before this court for consideration, and forms an expensive and unnecessary burden upon the record. This court has had occasion, in many cases, to express its regret on account of irregular proceedings of this nature; there was not the slightest necessity of putting any portion of the evidence in this case upon the record; since the opinion of the court, delivered to the jury, presented a general principle of law, and the application of the evidence to it was left to the jury." Pennock *v.* Dialogue, 2 Pet. 1, 7 L. Ed. 327, cited in Johnston *v.* Jones, 1 Black 209, 17 L. Ed. 117; Carver *v.* Jackson, 4 Pet. 1, 7 L. Ed. 761.

51. Consent of counsel unavailing.—The rule that the bill of exceptions should not contain all the evidence applies, even though a consent of counsel be obtained. Graham *v.* Bayne, 18 How. 60, 15 L. Ed. 265.

52. Unnecessary evidence in record tends to confuse.—Zeller *v.* Eckert, 4 How. 289, 11 L. Ed. 979.

A bill of exception should contain only so much of the evidence as is necessary to present the legal question raised. When more than this is inserted in the bill, it is an irregularity to be condemned as a departure from established practice, inconvenient and embarrassing to the court. Johnston *v.* Jones, 1 Black 209, 17 L. Ed. 117, following Pennock *v.* Dialogue, 2 Pet. 1, 15, 7 L. Ed. 327; Zeller *v.* Eckert, 4 How. 289, 297, 11 L. Ed. 979.

53. Rule of the court as to amount of evidence.—The bill of exceptions should not contain all the evidence adduced on both sides. This is a direct violation of the rule of the federal supreme court upon the subject. Hickman *v.* Jones, 9 Wall. 197, 19 L. Ed. 551.

54. Admitted facts.—Lincoln *v.* Claflin, 7 Wall. 132, 136, 19 L. Ed. 106.

55. Disputed facts.—Lincoln *v.* Claflin, 7 Wall. 132, 136, 19 L. Ed. 106.

ground of the exception, such defect should be mentioned without a detail of the testimony.[56]

(4) *The Rule When the Trial Is by the Court.*—A bill of exceptions cannot be used to bring up the whole testimony for review when the case has been tried by the court, any more than when there has been a trial by jury.[57] Where a case is tried by the court without a jury, the bill of exceptions brings up nothing for revision except what it would have done had there been a jury trial.[58] And this was the rule prior to the act of March 3rd, 1865, when such a case was brought up to the federal supreme court from the circuit court of the United States for Louisiana.[59]

(5) *Presumption on Appeal.*—But it will be assumed that the bill of exceptions contains all the testimony material to raise the point of law involved;[60] the supreme court cannot presume that any material part of the evidence is omitted. As to the evidence that was before the court below, the bill is conclusive.[61] On the other hand, it is equally well settled that it is not for the appellate court to say that the entire evidence in the case is set forth in the bill of exceptions, for that would be to presume a direct violation of a settled rule of practice as regards bills of exceptions, viz, that a bill of exceptions should contain only so much of the evidence as may be necessary to explain the bearing of the rulings of the court upon matters of law, in reference to the questions in dispute between the parties to the case, and which may relate to exceptions noted at the trial.[62]

b. *Present Practice*—(1) *In General.*—The rule of practice in the federal supreme court now is that the bill of exceptions must purport to contain,[63] in

56. Want of proof.—Lincoln *v.* Claflin, 7 Wall. 132, 136, 19 L. Ed. 106.

57. Trials by the court under act of March 3rd, 1865.—Norris *v.* Jackson, 9 Wall. 125, 128, 19 L. Ed. 608; Insurance Co. *v.* Sea, 21 Wall. 158, 22 L. Ed. 511; Betts *v.* Mugridge, 154 U. S., appx., 644, 25 L. Ed. 157; Grayson *v.* Lynch, 163 U. S. 468, 41 L. Ed. 230; St. Louis *v.* Western Union Tel. Co., 166 U. S. 388, 41 L. Ed. 1044. For a full discussion, see the title APPEAL AND ERROR, vol. 1, p. 1051.

Where the parties submit issues of fact in civil cases to be tried and determined by the court under the act of March 3, 1865, a bill of exceptions cannot be used to bring up the whole testimony for review any more than in a trial by jury. Insurance Co. *v.* Tweed, 7 Wall. 44, 19 L. Ed. 65; Norris *v.* Jackson, 9 Wall. 125, 19 L. Ed. 608.

58. Insurance Co. *v.* Folsom, 18 Wall. 237, 250, 21 L. Ed. 827, citing Norris *v.* Jackson, 9 Wall. 125, 19 L. Ed. 608; Coddington *v.* Richardson, 10 Wall. 516, 19 L. Ed. 981; Miller *v.* Life Ins. Co., 12 Wall. 285, 20 L. Ed. 398.

59. Review of causes from Louisiana prior to 1865.—Where a jury is waived, and questions of law and fact decided by the court in Louisiana, the rules of the state appellate court require that the whole evidence should be put into the record. But where a case is brought up to the federal supreme court, by writ of error from the circuit court of the United States for Louisiana, the rules of the federal court only require that so much of the evidence should be inserted as is necessary to explain the legal questions decided by the court. Consequently, the mere fact, that some of the evidence given below is omitted from the record, is not of itself sufficient to prevent the court from examining the questions of law presented by the record. Arthurs *v.* Hart, 17 How. 6, 15 L. Ed. 30, citing Phillips *v.* Preston, 5 How. 278, 12 L. Ed. 152.

"In order, however, to disembarrass the proceedings, as far as practicable, in this peculiar mode of the trial of a common-law case, and to enable the appellate court to re-examine the point or points of law involved, the counsel, after the close of the evidence, should present the propositions of law which, it is claimed, should govern the decision; and the court should state the rulings thereon, or in coming to its determination. And, in the return to the writ of error, so much of the evidence, and no more, should be incorporated in the bill of exceptions, as was deemed necessary to present the points of law determined against the party bringing the writ. No technical exception need be stated, except in the case of the rejection or admission of evidence. As the rulings in the final determination do not take place upon the trial, or need not, the exception would be impracticable." Arthurs *v.* Hart, 17 How. 6, 15, 15 L. Ed. 30.

60. Presumption on appeal is that bill is complete.—Arthurs *v.* Hart, 17 How. 6, 15 L. Ed. 30.

61. Bingham *v.* Cabot, 3 Dall. 19, 27, 1 L. Ed. 491.

62. Grand Trunk R. Co. *v.* Ives, 144 U. S. 408, 414, 36 L. Ed. 485.

63. Present practice as to incorporating the evidence.—Stokes *v.* United States,

substance at least,[64] all the evidence offered on the trial.

(2) *Illustrative Cases.*—And this rule is especially true where error is alleged in the action of the court in directing or refusing to direct a verdict,[65] or in denying a motion to compel the prosecuting attorney to elect on which one

157 U. S. 187, 39 L. Ed. 667; Clune *v.* United States, 159 U. S. 590, 40 L. Ed. 269; Nashua Savings Bank *v.* Anglo-American Land, etc., Co., 189 U. S. 221, 231, 47 L. Ed. 782.

"On the face of the papers the right of the plaintiff to recover is clear. The record does not contain the entire testimony offered on the trial. It cannot, therefore, be said, even if this court were at liberty to examine the testimony, that it was not amply sufficient to sustain the verdict and judgment." Nelson *v.* Flint, 166 U. S. 276, 278, 41 L. Ed. 1002.

Appeals from special to general term of supreme court of district.—"Of course, if the ground of motion for a new trial is for insufficient evidence, or for excessive damages, the bill of exceptions or case for the appeal must contain a statement of all the evidence offered and received on the trial, because it must bring to the general term all the material necessary to enable it to act upon the appeal precisely as the judge at special term acted upon the motion. If, however, the judge at special term exercises his discretion under § 804, by refusing to entertain the motion for a new trial to be made on his minutes, then the party moving for the new trial may, under § 806, predicate his motion on a case or bill of exceptions, containing, as in the former instance, all the evidence, and in that event the motion shall be heard in the first instance at a general term." Metropolitan R. Co. *v.* Moore, 121 U. S. 558, 565, 30 L. Ed. 1022.

64. Must contain all the evidence in substance at least.—"If it be objected that the verdict of the jury could not have been rendered on the second count alone, because although it appears from the record that the work and labor of prosecuting the claim to a successful termination was performed by the plaintiff, yet the record fails to show that any evidence was adduced upon the trial before the jury of the value of such work and labor and services, the answer is, that the bill of exceptions does not purport to set out, even in substance, all the evidence bearing on the issues in the case. It is manifest from the face of the bill of exceptions that what is stated to be the evidence given is set forth in a condensed form, and that the charge of the court to the jury assumed that there was evidence in support of the value of the services performed on which the second count was based. We think, therefore, that in the absence of any statement in the bill of exceptions that all of the evidence is set forth, that what is set forth is a mere summary." Delaware City, etc., Nav. Co. *v.* Reybold, 142 U. S. 636, 642, 35 L. Ed. 1141. See The City *v.* Babcock, 3 Wall. 240, 18 L. Ed. 31.

Upon a writ of error to the highest state court to review its determination in a criminal case, it was held that in the absence of a bill of exceptions, disclosing at least the substance of the evidence, that the supreme court may suppose that the evidence was trivial and that it did no injury to the defendant. Murray *v.* Louisiana, 163 U. S. 101, 108, 41 L. Ed. 87.

65. Directing verdict.—Grand Trunk R. Co. *v.* Cummings, 106 U. S. 700, 27 L. Ed. 266; Texas, etc., R. Co. *v.* Cox, 145 U. S. 593, 36 L. Ed. 829; Baltimore, etc., R. Co. *v.* Mackey, 157 U. S. 72, 83, 39 L. Ed. 624; Baylis *v.* Travellers' Ins. Co., 113 U. S. 316, 28 L. Ed. 989; Spaids *v.* Cooley, 113 U. S. 278, 28 L. Ed. 984. See the title VERDICT.

The federal supreme court cannot review a ruling upon a motion on behalf of a defendant at the close of the whole evidence for an instruction in his favor, where the bill of exceptions does not purport to contain all the evidence. Hansen *v.* Boyd, 161 U. S. 397, 40 L. Ed. 746.

So, in Texas, etc., R. Co. *v.* Cox, 145 U. S. 593, 606, 36 L. Ed. 829, which was an action to recover damages against the company for the death of plaintiff's husband, resulting from the negligence of the company, it was remarked, in regard to the evidence in the case, that: "The bill of exception does not purport to contain all the evidence, and it would be improper to hold that the court should have directed a verdict for defendants for want of that which may have existed." Cited and approved in United States *v.* Copper Queen Min. Co., 185 U. S. 495, 498, 46 L. Ed. 1008.

When the federal supreme court is asked to reverse a judgment entered upon a verdict of a jury, upon a writ of error, upon the ground that there is absolutely no evidence to sustain it, and the court should have directed a verdict, the bill of exceptions must embody a statement or there must be a stipulation of counsel declaring that the bill contains all the evidence given upon the trial so that the record shall affirmatively show the fact. Russell *v.* Ely, 2 Black 575, 580, 17 L. Ed. 258; United States *v.* Copper Queen Min. Co., 185 U. S. 495, 497, 46 L. Ed. 1008.

But in the absence of a motion made at the close of the evidence to direct a verdict, the federal supreme court will presume that there was sufficient evidence to warrant the court in permitting the jury to draw the inferences proper to be deduced from the evidence in the case, especially where the bill of exceptions filed

of several offenses disclosed by the evidence to have been committed, he would ask for a conviction.[66]

(3) *Construction of Words "All the Testimony."*—The words "all the testimony" in a bill of exceptions have been held to be synonymous with "all the evidence."[67]

(4) *Appeals from Territorial Courts.*—Where the supreme court of a territory proceeds upon the record as containing all the evidence, the supreme court will decline to interfere with their action.[68]

(5) *Sufficiency of Showing.*—Neither in criminal,[69] nor in civil cases,[70] is it

in the record does not purport to contain all the evidence. Hansen *v.* Boyd, 161 U. S. 397, 40 L. Ed. 746.

66. Compelling election by district attorney.—Where as to the action of the court below in overruling defendant's motion on the evidence to compel the district attorney to elect, the bill of exceptions does not contain the evidence, and it is impossible for the federal supreme court to know the ground on which the circuit court proceeded, the exception in that regard need not therefore be considered. Barrett *v.* United States, 169 U. S. 218, 220, 42 L. Ed. 723.

67. Construction of words "all the testimony."—Waldron *v.* Waldron, 156 U. S. 361, 39 L. Ed. 453. See ALL, vol. 1, p. 256.

"Whether the concluding words in the bill of exceptions, 'which was all the testimony offered on the trial of the cause,' would be treated as meaning all the evidence, if unexplained by the context of the bill, need not be considered, as all the recitals in the bill, from the caption to the end thereof, taken together, we think, conclusively show that the words, 'all the testimony,' were used as synonymous with 'all the evidence.' This conclusion is strengthened by the fact that the bill was settled contradictorily, and no reservation as to its incompleteness was made." Waldron *v.* Waldron, 156 U. S. 361, 378, 39 L. Ed. 453.

68. Appeals from territorial courts.—"Several of the errors assigned are to the effect that the supreme court (of the territory) erred in considering or determining the case upon questions of fact, because the bill of exception failed to state that it contained all of the evidence given in the case, and the record failed 'to show that the bill of exceptions contains all of the evidence given in the case, or all of the evidence bearing upon the questions involved in the decisions' of the court. The supreme court proceeded upon the record as containing all the evidence and we are not inclined to hold that the contention that it should not have done so is open to our consideration under the limitations of the statute." Crowe *v.* Trickey, 204 U. S. 228, 235, 51 L. Ed. 454, followed in Crowe *v.* Harmon, 304 U. S. 241, 51 L. Ed. 461.

69. Sufficiency of showing in criminal cases.—Where the bill of exceptions, after citing the empanelling of the jury, proceeds in these words: "And thereupon the plaintiff, to maintain the issues upon its part, produced and offered as a witness James R. Dean, who, being first duly sworn, did testify as follows:" That recital is followed by what purports to be the testimony of the witness. Then follows in succession the testimony of several witnesses, each being preceded by a statement in form similar to this: "The plaintiff then introduced and offered as a witness, H. S. Sutton, who, being first duly sworn, did testify as follows." At the close of the testimony of the last witness named in this statement: "Whereupon the plaintiff rests its case. Defendant rests—introduces no testimony. And the said judge, after charging the jury on the law in the case, submitted the said issues and the evidence so given on the trial, to the jury, and the jury aforesaid then and there gave their verdict for the plaintiff." Held, such recitals sufficiently show that the bill contains all the evidence. Clyatt *v.* United States, 197 U. S. 207, 220, 49 L. Ed. 726.

"If in a civil case such recitals in the bill of exceptions are sufficient to show that it contains all the testimony, a fortiori should this be the rule in a criminal case, and the defendant therein should not be deprived of a full consideration of the question of his guilt by an omission from the bill of the technical recital that it contains all the evidence." Clyatt *v.* United States, 197 U. S. 207, 221, 49 L. Ed. 726.

70. Sufficiency of showing in civil cases.—Goodlett *v.* Louisville, etc., Railroad, 122 U. S. 391, 411, 30 L. Ed. 1230.

"This question was presented in Gunnison County Comm'rs *v.* Rollins, 173 U. S. 255, 43 L. Ed. 689, a civil case, brought to this court on certiorari to the circuit court of appeals, which court had held that the bill of exceptions did not purport to contain all the evidence adduced at the trial, and for that reason did not consider the question whether error was committed in instructing the jury to find for the defendant. Mr. Justice Harlan, delivering the unanimous opinion of the court, disposed of that question in these words (p. 261): 'We are of opinion that the bill of exceptions should be taken as containing all the evidence. It appears that as soon as the jury was sworn to try the issues in the cause "the complainants, to sustain the issues on their part, offered the following oral and documentary evi-

necessary that the bill of exceptions should state in express words that it contains all the evidence.[71] It is sufficient if the bill shows by a reasonable construction that all the evidence was contained therein.[72] And where the evidence returned in the bill of exceptions, which does not purport to contain all the evidence on the trial, is not sufficient, but the judge, in his charge to the jury, refers to evidence which does not appear in the bill, and he is not corrected by counsel, and no exception is taken to the statement, the supreme court will regard the evidence in the record as supplemented by the statement of the evidence by the court.[73]

(6) *Presumptions on Appeal.*—But when there is nothing whatever in the bill of exceptions to show that the evidence contained therein is all the evidence that was given on the trial, the appellate court cannot presume, for the purpose of reversing the judgment, that there was no evidence given upon which the jury might rightfully have found the verdict which they did.[74] Though where the record in a criminal case contains only a small portion of the testimony, the appellate court will presume that it was sufficient to establish the guilt of the defendant, and the judgment will be affirmed.[75]

F. The Instructions—1. In General.—As has been stated elsewhere in this title,[76] a bill of exceptions is necessary to incorporate the charge of the court in the record, and this can be accomplished in no other manner.

2. Necessity for Setting out the Facts or Evidence—a. *Where Error Is Assigned to the Giving of Instructions*—(1) *In General.*—Where error is assigned to the instructions given to the jury, the material facts or proofs on which the instructions rest should be inserted before the instructions, in order that the

dence." Then follow many pages of testimony on the part of the plaintiffs, when this entry appears: "Whereupon complainants rested." Immediately after comes this entry: "Thereupon the defendants, to sustain the issues herein joined on their part, produced the following evidence." Then follow many pages of evidence given on behalf of the defendant, and the evidence of a witness recalled by the defendant, concluding with this entry: "Whereupon the further proceedings herein were continued until the 20th day of May, 1896, at 10 o'clock a. m." Immediately following is this entry: "Wednesday, May 20th, at 10 o'clock, the further trial of this cause was continued as follows." The transcript next shows some discussion by counsel as to the exclusion of particular evidence, after which is this entry: "Thereupon counsel for defendant made a formal motion under the evidence on both sides that the court instruct the jury to return a verdict for the defendant." Although the bill of exceptions does not state, in words, that it contains all the evidence, the above entries sufficiently show that it does contain all the evidence.'" Approved in Clyatt *v.* United States, 197 U. S. 207, 220, 49 L. Ed. 726.

71. **Affirmative statement in bill unnecessary.**—"It is true there is no affirmative statement in the bill of exceptions that it contains all the testimony, but such omission is not fatal." Clyatt *v.* United States, 197 U. S. 207, 220, 49 L. Ed. 726.

72. **Sufficiency of recitals in bill.**—Gunnison County Comm'rs *v.* Rollins, 173 U. S. 255, 43 L. Ed. 689; Crowe *v.* Trickey, 204 U. S. 228, 235, 51 L. Ed. 454, followed in Crowe *v.* Harmon, 204 U. S. 241, 51 L. Ed. 461.

73. **Evidence in record may be supplemented by statement of evidence by court.**—"It must be assumed that the statements of the court were correct statements of the testimony. If not, the bill of exceptions should have shown it, and some question made at the time in regard to the erroneous character of the charge upon the facts. Error must appear in the record and cannot be presumed." Sharp *v.* United States, 191 U. S. 341, 353, 48 L. Ed. 211.

74. **Presumptions on appeal.**—United States *v.* Copper Queen Min. Co., 185 U. S. 495, 498, 46 L. Ed. 1008.

Where it does not appear that the bill of exceptions contains all the evidence given upon the trial, this court cannot in the absence of any statement in the bill to that effect presume that it does for the purpose of reversing the judgment and verdict ascertaining that the defendant in an action for wrongfully cutting and taking the timber was not a bona fide resident under the act of congress of June 3d, 1878, 20 Stat. 88, permitting bona fide residents to fell and remove for certain purposes timber or other trees growing or being on public lands. United States *v.* Copper Queen Min. Co., 185 U. S. 495, 46 L. Ed. 1008.

75. **Presumptions in criminal cases.**—Allis *v.* United States, 155 U. S. 117, 39 L. Ed. 91.

76. See ante, "Instructions," III, A, 2, d.

appellate court may see if the points arise on which they are given, and to which exception is taken,[77] unless such preliminary evidence on which the judge instructed the jury is apparent.[78] In other words, when the question is on the soundness of the judge's law as given to the jury, he must, on his due responsibility, certify to the appellate court, and not to the jury, the evidence on which he pronounced the law.[79] And where none of the evidence given or offered on the trial is set out in the bill of exceptions to support the charge, this cannot be supplied by presumptions,[80] nor can the charge of the judge be looked to for the state of the evidence on which that very charge is to be held right or wrong,[81]

77. Assignment of error to the giving of instructions.—Vasse *v.* Smith, 6 Cranch 226, 233, 234, 3 L. Ed. 207; Stimpson *v.* West Chester R. Co., 3 How. 553, 555, 556, 11 L. Ed. 722; Zeller *v.* Eckert, 4 How. 289, 297, 298, 11 L. Ed. 979; United States *v.* Morgan, 11 How. 154, 158, 13 L. Ed. 643; Reed *v.* Gardner, 17 Wall. 409, 21 L. Ed. 665; Jones *v.* Buckell, 104 U. S. 554, 556, 26 L. Ed. 841; New York, etc., R. Co. *v.* Madison, 123 U. S. 524, 527, 31 L. Ed. 258.

"As we understand the principles on which judgments here are reviewed by writ of error, that error must appear by some ruling on the pleadings, or on a state of facts presented to this court. Those facts, apart from the pleadings, can only be shown here by a special verdict, an agreed statement duly signed and submitted to the court below, or by bill of exceptions. When in the latter, complaint is made of the instructions of the court given or refused, it must be accompanied by a distinct statement of testimony given or offered which raises the question to which the instructions apply." Worthington *v.* Mason, 101 U. S. 149, 152, 25 L. Ed. 848, approved in Phœnix Life Ins. Co. *v.* Raddin, 120 U. S. 183, 196, 30 L. Ed. 644; New York, etc., R. Co. *v.* Madison, 123 U. S. 524, 527, 31 L. Ed. 258.

Where an exception is taken to the giving or refusal of an instruction, the bill of exceptions must show that there was evidence to which the instruction given or refused was applicable. Phœnix Life Ins. Co. *v.* Raddin, 120 U. S. 183, 30 L. Ed. 644, citing Worthington *v.* Mason, 101 U. S. 149, 25 L. Ed. 848.

Where the bill of exceptions does not purport to set out all the evidence given in a case below, and it does not appear what other evidence, if any, was there given, a court of error will not reverse for an instruction whose correctness or want of it depends upon the state of the evidence; the terms of the instruction not necessarily implying that there were not facts in proof bearing upon the subject besides those of which the instruction was expressly predicated; and error not being matter to be presumed, but contrariwise. Wiggins *v.* Burkham, 10 Wall. 129, 19 L. Ed. 884.

In considering the question whether an instruction to the jury was erroneous, the appellate court is confined to the evidence reported in the bill of exceptions as the only means of ascertaining the precise state of facts on which the instruction to the jury was given. Whether the report of the evidence, as set forth in the bill of exceptions, may or may not be incomplete, or imperfectly stated, cannot be known in an appellate court. Chaffee *v.* Boston Belting Co., 22 How. 217, 222, 16 L. Ed. 240.

Where on an indictment for murder there is no portion of the evidence returned in the bill of exceptions, the federal supreme court cannot judge whether there was any which would justify, or which did justify the court in submitting the question of irresistible impulse to the jury. Hotema *v.* United States, 186 U. S. 413, 46 L. Ed. 1225.

Theory of the case.—The exception noted to the charge was, "that there is nothing in the pleadings, evidence, or record in this action to support or justify the theory of the plaintiffs stated by the court in this part of its charge here excepted to; that the portion of said charge here excepted to is prejudicial to the defendant and is misleading to the jury, is error in the charge and error in law on all the evidence and facts in the case." Held, the assignment is without merit. As all the evidence is not shown to be contained in the record, we must assume that there was evidence in the case tending to support plaintiffs' theory of the case stated by the court. Hansen *v.* Boyd, 161 U. S. 397, 407, 40 L. Ed. 746.

78. United States *v.* Morgan, 11 How. 154, 158, 13 L. Ed. 643.

79. Worthington *v.* Mason, 101 U. S. 149, 153, 25 L. Ed. 848.

80. Evidence cannot be supplied by presumptions.—Worthington *v.* Mason, 101 U. S. 149, 25 L. Ed. 848.

The proof of the facts which make the charge erroneous must be distinctly set forth, or it must appear that evidence was given tending to prove them. It is not sufficient to show that the judge assumed this in his charge to the jury; it must be certified to the supreme court distinctly under his hand. Worthington *v.* Mason, 101 U. S. 149, 152, 25 L. Ed. 848, followed in New York, etc., R. Co. *v.* Madison, 123 U. S. 524, 31 L. Ed. 258.

81. The charge itself cannot supply the evidence.—Worthington *v.* Mason, 101 U. S. 149, 25 L. Ed. 848.

nor is it to be sought for in the comments of the court to the jury on the testimony.[82]

(2) *Instructions Giving Undue Prominence to Particular Evidence.*—A bill of exceptions which alleges that the instructions of the court laid too large a stress upon the testimony of a particular witness, should embody the testimony at length, or so refer to it as to make it part of the record; otherwise a court of error must presume that it justified the instruction.[83]

(3) *Showing as to Materiality of Instructions.*—Where no evidence is set forth or referred to in a bill of exceptions, showing the materiality of the charge complained of, the case presents only an abstract proposition of law which may or may not have been stated by the court in a way injurious to the plaintiffs in error, and, therefore, will not be considered by the appellate court.[84]

b. *Where Error Is Assigned to the Refusal to Give Instructions.*—When error is assigned to the refusal of the court to give instructions, the bill of exceptions must set forth so much of the evidence as tends to prove the facts, out of which the question is raised to which the instructions apply.[85] Or as the rule has been otherwise expressed, bills of exceptions ought to state that evidence was offered of the facts upon which the opinion of the court is prayed, else the court is under no obligation to give the instruction.[86] Where the bill embodies only the instructions refused, the supreme court will not reverse the judgment.[87]

3. How Much of the Instructions Should Be Incorporated—a. *In General.*—But only so much of the charge as is excepted to should be embodied in the bill.[88] An appellate court has nothing to do with the charge of the court to the

82. Comments of court to jury.—Worthington *v.* Mason, 101 U. S. 149, 25 L. Ed. 848.

83. Instructions giving undue prominence to particular matters.—Russell *v.* Ely, 2 Black 575, 576, 17 L. Ed 258.

84. Materiality of instruction must be shown.—Jones *v.* Buckell, 104 U. S. 554, 26 L. Ed. 841, citing Reed *v.* Gardner, 17 Wall. 409, 21 L. Ed. 665.

Where error is assigned that the court below erred in its charge to the jury, but there is nothing in the record to show the materially of the charge complained of, or of the requests to charge which were refused, and no part of the evidence save that which was excepted to, is set out in the bill of exceptions, and there is no such statement of the facts proven as will enable this court to see that the charge as given or refused had any reference to the case as it appeared at the trial, the errors assigned will not be considered, because such a record presents only abstract questions of law, which may or may not have been ruled in a way to affect the defendant injuriously. New York, etc., R. Co. *v.* Madison, 123 U. S. 524, 31 L. Ed. 258.

85. Assignment of error to refusal to give instructions.—Worthington *v.* Mason, 101 U. S. 149, 25 L. Ed. 848.

"To the same effect is Worthington *v.* Mason, 101 U S. 149, 152, 25 L. Ed. 848, where this appears: 'As we understand the principles on which judgments here are reviewed by writ of error, that error must appear by some ruling on the pleadings, or on a state of facts presented to this court. Those facts, apart from the pleadings, can only be shown here by a special verdict, an agreed statement duly signed and submitted to the court below, or by bill of exceptions. When in the later, complaint is made of the instructions of the court given or refused it must be accompanied by a distinct statement of testimony given or offered which raises the question to which the instructions apply.' 'The proof of the facts which make the charge erroneous must be distinctly set forth, or it must appear that evidence was given tending to prove them.' See, also, United States *v.* Morgan, 11 How. 154, 158, 13 L. Ed. 643; Reed *v.* Gardner, 17 Wall. 409, 21 L. Ed. 665; Jones *v.* Buckell, 104 U. S. 554, 26 L. Ed. 841; Phœnix Life Ins. Co. *v.* Raddin, 120 U. S. 183, 196, 30 L. Ed. 644." New York, etc., R. Co. *v.* Madison, 123 U. S. 524, 527, 31 L. Ed. 258.

86. The bill should show that evidence was offered to justify an instruction.—Vasse *v.* Smith, 6 Cranch 226, 3 L. Ed. 207; United States *v.* Dunham, 21 Law Reporter, 591; Caldwell *v.* United States, 8 How. 366, 12 L. Ed. 1115; Blackburn *v.* Crawfords, 3 Wall. 175, 176, 18 L. Ed. 186; Insurance Co. *v.* Baring, 20 Wall. 159, 162, 22 L. Ed. 250; New Jersey Mut. Life Ins. Co. *v.* Baker, 94 U. S. 610, 24 L. Ed. 268.

87. Reversal.—Worthington *v.* Mason, 101 U. S. 149, 25 L. Ed. 848.

88. Only instructions excepted to should be incorporated.—Evans *v.* Eaton, 7 Wheat. 356, 5 L. Ed. 472; Carver *v.* Jackson, 4 Pet. 1, 7 L. Ed. 761; Ex parte Crane, 5 Pet. 190, 8 L. Ed. 92; Magniac *v.* Thomson, 7 Pet. 348, 8 L. Ed. 709;

jury upon mere matters of fact, and with its commentaries upon the weight of evidence.[89] Besides the practice of incorporating in the record the whole charge

Gregg *v.* Sayre, 8 Pet. 244, 8 L. Ed. 932; Stimpson *v.* West Chester R. Co., 3 How. 553, 11 L. Ed. 722; Zeller *v.* Eckert, 4 How. 289, 11 L. Ed. 979; Lincoln *v.* Claflin, 7 Wall. 132, 19 L. Ed. 106; United States *v.* Rindskopf, 105 U. S. 418, 26 L. Ed. 1131; Phœnix Life Ins. Co. *v.* Raddin, 120 U. S. 183, 30 L. Ed. 644.

Only so much of the charge to the jury should be set out in the bill as is pertinent to the error assigned. Stimpson *v.* West Chester R. Co., 3 How. 553, 11 L. Ed. 722; Zeller *v.* Eckert, 4 How. 289, 11 L. Ed. 979; United States *v.* Morgan, 11 How. 154, 13 L. Ed. 643.

"This court have frequently remonstrated against the practice of spreading the charge of the judge at length upon the record, instead of the points excepted to, as productive of no good, but much inconvenience." Gregg *v.* Sayre, 8 Pet. 244, 8 L. Ed. 932.

The bringing up, with the record of the proceedings in the circuit court, the charge of the court at large, is a practice which the federal supreme court has often disapproved and deems incorrect. Conard *v.* Pacific Ins. Co., 6 Pet. 262, 8 L. Ed. 392.

The whole charge of the circuit court was brought up with the record. By the court: This is a practice which this court have uniformly discountenanced, and which the court trusts a rule made at last term will effectually suppress. Magniac *v.* Thomson, 7 Pet. 348, 8 L. Ed. 709.

"The whole charge to the jury is made part of the bill of exceptions, in accordance with a practice which this court for more than half a century has emphatically condemned, and has by repeated decisions, as well as by express rule, constantly endeavored to suppress. As long ago as 1822, Mr. Justice Story, speaking for the whole court, said: 'The charge is spread in extenso upon the record, a practice which is unnecessary and inconvenient, and may give rise to minute criticisms and observations upon points incidentally introduced, for purposes of argument or illustration, and by no means essential to the merits of the case.' Evans *v.* Eaton, 7 Wheat. 356, 426, 427, 5 L. Ed. 472. Opinions to the same effect have been delivered in many later cases. Carver *v.* Jackson, 4 Pet. 1, 80, 81, 7 L. Ed. 761; Ex parte Crane, 5 Pet. 190, 8 L. Ed. 92; Conard *v.* Pacific Ins. Co., 6 Pet. 262, 280, 8 L. Ed. 392; Magniac *v.* Thomson, 7 Pet. 348, 390, 8 L. Ed. 709; Gregg *v.* Sayre, 8 Pet. 244, 251, 8 L. Ed. 932; Stimpson *v.* West Chester R. Co., 3 How. 553, 11 L. Ed. 722; Zeller *v.* Eckert, 4 How. 289, 297, 11 L. Ed. 979; United States *v.* Rindskop, 105 U. S. 418, 26 L. Ed. 1131." Phœnix Life Ins. Co. *v.* Raddin, 120 U. S. 183, 193, 30 L. Ed. 644.

"The whole charge of the judge to the jury is incorporated into this record. This mode of making up the error books is exceedingly inconvenient and embarrassing to the court, and is a departure from familiar and established practice. So far as error is founded upon the bill of exceptions incorporated into the record, it lies only to exceptions taken at the trial, and to the ruling of the law by the judge, and to the admission or rejection of evidence. And only so much of the evidence as may be necessary to present the legal questions thus raised and noted should be carried into the bill of exceptions. All beyond serves to encumber and confuse the record, and to perplex and embarrass both court and counsel. The earlier forms under the statute giving the bill of exceptions are models which it would be wise to consult and adhere to." Zeller *v.* Eckert, 4 How. 289, 11 L. Ed. 979.

Duty of court below pointed out.—"The bill of exceptions in this case sets forth the charge of the court below in full, in disregard of our frequent condemnation of this practice. Only the parts to which the exceptions relate should have been given; all else is unnecessary, and produces only inconvenience. We repeat of this practice what we said of another practice not uncommon, and equally objectionable—that of inserting the entire evidence in the record: 'If counsel will not heed our admonitions upon this subject, so frequently expressed by us, the judges of the courts below, to whom the bills are presented, should withhold their signatures until the bills are prepared in proper form, freed from all matter not essential to explain and point the exceptions.' Lincoln *v.* Claflin, 7 Wall. 132, 137, 19 L. Ed. 106." United States *v.* Rindskopf, 105 U. S. 418, 421, 26 L. Ed. 1131.

89. Matters of fact and the weight of the evidence.—The practice of bringing the whole of the charge of the court delivered to the jury in the court below for review before the federal supreme court, is unauthorized and extremely inconvenient, both to the inferior and to the appellate court. With the charge of the court to the jury upon mere matters of fact, and with its commentaries upon the weight of evidence, this court has nothing to do. Observations of that nature are understood to be addressed to the jury merely for their consideration as the ultimate judges of the matters of fact, and are entitled to no more weight or importance than the jury in the exercise of their own judgment choose to give them. They neither are, nor are understood to

of the judge to the jury is in direct violation of a rule of court.[90]

b. *Matters Incidental to the Charge.*—It is entirely clear that it is unnecessary to set forth matters merely incidental to the charge, and which had no immediate bearing upon the result of the case, or of the validity of the judgment.[91]

G. Papers and Documents.—1. In General.—When a paper which is to constitute a part of a bill of exceptions is not incorporated into the body of the bill, it must be annexed to it, or so marked by letter, number, or other means of identification mentioned in the bill, as to leave no doubt, when found in the record, that it is the one referred to in the bill of exceptions; otherwise it will be disregarded.[92] But the mere fact that a paper is found among the files in a cause

be, binding on them as the true and conclusive exposition of the evidence. If, in summoning up the evidence to the jury, the court should misstate the law, that would justly furnish a ground for an exception. But the exception should be strictly confined to that misstatement, and by being made known at the moment, would often enable the court to correct an erroneous expression, so as to explain or qualify it in such manner as to make it wholly unexceptionable, or perfectly distinct. Carver *v.* Jackson, 4 Pet. 1, 7 L. Ed. 761, reaffirmed in Ex parte Crane, 5 Pet. 190, 8 L. Ed. 92; Hicks *v.* United States, 150 U. S. 442, 457, 37 L. Ed. 1137, dissenting opinion of Brewer, J.

"Exceptions taken on the trial of a cause before a jury, for the purpose of submitting to the revision of this court questions of law decided by the circuit court, during the trial, cannot be taken in such a form as to bring the whole charge of the judge before this court—a charge in which he not only states the results of the law from the facts, but sums up all the evidence." Ex parte Crane, 5 Pet. 190, 8 L. Ed. 92, citing with approval Carver *v.* Jackson, 4 Pet. 1, 80, 7 L. Ed. 761.

90. Rule of court condemns insertion of whole charge.—Stimpson *v.* West Chester R. Co., 3 How. 553, 11 L. Ed. 722; United States *v.* Morgan, 11 How. 154, 158, 13 L. Ed. 643; Hickman *v.* Jones, 9 Wall. 197, 19 L. Ed. 551.

"And in 1832 this court adopted a rule, which, with slight verbal changes, has ever since remained in force, by which it was ordered, not only that the judges of the circuit and district courts should not allow any bill of exceptions containing the charge of the court at large to the jury in trials at common law, upon any ground of exception to the whole of such charge; but also, 'that the party excepting be required to state distinctly the several matters of law in such charge to which he excepts; and that such matters of law, and those only, be inserted in the bill of exceptions, and allowed by the court.' Rule 38 of 1832, 6 Pet. iv and 1 How. xxxiv; Rule 4 of 1858 and 1884, 21 How. vi and 108 U. S. 574." Phœnix Life Ins. Co. *v.* Raddin, 120 U. S. 183, 194, 30 L. Ed. 644.

"The 38th rule of this court, adopted at January term, 1832, directs that thereafter 'the judges of the circuit and district courts do not allow any bill of exceptions which shall contain the charge of the court at large to the jury, in trials at common law, upon any general exception to the whole of such charge, but that the party excepting be required to state distinctly the several matters in law in such charge, to which he excepts, and that such matters of law, and those only, be inserted in the bill of exceptions, and allowed by the court.'" Johnston *v.* Jones, 1 Black 209, 220, 17 L. Ed. 117.

"The whole charge of the court is spread upon the record (a practice which this court have uniformly discountenanced, and which, we trust, a rule made at the last term will effectually suppress), and the question now is, whether that charge contains any erroneous statement of the law; for as to the comments of the court upon the evidence, it is almost unnecessary to say, after what was said by this court in Carver *v.* Jackson, 4 Pet. 1, 80-1, 7 L. Ed. 761, that we have nothing to do with them. In examining the charge, for the purpose of ascertaining its correctness in point of law, the whole scope and hearing of it must be taken together. It is wholly inadmissible, to take up single and detached passages, and to decide upon them, without attending to the context, or without incorporating such qualifications and explanations as naturally flow from the language of other parts of the charge. In short, we are to construe the whole, as it must have been understood, both by the court and the jury, at the time when it was delivered." Magniac *v.* Thomson, 7 Pet. 348, 390, 8 L. Ed. 709.

Rule four.—If he objects to a specific portion of a charge, he should state only that portion. Putting in the whole charge is clearly against rule four of the supreme court, and has been explicitly condemned. United States *v.* Rinskopf, 105 U. S. 418, 26 L. Ed. 1131; Lewis *v.* United States, 146 U. S. 370, 384, 36 L. Ed. 1011, dissenting opinion of Brewer, J; Allis *v.* United States, 155 U. S. 117, 122, 39 L. Ed. 91.

91. Matters incidental to the charge.—United States *v.* Taylor, 147 U. S. 695, 700, 37 L. Ed. 335.

92. Incorporating papers and documents.—Leftwich *v.* Lecanu, 4 Wall. 187, 18 L. Ed. 388.

A paper filed in the circuit court upon the trial of a cause before that court with-

does not of itself make it a part of the record. If not a part of the pleadings or process in the cause, it must be put into the record by some action of the court.[93] This may be done by a bill of exceptions, or something which is equivalent.[94]

2. Illustrative Cases.—A paper constituting the withdrawal of appearance is sufficiently brought into the record by a bill of exceptions in which it is set forth at length, and wherein it is averred that the paper was filed by the party in the cause.[95]

H. Proceedings before Special Tribunals—1. In General.—A bill of exceptions in courts of common law of original jurisdiction may embrace all such judgments or opinions of the court as arise in the course of a cause, which are the subjects of revision by an appellate court, and which do not otherwise appear on the record. But to present a question to the supreme court, the subordinate tribunal must ascertain the facts upon which the judgment or opinion excepted to is founded.[96]

2. Proceedings before Referees and Arbitrators.—Since the equity of the statute of Westminster allowing a bill of exceptions in courts of common law of original jurisdiction embraces all such judgments or opinions of the court as arise in the course of a cause which are the subjects of revision by an appellate court, and which do not otherwise appear on the record, therefore the testimony elicited before an arbitrator and his decision are properly embodied in a bill of exceptions.[97]

out a jury, eight days after the opinion and findings of the court were filed, which paper forms no part of the bill of exceptions which is signed by the judge, but is a paper signed only by the attorney for the defendant, and purports to be exceptions to certain findings of fact made by the judge and to his conclusion based upon such findings, cannot be regarded as a bill of exceptions, or as part of the bill of exceptions signed by the judge, irrespectively of the point that this court cannot review the findings of fact. Sire *v.* Ellithorpe Air Brake Co., 137 U. S. 579, 34 L. Ed. 801.

93. Manner of incorporating papers.—Fisher *v.* Cockerell, 5 Pet. 248, 254, 8 L. Ed. 114; Sargeant *v.* State Bank, 12 How. 371, 384, 13 L. Ed. 1028, England *v.* Gebhardt, 112 U. S. 502, 505, 28 L. Ed. 811.

That a copy of a paper is attached to a pleading in the case, which purports to be the same as the paper mentioned in the bill of exceptions, does not make it a part of that bill, nor can the federal supreme court presume that it is the same paper read in evidence and excepted to. Leftwich *v.* Lecanu, 4 Wall. 187, 18 L. Ed. 388.

The fact that the papers not in the judgment roll are in the transcript, and certified to by the clerk, does not make them any part of the record on appeal. England *v.* Gebhardt, 112 U. S. 502, 28 L. Ed. 811; Young *v.* Martin, 8 Wall. 354, 19 L. Ed. 418; Sire *v.* Ellithorpe Air Brake Co., 137 U. S. 579, 34 L. Ed. 801.

Paper must be set forth in bill.—Where objections are made and exceptions are taken to receiving in evidence a certain paper (a certificate from a clerk of a court for a Louisiana parish), marked D., but the paper is not copied in, or annexed to the bill, the appellate court cannot know whether the objection was overruled because the paper was not what it assumed to be, or because the objection was not well taken, if it was. Weems *v.* George, 13 How. 190, 14 L. Ed. 108.

94. England *v.* Gebhardt, 112 U. S. 502, 505, 28 L. Ed. 811.

95. Paper constituting withdrawal of appearance.—Rio Grande Irrigation, etc., Co. *v.* Gildersleeve, 174 U. S. 603, 43 L. Ed. 1103. See, generally, the title APPEARANCES, vol. 2, p. 458.

"We agree, however, with the supreme court of the territory, that this letter, which constituted the withdrawal of appearance, was sufficiently brought into the record by the defendant's bill of exceptions, in which it is set forth at length, and wherein it is averred that said paper, signed by Pickett, was filed by plaintiff in said cause. The mere fact that a paper is found among the files in a cause does not of itself make it a part of the record. But it may be put into the record by a bill of exceptions, or something which is equivalent; so, at least, to enable the supreme court of the territory to deal with it as part of the record." England *v.* Gebhardt, 112 U. S. 502, 28 L. Ed. 811; Rio Grande Irrigation, etc., Co. *v.* Gildersleeve, 174 U. S. 603, 608, 43 L. Ed. 1103.

96. Proceedings before special tribunals.—New York, etc., R. Co. *v.* Myers, 18 How. 246, 15 L. Ed. 380, citing Zeller *v.* Eckert, 4 How. 289, 11 L. Ed. 979, approved in Baltimore, etc., R. Co. *v.* Trustees of Sixth Presbyterian Church, 91 U. S. 127, 132, 23 L. Ed. 260.

97. Proceedings before referees and arbitrators.—Baltimore, etc., R. Co. *v.* Trustees of Sixth Presbyterian Church, 91 U. S. 127, 132, 23 L. Ed. 260, citing New York, etc., R. Co. *v.* Myers, 18 How. 246, 250, 15 L. Ed. 380, followed in Pome-

I. Proceedings in Criminal Cases.—All the authorities agree that, in a criminal case, the judgment record should show what the prisoner is charged with, that the court had jurisdiction of the case, that the defendant was duly convicted, and the sentence.[98]

J. Rules of Practice.—When it is assigned for error that the court below has incorrectly construed its rules of practice, the rule should be incorporated in the bill of exceptions.[99]

VI. Settlement of Bill or Statement of Facts.

A. Duty to Draw Up and Tender Bill.—The duty of seasonably drawing up and tendering a bill of exceptions, stating distinctly the rulings complained of and the exceptions taken to them, belongs to the excepting party, and not to the court; the trial court has only to consider whether the bill tendered by the party is in due time, in legal form, and conformable to the truth; and the duty of the court of error is limited to determining the validity of exceptions duly framed and presented.[1]

B. Rule in District of Columbia.—The case or bill of exceptions, upon an appeal from the special to the general term of the supreme court of the District of Columbia, is settled in the usual manner.[2] But whenever the judge is unable to settle the bill of exceptions, and counsel cannot settle it, a new trial will be granted.[3]

C. Notice of Request for Allowance.—Notice must be given to the op-

roy *v.* State Bank, 1 Wall. 592, 598, 17 L. Ed. 638; Heckers *v.* Fowler, 2 Wall. 123, 129, 17 L. Ed. 759; Bond *v.* Dustin, 112 U. S. 604, 606, 28 L. Ed. 835.

The opinion of the court below as to the regularity of a certain mode of proceeding before arbitrators, and whether the judgment can be revised, should be embodied in the bill. New York, etc., R. Co. *v.* Myers, 18 How. 246, 251, 15 L. Ed. 380, cited and approved in Baltimore, etc., R. Co. *v.* Trustees of Sixth Presbyterian Church, 91 U. S. 127, 131, 23 L. Ed. 260.

When the report is filed in court, the losing party may file objections in writing to the confirmation of the report, and may introduce evidence in support of the objections; and it is well-settled law, that the ruling of the court in overruling such objections is the proper subject of a bill of exceptions. Baltimore, etc., R. Co. *v.* Trustees of Sixth Presbyterian Church, 91 U. S. 127, 131, 23 L. Ed. 260, citing New York, etc., R. Co. *v.* Myers, 18 How. 246, 250, 15 L. Ed. 380.

98. **Proceedings in criminal cases.**—United States *v.* Taylor, 147 U. S. 695, 700, 37 L. Ed. 335. See ante, "Proceedings in Criminal Cases," III, A, 2, b.

99. **Rules of practice in trial court.**—Whilst the right to plead the statute of limitations is no more within the discretion of the court than other pleas, when the refusal of the court to permit that plea to be filed is based on the allegation that it is not filed within the time prescribed by the rules of practice adopted in that court, it is necessary that the party excepting to the refusal shall incorporate the rule in his bill of exceptions, or the federal supreme court will presume that the court below construed correctly its own rules. Such rules are indispensable to the dispatch of business and the orderly administration of justice, and it must be presumed that the court below is familiar with the construction and course of practice under them. Packet Co. *v.* Sickles, 19 Wall. 611, 22 L. Ed. 203.

1. **Duty to draw up the bill rests on the exceptant.**—Hanna *v.* Maas, 122 U. S. 24, 30 L. Ed. 1117; Michigan Ins. Bank *v.* Eldred, 143 U. S. 293, 298, 36 L. Ed. 162; Insurance Co. *v.* Boon, 95 U. S. 117, 142, 24 L. Ed. 395, dissenting opinion of Clifford, J.

2. **Appeals from general to special term of supreme court of district.**—Metropolitan R. Co. *v.* Moore, 121 U. S. 558, 30 L. Ed. 1022.

3. "The supreme court of the District had power to prescribe rules upon the subject, and had done so. Under those rules, whenever the judge was unable to settle the bill of exceptions, and counsel could not settle it by agreement, a new trial followed as matter of course. If, therefore, in this case, the bill of exceptions was open to be settled at the time of the granting of the new trial, the power to grant the latter existed. If the bill were settled, the court in general term could hear the case, and if reversible error were found, could set aside the judgment; and if the bill could not be settled, the judgment was necessarily so far in fieri as to be susceptible of being vacated under the rule. Ordinarily where a party, without laches on his part, loses the benefit of his exceptions through the death or illness of the judge, a new trial will be granted." Hume *v.* Bowie, 148 U. S. 245, 253, 37 L. Ed. 438.

posite parties of an intention to ask for the allowance of a bill of exceptions, either during the term or after.[4]

D. Notice of Settlement—1. In General.—A reasonable compliance with a rule of court as to notice of settlement is all that is required.[5]

2. Service of Notice.—By rule of court in some circuits, notice of settlement of the bill must be served on the opposite party within a certain time.[6]

E. Time of Settlement—1. In General.—While the rule is well established and of long standing that an exception to be of any avail must be taken at the trial and before the jury withdraws from the bar,[7] which fact must ap-

4. Notice of request for bill must be given.—Muller *v.* Ehlers, 91 U. S. 249, 23 L. Ed. 319.

5. Rule as to notice of settlement.—In the Chateaugay Ore, etc., Co., Petitioner, 128 U. S. 544, 32 L. Ed. 508, the defendant prepared and served its bill of exceptions within the forty days from January 25. The expression "prepare and serve," in the order allowing the forty days, clearly meant, in view of rules 67 and 69 of the circuit court for the Southern District of New York, that the proposed bill was to be prepared and served on the opposite party within the forty days, so that he might propose amendments to it within the time prescribed by the rules. It was so prepared and served within the forty days. It was retained by the plaintiff for ten days after its service. He then obtained, by stipulation from the defendant, ten days' more time to prepare and serve amendments. The proposed amendments were served on the tenth day and the notice of settlement was accepted, written admission of its service was given and it was retained. Under these and the other circumstances above detailed, we think the defendant was entirely regular in its practice and that the plaintiff was estopped from raising the objection that the time had elapsed, which he made before the district judge.

6. Service of notice of settlement.—Where the circuit judge was not in the district at the end of the four days allowed for service of notice of settlement of a bill of exceptions, service of such notice within fourteen days is sufficient compliance with the rule limiting the service of notice to four days. Chateaugay Ore, etc., Co., Petitioner, 128 U. S. 544, 553, 32 L. Ed. 508.

7. Exceptions must be seasonably taken.—Walton *v.* United States, 9 Wheat. 651, 6 L. Ed. 182; Ex parte Bradstreet, 4 Pet. 102, 7 L. Ed. 796; Brown *v.* Clarke, 4 How. 4, 11 L. Ed. 850; Sheppard *v.* Wilson, 6 How. 260, 275, 12 L. Ed. 430; United States *v.* Breitling, 20 How. 252, 15 L. Ed. 900; Stanton *v.* Embrey, 93 U. S. 548, 555, 23 L. Ed. 983; Insurance Co. *v.* Boon, 95 U. S. 117, 137, 142, 24 L. Ed. 395, dissenting opinion of Clifford, J.; United States *v.* Carey, 110 U. S. 51, 52, 28 L. Ed. 67; New Orleans, etc., R. Co. *v.* Jopes, 142 U. S. 18, 21, 35 L. Ed. 919; Tucker *v.* United States, 151 U. S. 164, 170, 38 L. Ed. 112; Newport News, etc., Valley Co. *v.* Pace, 158 U. S. 36, 37, 39 L. Ed. 887.

There can be no doubt that exceptions to the opinions given by courts below must all be taken at the time the opinions are pronounced. Garland *v.* Davis, 4 How. 131, 143, 11 L. Ed. 907.

"We hold now, as we have always holden, that when bills of exceptions are necessary to bring any matter upon record so that it can be reviewed in error, it must appear by the record that the exception was taken at the trial. A judge cannot afterwards allow one not taken in time. Could he allow it, the record would be made to speak falsely." Insurance Co. *v.* Boon, 95 U. S. 117, 127, 24 L. Ed. 395.

It is not necessary that the bill of exceptions should be formally drawn and signed, before the trial is at an end. But the exception must be noted then, and must purport on its face so to have been, although signed afterwards nunc pro tunc. Turner *v.* Yates, 16 How. 14, 14 L. Ed. 824, following The Fanny, 9 Wheat. 658, 6 L. Ed. 184; Ex parte Tillinghast, 4 Pet. 108, 7 L. Ed. 798; Poole *v.* Fleeger, 11 Pet. 185, 9 L. Ed. 680; Tombigbee R. Co. *v.* Kneeland, 4 How. 16, 11 L. Ed. 855.

A bill of exceptions dated during the term at which the trial was had, though some days after the trial, is sufficient if it show that the exceptions were taken at the trial. French *v.* Edwards, 13 Wall. 506, 20 L. Ed. 702.

The theory of a bill of exceptions is that it states what occurred while the trial was going on. Accordingly the bill of exceptions must show that the exceptions were taken in the progress of the trial to what was done by the court below, because the power of this court is confined to exceptions actually taken at the trial. Railway Co. *v.* Heck, 102 U. S. 120, 26 L. Ed. 58.

Exceptions to instructions.—"It has been repeatedly ruled by this court, as will appear by the cases reported, that no instruction to the jury, given or refused by the court below, can be brought here for revision by writ of error, unless the record shows that the exception to it was taken or reserved while the jury were at the bar." Barton *v.* Forsyth, 20 How. 532, 533, 15 L. Ed. 1012.

Effect of use of wrong tense.—Where a bill of exceptions at all fairly discloses the fact that the exceptions were made in proper time, the appellate court will not

allow the right of review by it to be defeated because the bill uses words in the present tense, when the true expression of the court's meaning required the use of the past one; nor because the bill is unskillfully drawn, and justly open philologically, to censure. Simpson *v.* Dall, 3 Wall. 460, 18 L. Ed. 265.

Under the statute of Westminster 2, the courts have always held that the exceptions should be taken and reduced to writing at the trial. Not that they need not be drawn up in form; but the substance must be reduced to writing while the thing is prosecuted. The practice is well settled also by the decisions of this court. Sheppard *v.* Wilson, 6 How. 260, 274, 12 L. Ed. 430, citing 1 Bac. Abr., tit. Bill of Exceptions; Ex parte Bradstreet, 4 Pet. 102, 106, 7 L. Ed. 796; Walton *v.* United States, 9 Wheat. 651, 657, 6 L. Ed. 182.

It has been repeatedly decided, by the federal supreme court, that it must appear by the transcript, not only that the instructions were given or refused at the trial, but also that the party who complains of them excepted to them while the jury were at the bar. The Statute of Westminster 2d, which provides for the proceeding by exceptions, requires in explicit terms that this should be done; and if it is not done, the charge of the court, or its refusal to charge as requested, form no part of the record, and cannot be carried before the appellate court by writ of error. It need not be drawn out in form and signed before the jury retire; but it must be taken in open court, and must appear, by the certificate of the judge who authenticates it, to have been so taken. Nor is this a mere formal or technical provision. It was introduced and is adhered to for purposes of justice. For if it is brought to the attention of the court that one of the parties excepts to his opinion, he has an opportunity of reconsidering or explaining it more fully to the jury. And if the exception is to evidence, the opposite party might be able to remove it, by further testimony, if apprised of it in time. Phelps *v.* Mayer, 15 How. 160, 161, 14 L. Ed. 643, cited in Stanton *v.* Embrey, 93 U. S. 548, 555, 23 L. Ed. 983.

Recitals as to time of taking exceptions.—In the case of Barton *v.* Forsyth, 20 How. 532, 15 L. Ed. 1012, it appeared that after the verdict and judgment the defendant filed a motion, supported by affidavit, which was overruled. Following the recital of this fact, the record added, "to all which decisions, rulings and instructions defendant then and there excepted;" and it was held that such recital showed that the exceptions were taken at the time of the overruling of the motion. Cited with approval in New Orleans, etc., R. Co. *v.* Jopes, 142 U. S. 18, 22, 35 L. Ed. 919.

The record sufficiently shows that the rulings of the court were excepted to at the time the rulings were made, and before the jury retired from the bar of the court, where just preceding the formal part of the bill of exceptions is the statement in the record that "the following exceptions were made by the defendants upon the trial of this cause," and that the same "were allowed by the court," and immediately following the instructions given is the additional statement that the "defendants then and there excepted" to the instructions, rulings, and decisions of the court. Dredge *v.* Forsyth, 2 Black 563, 17 L. Ed. 253, followed in Kellogg *v.* Forsyth, 2 Black 571, 17 L. Ed. 256.

Exceptions to evidence.—In New Orleans, etc., R. Co. *v.* Jopes, 142 U. S. 18, 35 L. Ed. 919, the bill of exceptions recited in the ordinary form the coming on of the case to trial, the impaneling of a jury, the testimony offered and the instructions given and refused. "In respect to one matter of testimony, the bill of exceptions recites: 'Whereupon the court refused to allow the testimony, to which ruling the defendant excepted.' So, following the recital in respect to the last matter of instructions, is the statement 'to which defendant excepted.' It is true the words used are not 'then and there excepted,' neither is it said that the court 'then and there instructed;' but as the bill purports to be a recital of what took place on the trial, it is to be assumed that the instructions were given, and the exceptions taken, during and as a part of the trial. The statement as to the exception follows that as to the instructions, and the only fair and reasonable intendment from the language is that as the one was given, so the other was taken, at the trial. The same form of recital was pursued in the case of United States *v.* Breitling, 20 How. 252, 15 L. Ed. 900, and held sufficient."

Exceptions to instructions.—Where the bill of exceptions states "(1) The court instructed the jury to return a verdict for the defendant. (2) The jury returned a verdict in accordance with said instructions, and judgment was thereupon entered up in behalf of defendant in pursuance of said instructions; and to said instructions, verdict and judgment, the plaintiff, by his counsel, excepted and now excepts, during the term at which said case was tried and while said term is still in session, and assigns the same as error, and prays the court to sign and certify this exception," it was held that the general instruction of the court to find for the defendant was excepted to at the proper time. Dunlap *v.* Northeastern R. Co., 130 U. S. 649, 653, 32 L. Ed. 1058.

In Railroad Co. *v.* Reeves, 10 Wall. 176, 19 L. Ed. 909, the bill of exceptions commenced after the title of the case, by saying that, "on the trial of this cause, the following proceedings were had." Then came the testimony introduced, the prayer

pear affirmatively in the record by a bill of exceptions,[8] and that it comes too late after verdict,[9] or judgment,[10] it is equally well settled that it may be drawn

of the plaintiff in error for five distinct instructions, the refusal of the court to grant them, and the instructions which the court did give (all as already mentioned), and the statement that the defendant excepted to the action of the court in refusing the instructions aforesaid, and also in giving the charge aforesaid, and also in overruling his motion for a new trial. Held: It is a reasonable inference from the language used at the beginning and end of this bill, that the exceptions were taken during the trial, as the rulings excepted to were made.

Rule in Mississippi.—Mississippi has a statute providing for the case of exceptions to be taken in the progress of the trial in the usual form, and this is the practice in the federal courts. Brown *v.* Clarke, 4 How. 4, 11 L. Ed. 850.

8. That party "then and there excepted" must appear affirmatively.—Walton *v.* United States, 9 Wheat. 651, 6 L. Ed. 182; Brown *v.* Clarke, 4 How. 4, 11 L. Ed. 850; Phelps *v.* Mayer, 15 How. 160, 14 L. Ed. 643; Turner *v.* Yates, 16 How. 14, 14 L. Ed. 824; United States *v.* Breitling, 20 How. 252, 15 L. Ed. 900; Barton *v.* Forsyth, 20 How. 532, 15 L. Ed. 1012; New Orleans, etc., R. Co. *v.* Jopes, 142 U. S. 18, 35 L. Ed. 919.

The rule is well established and of long standing that an exception to be of any avail must be taken at the trial. It may be reduced to form and signed afterwards, but the fact that it was seasonably taken must appear affirmatively in the record by a bill of exceptions duly allowed or otherwise. Phelps *v.* Mayer, 15 How. 160, 14 L. Ed. 643; United States *v.* Breitling, 20 How. 252, 15 L. Ed. 900; French *v.* Edwards, 13 Wall. 506, 20 L. Ed. 702; Stanton *v.* Embrey, 93 U. S. 548, 23 L. Ed. 983; Hunnicutt *v.* Peyton, 102 U. S. 333, 26 L. Ed. 113; United States *v.* Carey, 110 U. S. 51, 52, 28 L. Ed. 67.

In order to make a bill of exceptions valid, it must appear by the transcript not only that the instructions were given or refused at the trial, but also that the party who complains of them, excepted to them while the jury were at the bar. The bill of exceptions need not be drawn out in form and signed before the jury retire; but it must be taken in open court and must appear by the certificate of the judge who authenticates it, to have been so taken. Hence, when the verdict was rendered on the 13th of December, and on the next day the plaintiff came into court and filed his exception, it is not properly before this court. And no error being assigned or appearing in the other proceedings, the judgment of the circuit court must be affirmed, with costs. Phelps *v.* Mayer, 15 How. 160, 14 L. Ed. 643, citing Sheppard *v.* Wilson, 6 How. 260, 275, 12 L. Ed. 430.

9. The bill of exceptions must be tendered before the verdict.—Jones *v.* Insurance Co., 4 Dall. 246, 1 L. Ed. 819.

Time is usually given to put what was done into an appropriate form for the record; but, unless objection was made and exception taken before the verdict, no case is presented for a review here of the rulings at the trial. Walton *v.* United States, 9 Wheat. 651, 6 L. Ed. 182; Railway Co. *v.* Heck, 102 U. S. 120, 26 L. Ed. 58.

In the case of Phelps *v.* Mayer, 15 How. 160, 14 L. Ed. 643, the verdict was rendered on the 13th of December, and the next day the plaintiff came into court and filed his exceptions, and there was nothing to show that any exception was reserved pending the trial. Cited in New Orleans, etc., R. Co. *v.* Jopes, 142 U. S. 18, 22, 35 L. Ed. 919.

"It may be further remarked that the alleged bills of exception do not show that the exceptions were taken on the trial. While exceptions may be reduced to form and signed after the trial, they must appear affirmatively to have been taken before the jury withdrew from the bar. United States *v.* Carey, 110 U. S. 51, 28 L. Ed. 67, and cases cited. Here it is expressly stated that the exceptions were taken on the 8th day of October, two days after the return of the verdict. This was too late." Pacific Express Co. *v.* Malin, 132 U. S. 531, 538, 33 L. Ed. 450.

Where the verdict was returned on October 21, and on November 2 counsel for defendant came into court, and sought to save other exceptions to the charge, the court will note those exceptions but will decline to make any ruling on them, because they are obviously too late. Thiede *v.* Utah, 159 U. S. 510, 40 L. Ed. 237, citing Michigan Ins. Bank *v.* Eldred, 143 U. S. 293, 36 L. Ed. 162.

Before delivery of verdict.—But counsel may tender exceptions for the first time to the charge of the court when the jury are at the bar, ready to deliver a verdict. Jones *v.* Insurance Co., 4 Dall. 246, 1 L. Ed. 819.

And although the jury have agreed upon a verdict and sealed it up, until it has been opened and confirmed in court, it is, in fact, no verdict. It will be sufficient, if the substance of the exception be reduced to writing and tendered to the court, before the verdict has been delivered. The exception may afterwards be reduced to form, and the court is not bound to suspend the trial of a cause, until a bill of exceptions is drawn in form and sealed. Cochran *v.* Cummings, 4 Dall. 250, 1 L. Ed. 820.

10. An exception comes too late after

up and signed by the judge after the trial during the term,[11] and the time within which this may be done must depend upon the rules and practice of the court

rendition of judgment.—In the case of Walton *v.* United States, 9 Wheat. 651, 6 L. Ed. 182, it appeared that the exception was not taken until after the judgment. Cited in New Orleans, etc., R. Co. *v.* Jopes, 142 U. S. 18, 22, 35 L. Ed. 919.

Where there is nothing whatever to indicate that any exception was taken to the rejection of the evidence complained of until the next term after the trial was over and the judgment rendered, though not signed, even the liberal extension of the rule granted in Simpson *v.* Dall, 3 Wall. 460, 18 L. Ed. 265, is not enough to reach this defect. "The language here implies an exception only at the time of tendering the bill of exceptions to be signed, which was not only long after the trial, but at a subsequent term of the court." United States *v.* Carey, 110 U. S. 51, 52, 28 L. Ed. 67.

11. Bill may be settled and signed after trial and during term.—United States *v.* Breitling, 20 How. 252, 15 L. Ed. 900; Dredge *v.* Forsyth, 2 Black 563, 568, 17 L. Ed. 253; Kellogg *v.* Forsyth, 2 Black 571, 573, 17 L. Ed. 256; Stanton *v.* Embrey, 93 U. S. 548, 555, 23 L. Ed. 983; Insurance Co. *v.* Boon, 95 U. S. 117, 133, 24 L. Ed. 395; Hunnicutt *v.* Peyton, 102 U. S. 333, 354, 26 L. Ed. 113; Davis *v.* Patrick, 122 U. S. 138, 143, 30 L. Ed. 1090; New Orleans, etc., R. Co. *v.* Jopes, 142 U. S. 18, 22, 35 L. Ed. 919; Hume *v.* Bowie, 148 U. S. 245, 37 L. Ed. 438.

"The attention of this court has, upon several occasions, been called to this subject, and the rule established by its decisions will be found to be this; the exception must show that it was taken and reserved by the party at the trial, but it may be drawn out in form and sealed by the judge afterwards. This point was directly decided in the case of Phelps *v.* Mayer, 15 How. 160, 14 L. Ed. 643; and again, in Turner *v.* Yates, 16 How. 14, 28, 14 L. Ed. 824." United States *v.* Breitling, 20 How. 252, 254, 15 L. Ed. 900; Stanton *v.* Embrey, 93 U. S. 548, 23 L. Ed. 983.

An exception taken to the ruling of a court, before the retirement of the jury from the bar, may be drawn out in form and sealed by the judge afterwards. Dredge *v.* Forsyth, 2 Black 563, 17 L. Ed. 253.

If an exception be seasonably taken and reserved, it may be drawn out and sealed by the judge afterwards, and the time within which it may be so drawn out and presented to the court must depend on the rules and practice of the court and the judicial discretion of the presiding justice. Kellogg *v.* Forsyth, 2 Black 571, 17 L. Ed. 256.

"It is true that in the hurry of the trial the bill is not often reduced to form and sealed or signed. Generally an exception is only noted by the judge at the time claimed, and it is subsequently drawn up." Insurance Co. *v.* Lanier, 95 U. S. 171, 24 L. Ed. 383.

It is no doubt necessary that exceptions should be taken and, at least, noted before the rendition of the verdict; but the reduction of the bills to form, and the signature of the judge to the bills, required for their attestation, or, as said in the Statute of Westminster, "for a testimony," may be afterwards, during the term. Hunnicutt *v.* Peyton, 102 U. S. 333, 353, 26 L. Ed. 113.

The rule is one of convenience.—"Undoubtedly the rule is that the record must show that the exception relied on was taken and reserved by the party at the trial; but it is a mistake to suppose that it has ever been held by this court that it must be drawn out and sealed by the judge before the jury retire from the bar of the court. Great inconvenience would result from such a requirement, and in point of fact there is no such rule. On the contrary, it is always allowable, if the exception be seasonably taken and reserved, that it may be drawn out in form and sealed by the judge afterwards; and the time within which it may be so drawn out and presented to the court must depend on the rules and practice of the court, and the judicial discretion of the presiding justice. Such was the rule laid down by this court in United States *v.* Breitling, 20 How. 252, 254, 15 L. Ed. 900, and we see no reason to qualify it on the present occasion. See, also, Phelps *v.* Mayer, 15 How. 160, 14 L. Ed. 643; Turner *v.* Yates, 16 How. 14, 28, 14 L. Ed. 824." Dredge *v.* Forsyth, 2 Black 563, 568, 17 L. Ed. 253.

"Bills of exceptions cannot always be formally prepared until a considerable time after verdict and judgment. They may require, in some cases, a full statement of almost all that occurred at the trial. Papers necessary to be incorporated may be mislaid or withheld by the opposite party; the charge of the judge, to which exception has been taken, may not have been filed, or sickness may have interfered. Meanwhile, judgment on the verdict may have been entered, and unless the party can protect himself by a writ of error, an execution may follow. For these reasons, the universal practice is to give reasonable time to make up the bills of exceptions and obtain the signature. This is not altering the record, it is completing it. It is not exercising jurisdiction over the case. It is merely putting into form the record statement of what was done before the writ of error was sent down." Hunnicutt *v.* Peyton, 102 U. S. 333, 356, 26 L. Ed. 113.

Practice is not to reduce bill to form until afterwards.—It is well settled that

and the judicial discretion of the presiding judge.[12] The convenient dispatch of business, in most cases, does not allow the preparation and signature of bills of exceptions during the progress of a trial.[13] This practice is well settled and exceedingly plain and simple, and will be strictly adhered to by the court.[14]

2. Signing Nunc Pro Tunc.—Where the bill of exceptions is signed by the judge after the trial, it is signed nunc pro tunc, and purports on its face to be

bills of exceptions are restricted to matter which occurred during the progress of the trial; but it is not necessary, neither is it the practice, to reduce to form every exception as it is taken, and before the trial is at an end. It will do for the judge to note them as they occur, and after the trial is over, if it is desirable to preserve them, they can be properly embodied in a bill of exceptions. Simpson *v.* Dall, 3 Wall. 460, 473, 18 L. Ed. 265, criticised in United States *v.* Carey, 110 U. S. 51, 52, 28 L. Ed. 67, as being a "liberal extension" of the rule.

In practice it is not usual to reduce bills of exception to form and to obtain the signature of the judge during the progress of the trial. Nor is it necessary. The Statute of Westminster did not require it. It would greatly and uselessly retard the business of courts were it required that every time an exception is taken the progress of the trial should be stayed until the bill could be reduced to form and signed by the judge. For this reason it has always been held that the exception need only be noted at the time it is made, and may be reduced to form within a reasonable time after the trial is over. United States *v.* Breitling, 20 How. 252, 15 L. Ed. 900; Dredge *v.* Forsyth, 2 Black 563, 564, 17 L. Ed. 253; Stanton *v.* Embrey, 93 U. S. 548, 23 L. Ed. 983; Hunnicutt *v.* Peyton, 102 U. S. 333, 354, 26 L. Ed. 113.

Formal bill to overruling motion for new trial settled and signed after motion overruled. Railroad Co. *v.* Reeves, 10 Wall. 176, 188, 19 L. Ed. 909.

12. Time of settling and signing after trial depends on rules of practice and judicial discretion.—United States *v.* Breitling, 20 How. 252, 254, 15 L. Ed. 900; Dredge *v.* Forsyth, 2 Black 563, 17 L. Ed. 253; Chateaugay Ore, etc., Co., Petitioner, 128 U. S. 544, 32 L. Ed. 508; Hume *v.* Bowie, 148 U. S. 245, 253, 37 L. Ed. 438.

The record must show that the exception was taken at that stage of the trial when its cause arose. The time and manner of placing the evidence of the exception formally on the record are matters belonging to the practice of the court in which the trial is held. Turner *v.* Yates, 16 How. 14, 29, 14 L. Ed. 824.

Their requisite certainty and accuracy can hardly be secured, if any considerable delay afterwards be permitted; and it is for each court in which cases are tried to secure, by its rules, that prompt attention to the subject necessary for the preservation of the actual occurrences on which the validity of the exception depends; and so to administer those rules that no artificial or imperfect case shall be presented here for adjudication. Turner *v.* Yates, 16 How. 14, 29, 14 L. Ed. 824.

Exceptions reserved at the trial of the cause may, within such time thereafter during the time as the judge shall deem reasonable, be reduced to form and presented to him for signature. Hunnicutt *v.* Peyton, 102 U. S. 333, 26 L. Ed. 113, citing United States *v.* Breitling, 20 How. 252, 253, 15 L. Ed. 900; Dredge *v.* Forsyth, 2 Black 563, 564, 17 L. Ed. 253; Stanton *v.* Embrey, 93 U. S. 548, 23 L. Ed. 983.

Execution to admission of evidence.—In the ordinary course of things, on the trial of a cause before a jury, if an objection is made and overruled, as to the admission of evidence, and the party does not take any exception, he is understood to waive it. The exception need not, indeed, then be put in form, or written out at large and signed; but it is sufficient, if it be taken, and the right reserved to put it in form, within the time prescribed by the practice or the rules of the court. Poole *v.* Fleeger, 11 Pet. 185, 9 L. Ed. 680.

13. Turner *v.* Yates, 16 How. 14, 29, 14 L. Ed. 824.

Beyond doubt, the record must show expressly or impliedly that the exception was taken and reserved by the party at the trial; but it is a mistake to suppose that it has ever been decided by this court that it must be drawn out and signed or sealed by the judge before the jury retire from the bar. Manifest inconvenience would result from such a requirement; and, in point of fact, there is no such rule. On the contrary, it is always allowable, if the exception is seasonably taken and reserved, that it may afterwards be put in form and filed in the case, pursuant to the order and direction of the judge who presided at the trial. Dredge *v.* Forsyth, 2 Black 563, 568, 17 L. Ed. 253; Stanton *v.* Embrey, 93 U. S. 548, 555, 23 L. Ed. 983.

Formal bill settled after overruling motion for new trial.—It is a common practice, convenient in dispatch of business, to permit the party to claim and note an exception when the occasion arises, but defer reducing it to a formal instrument until the trial is over. Railroad Co. *v.* Reeves, 10 Wall. 176, 188, 19 L. Ed. 909.

14. Practice must be strictly complied with.—Brown *v.* Clarke, 4 How. 4, 15, 11 L. Ed. 850.

the same as if actually reduced to form, and signed, during the trial,[15] though it is not necessary to render it effective that it be antedated, or ordered to be filed nunc pro tunc, as of a time during the trial.[16]

3. Removal of Causes from District of Columbia.—Writs of error from the federal supreme court to the supreme court of the District of Columbia are governed by the same rules and regulations as are those to the circuit courts. When, therefore, the record shows that an exception was taken and reserved at the trial, it is not necessary that the bill of exceptions be drawn out in form, and signed or sealed by the judge, before the jury retires; but it may be so signed or sealed at a later period; and, when filed nunc pro tunc, brings the case within the settled practice of courts of error.[17]

4. Settlement during or after the Term—a. *In General.*—Save under very extraordinary circumstances,[18] the bill of exceptions must be settled and

15. Signing nunc pro tunc.—Walton *v.* United States, 9 Wheat. 651, 657, 6 L. Ed. 182; Turner *v.* Yates, 16 How. 14, 14 L. Ed. 824; Stanton *v.* Embrey, 93 U. S. 548, 23 L. Ed. 983.

It is not necessary, that a bill of exceptions should be formally drawn and signed, before the trial is at an end; the exception may be taken at the trial, and noted by the court, and may afterwards, during the term, be reduced to form, and signed by the judge; but in such cases, it is signed nunc pro tunc, and purports, on its face, to be the same as if actually reduced to form, and signed, during the trial; it would be a fatal error, if it were to appear otherwise. Brown *v.* Clarke, 4 How. 4, 11 L. Ed. 850; Sheppard *v.* Wilson, 6 How. 260, 12 L. Ed. 430; Phelps *v.* Mayer, 15 How. 160, 14 L. Ed. 643; Walton *v.* United States, 9 Wheat. 651, 652, 6 L. Ed. 182.

The statutes of Iowa provide a mode for taking bills of exceptions, by directing that they shall be tendered to the judge for his signature during the progress of the trial, although judges may, and often do, sign bills of exception, nunc pro tunc, after the trial. Such is also the English practice under the Statute of Westminster 2, and such is the practice recognized by this court. Therefore, where a bill of exceptions was signed two years after the trial (but not nunc pro tunc), the supreme court of Iowa were right in striking it out of the record. Sheppard *v.* Wilson, 6 How. 260, 12 L. Ed. 430.

In Sheppard *v.* Wilson, 6 How. 260, 274, 12 L. Ed. 430, the supreme court declined to interfere with the action of the supreme court of the territory of Iowa in refusing to grant a mandamus to the judge of the district court to sign a bill of exceptions nunc pro tunc, tendered two years or more after the trial. "It is true, judges may, and often do, sign bills of exception after the trial, nunc pro tunc, the bills being dated as if taken on the trial; but the propriety of their refusal to do so on particular occasions depends on so many circumstances which cannot appear on the record, and are known only to themselves, that we ought not to presume they have acted improperly in the exercise of their discretion. Certainly a judge ought not to be called on to make up a bill of exceptions two or more years after a trial, where the counsel have disagreed as to the facts, and failed to settle the exceptions at the term in which the cause was tried."

Findings of court.—Where the court tried the issues of fact, and its opinion, embodying its findings and the conclusions of law thereon, was filed concurrently with the entry of the judgment, but there was no formal finding of facts, and the court, at the next following term, upon a rule awarded, and, after hearing the parties, made an order that a special finding, with the conclusions of law conformable to that opinion so filed, be entered nunc pro tunc, and made part of the record as of the term when the judgment was rendered, held, that the order was within the discretion of the court, and that by it such special finding became a part of the record of the cause, and that the judgment upon it is, without a bill of exceptions, subject to review here. Insurance Co. *v.* Boon, 95 U. S. 117, 24 L. Ed. 395. See the title APPEAL AND ERROR, vol. 1, p. 1028.

16. Necessity for antedating or filing nunc pro tunc.—Where a bill of exceptions is signed during the term at which the trial took place, though after the close of the trial, it is not necessary to render it effective that it be antedated, or ordered to be filed nunc pro tunc, as of the time during the trial. Hunnicutt *v.* Peyton, 102 U. S. 333, 26 L. Ed. 113, explaining Walton *v.* United States, 9 Wheat. 651, 6 L. Ed. 182.

17. Removal of causes from the District.—Stanton *v.* Embrey, 93 U. S. 548, 23 L. Ed. 983.

18. Extraordinary circumstances may justify settlement after term.—Muller *v.* Ehlers, 91 U. S. 249, 250, 23 L. Ed. 319, cited and distinguished in Ward *v.* Cochran, 150 U. S. 597, 603, 37 L. Ed. 1195; Davis *v.* Patrick, 122 U. S. 138, 143, 30 L. Ed. 1090, cited in Michigan Ins. Bank *v.* Eldred, 143 U. S. 293, 298, 36 L. Ed. 162.

Signing after adjournment upheld under special circumstances.—The circuit

signed during the term at which the judgment was rendered;[19] it cannot be settled after the term at which it was rendered expires,[20] or at a subsequent

court of the United States in Alabama, by a general rule, adopted the practice of the state courts, which is regulated by a statute providing that no bill of exceptions can be signed after the adjournment of the court, unless with the consent of counsel, etc. But where a judge holding the circuit court in Alabama signed a bill of exceptions under special circumstances, after adjournment, and without the consent of counsel, the federal supreme court will consider the exception as properly before it. It is in the power of a court to suspend its own rules, or except a particular case from them, to subserve the purposes of justice. United States *v.* Breitling, 20 How. 252, 15 L. Ed. 900, expressly approved in Davis *v.* Patrick, 122 U. S. 138, 143, 30 L. Ed. 1090.

19. Bill must be settled during term.—Brown *v.* Clarke, 4 How. 4, 11 L. Ed. 850; Muller *v.* Ehlers, 91 U. S. 249, 250, 23 L. Ed. 319; Ward *v.* Cochran, 150 U. S. 597, 602, 37 L. Ed. 1195.

"As early as Walton *v.* United States, 9 Wheat. 651, 6 L. Ed. 182, the power to reduce exceptions taken at the trial to form, and to have them signed and filed, was, under ordinary circumstances, confined to a time not later than the term at which the judgment was rendered. This, we think, is the true rule, and one to which there should be no exceptions without an express order of the court during the term or consent of the parties, save under very extraordinary circumstances." Muller *v.* Ehlers, 91 U. S. 249, 251, 23 L. Ed. 319, reaffirmed in Ward *v.* Cochran, 150 U. S. 597, 37 L. Ed. 1195, and distinguished in Davis *v.* Patrick, 122 U. S. 138, 143, 30 L. Ed. 1090; Chateaugay Ore, etc., Co., Petitioner, 128 U. S. 544, 555, 32 L. Ed. 508.

By the uniform course of decision, no exceptions to rulings at a trial can be considered by this court, unless they were taken at the trial, and were also embodied in a formal bill of exceptions presented to the judge at the same term, or within a further time allowed by order entered at that term, or by standing rule of court, or by consent of parties; and, save under very extraordinary circumstances, they must be allowed by the judge and filed with the clerk during the same term. After the term has expired, without the court's control over the case being reserved by standing rule or special order, and especially after a writ of error has been entered in this court, all authority of the court below to allow a bill of exceptions then first presented, or to alter or amend a bill of exceptions already allowed and filed, is at an end. United States *v.* Breitling, 20 How. 252, 15 L. Ed. 900; Muller *v.* Ehlers, 91 U. S. 249, 23 L. Ed. 319; Hunnicutt *v.* Peyton, 102 U. S. 333, 26 L. Ed. 113; Davis *v.* Patrick, 122 U. S. 138, 30 L. Ed. 1090; Chateaugay Ore, etc., Co., Petitioner, 128 U. S. 544, 32 L. Ed. 508; Jones *v.* Grover, etc., Sewing Machine Co., 131 U. S., appx. cl, 24 L. Ed. 925; Michigan Ins. Bank *v.* Eldred, 143 U. S. 293, 298, 36 L. Ed. 162.

Illustrative cases.—In Jones *v.* Grover, etc., Sewing Machine Co., 131 U. S., appx. cl, 24 L. Ed. 925, the judgment was rendered at the June term, 1875, "the writ of error sued out July 16, and the citation served the same day. The authentication of the transcript of the record annexed to and returned with the writ, as required by § 997, Rev. Stat., bears date October 7, and the bill of exceptions, signed as it was after that time, is simply appended to what was thus authenticated. There is nothing to show that it was ever even filed in the office of the clerk of the court. Certainly such a paper cannot be considered here." Cited in United States *v.* Jones, 149 U. S. 262, 37 L. Ed. 726.

Where the court below rendered judgment upon a finding, and at the next term, in the absence of any special circumstances in the case, and without the consent of parties or any previous order on the subject, allowed and signed a bill of exceptions, and directed it to be filed as of the date of the trial, it was held, that the bill, although returned with the record, cannot be considered here as a part thereof. Muller *v.* Ehlers, 91 U. S. 249, 23 L. Ed. 319, citing Generes *v.* Bonnemer, 7 Wall. 564, 565, 19 L. Ed. 287; Flanders *v.* Tweed, 9 Wall. 425, 19 L. Ed. 678; Walton *v.* United States, 9 Wheat. 651, 6 L. Ed. 182, and distinguishing United States *v.* Breitling, 20 How. 252, 253, 15 L. Ed. 900, distinguished in Davis *v.* Patrick, 122 U. S. 138, 143, 30 L. Ed. 1090.

Clerical errors.—Where a bill of exceptions purported to have been taken at April term, 1848, but the record showed that at that time no suit between the parties was pending, and that the trial took place in April, 1849, the date of 1848 must be considered as a clerical error. The certificate from the circuit court showed that the bill of exceptions was regularly allowed upon the trial, and this must be conclusive upon this court. United States *v.* Wilkinson, 12 How. 252, 13 L. Ed. 974.

20. Bill cannot be settled after the term expires.—Insurance Co. *v.* Boon, 95 U. S. 117, 127, 24 L. Ed. 395; Glaspell *v.* Northern Pac. R. Co., 144 U. S. 211, 36 L. Ed. 409; Morse *v.* Anderson, 150 U. S. 156, 37 L. Ed. 1037.

The rule is unquestionably correctly laid down in Muller *v.* Ehlers, 91 U. S. 249, 23 L. Ed. 319, that when judgment has been rendered, and the term expires, a bill of exceptions cannot be allowed,

term,[21] unless by an express order of the court made during the term,[22] by con-

signed and filed as of the date of the trial, in the absence of any special circumstances in the case, and without the consent of parties or any previous order of court. Cited in Hume *v.* Bowie, 148 U. S. 245, 253, 37 L. Ed. 438.

Where the bill of exceptions is not tendered to the judge or signed by him until the court has adjourned for the term, and no order is entered extending the time for its presentation, nor is there any consent of parties thereto, nor any standing rule of court which authorizes such approval, the bill of exceptions allowed thereafter is improvidently allowed, and the judgment will be affirmed if the errors assigned arise upon the bill of exceptions. United States *v.* Jones, 149 U. S. 262, 37 L. Ed. 726, citing Muller *v.* Ehlers, 91 U. S. 249, 23 L. Ed. 319; Jones *v.* Grover, etc., Sewing Machine Co., 131 U. S., appx. cl, 24 L. Ed. 925; Michigan Ins. Bank *v.* Eldred, 143 U. S. 293, 36 L. Ed. 162.

21. Bill cannot be settled at subsequent term.—The court, at a term subsequent to the judgment, cannot lawfully allow and sign a bill of exceptions not noted at the trial. Insurance Co. *v.* Boon, 95 U. S. 117, 24 L. Ed. 395.

22. Express order of court may allow settlement after term.—Chateaugay Ore, etc., Co., Petitioner, 128 U. S. 544, 555, 32 L. Ed. 508, distinguishing Muller *v.* Ehlers, 91 U. S. 249, 23 L. Ed. 319; Michigan Ins. Bank *v.* Eldred, 143 U. S. 293, 298, 36 L. Ed. 162; United States *v.* Jones, 149 U. S. 262, 37 L. Ed. 726.

Where the record discloses an express order of the court during the judgment term extending the time for preparing and presenting a bill of exceptions, the rule that the power to reduce exceptions taken at the trial to form and have them signed and filed is, under ordinary circumstances, confined to a time not later than the term at which the judgment was rendered, does not apply. Ward *v.* Cochran, 150 U. S. 597, 37 L. Ed. 1195, citing Muller *v.* Ehlers, 91 U. S. 249, 23 L. Ed. 319; Walton *v.* United States, 9 Wheat. 651, 6 L. Ed. 182, and distinguishing Morse *v.* Anderson, 150 U. S. 156, 158, 37 L. Ed. 1037.

The law requires that a bill of exceptions should be tendered at the trial. If a party intends to take a bill of exceptions, he should give notice to the judge at the trial; and if he does not file it at the trial, he should move the judge to assign a reasonable time within which he may file it. A practice to sign it after the term must be understood to be matter of consent between the parties, unless the judge has made an express order in the term, allowing such a period to prepare it. Ex parte Bradstreet, 4 Pet. 102, 7 L. Ed. 796.

Muller v. Ehlers distinguished.—"The decision in Muller *v.* Ehlers, 91 U. S. 249, 23 L. Ed. 319, has no application because here the rights of the defendant were saved by the express order of the court made during the term, and by a sufficient compliance on the part of the defendant with the rules of the circuit court, and by what must be held to have been the consent of the plaintiff." Chateaugay Ore, etc., Co., Petitioner, 128 U. S. 544, 556, 32 L. Ed. 508.

Must be settled within time fixed by special order.—Where the time is extended for settling and filing a bill of exceptions, the federal supreme court will not review bills of exceptions signed after the time fixed by such special order of the court has expired. Morse *v.* Anderson, 150 U. S. 156, 37 L. Ed. 1037, citing Muller *v.* Ehlers, 91 U. S. 249, 23 L. Ed. 319; Jones *v.* Grover, etc., Sewing Machine Co., 131 U. S., appx. cl, 24 L. Ed. 925; Michigan Ins. Bank *v.* Eldred, 143 U. S. 293, 36 L. Ed. 162; Glaspell *v.* Northern Pac. R. Co., 144 U. S. 211, 36 L. Ed. 409; Hume *v.* Bowie, 148 U. S. 245, 37 L. Ed. 438, cited in Ward *v.* Cochran, 150 U. S. 597, 37 L. Ed. 1195.

Where an order is made extending the time for signing and settling the bill, it must be signed within the time limited in the order; if signed after the expiration of that time, the bill of exceptions is void. Jones *v.* Grover, etc., Sewing Machine Co., 131 U. S., appx. cl, 24 L. Ed. 925; Morse *v.* Anderson, 150 U. S. 156, 157, 37 L. Ed. 1037; Michigan Ins. Bank *v.* Eldred, 143 U. S. 293, 36 L. Ed. 162; Glaspell *v.* Northern Pac. R. Co., 144 U. S. 211, 36 L. Ed. 409; Hume *v.* Bowie, 148 U. S. 245, 37 L. Ed. 438.

Practice in North Dakota.—In Glaspell *v.* Northern Pac. R. Co., 144 U. S. 211, 222, 36 L. Ed. 409, the time within which to settle a bill of exceptions was extended six times. The first was by consent of counsel, the second for reasons given, the third, as asserted, "upon good cause shown," and the fourth, fifth and last extension assigned no ground. The last order of extension expired June 29, 1889, defendant having ten days after the settling of the bill within which to serve notice of intention to move for new trial and within which to move for a new trial. The bill of exceptions was, nevertheless, signed August 30, 1889, and filed September 3. The certificate originally stated not only the date but that the settlement was "within the time provided by law, as enlarged and extended by orders of the judge of this court," but subsequently these words were stricken out by the judge, and the question whether the bill was improvidently signed or not was left open, unless the rule be applied, as subsequently laid down by the supreme court

sent or agreement of parties given during the term,[23] or by standing rule of

of the state, that the settlement, whenever made, in itself operated to extend the time. Notice of the intention to move and of the motion appear to have been given on the third of September, returnable on September 12, 1889, and the hearing appears to have been extended by the judge until September 21. Here the record becomes silent. It is nowhere disclosed that the defendant appeared to prosecute its motion on the 21st of September, and whatever liberality might be indulged under the provisions of the territorial code, as now expounded by the supreme court of the state, we are not prepared to hold, in passing upon the question before us, that any motion was pending on the 7th of December, 1889, there being no evidence whatever that a motion was ever made, except the action of the court assigning the hearing of a proposed motion for a day more than two months before, which came and went without such hearing, the meditated motion having apparently been waived and abandoned. Held, this bill of exceptions was not settled and filed within the time allowed by the laws of North Dakota or under any order of the court.

• **23. Stipulation of parties may allow settlement after term.**—Davis *v.* Patrick, 122 U. S. 138, 30 L. Ed. 1090; United States *v.* Jones, 149 U. S. 262, 37 L. Ed. 726; Muller *v.* Ehlers, 91 U. S. 249, 250, 23 L. Ed. 319; Chateaugay Ore, etc., Co., Petitioner, 128 U. S. 544, 556, 32 L. Ed. 508, distinguishing Muller *v.* Ehlers, 91 U. S. 249, 250, 23 L. Ed. 319.

The signing of the bill of exceptions, after the expiration of the term at which the judgment was rendered, is lawful if done by consent of parties given during that term. Hunnicutt *v.* Peyton, 102 U. S. 333, 26 L. Ed. 113; Davis *v.* Patrick, 122 U. S. 138, 30 L. Ed. 1090; Michigan Ins. Bank *v.* Eldred, 143 U. S. 293, 36 L. Ed. 162; Waldron *v.* Waldron, 156 U. S. 361, 378, 39 L. Ed. 453.

The law requires that a bill of exceptions should be tendered at the trial. But the usual practice is to request the judge to note down in writing the exceptions, and afterwards, during the session of the court, to hand him the bill of exceptions, and submit it to his correction from his notes. If he is to resort to his memory, it should be handed to him immediately, or in a reasonable time after the trial. It would be dangerous, to allow a bill of exceptions, of matters dependent on memory, at a distant period, when he may not accurately recollect them; and the judge ought not to allow it. If the party intends to take a bill of exceptions, he should give notice to the judge at the trial; and if he does not file it at the trial, he should move the judge to assign a reasonable time within which he may file it. A practice to sign it after the term, must be understood to be a matter of consent between the parties, unless the judge has made an express order in the term, allowing such a period to prepare it. Ex parte Bradstreet, 4 Pet. 102, 107, 7 L. Ed. 796.

Where the bill has the sanction and signature of the judge, though settled after the trial, yet if it was agreed upon by the parties, "it is free from objections which have prevailed in other cases. Generes *v.* Bonnemer, 7 Wall. 564, 19 L. Ed. 287; Graham *v.* Bayne, 18 How. 60, 15 L. Ed. 265." Herbert *v.* Butler, 97 U. S. 319, 320, 24 L. Ed. 958.

Delay agreed to for convenience of judge.—Although a bill of exceptions was signed after the beginning of the term of the federal supreme court at which the writ of error was made returnable, and during the term of the circuit court succeeding that at which the case was tried, a motion to strike out will be denied if the record shows a stipulation between the parties that the matter of the settlement of the bill had been submitted to the judge, and that the delay was agreed to for the convenience of the judge. Davis *v.* Patrick, 122 U. S. 138, 30 L. Ed. 1090, following United States *v.* Breitling, 20 How. 252, 15 L. Ed. 900, and distinguishing Walton *v.* United States, 9 Wheat. 651, 6 L. Ed. 182; Ex parte Bradstreet, 4 Pet. 102, 7 L. Ed. 796; Sheppard *v.* Wilson, 6 How. 260, 12 L. Ed. 430; Muller *v.* Ehlers, 91 U. S. 249, 23 L. Ed. 319; Coughlin *v.* District of Columbia, 106 U. S. 7, 27 L. Ed. 74.

Case distinguished.—"This case differs very materially from that of United States *v.* Breitling, 20 How. 252, 253, 15 L. Ed. 900. There the bill of exceptions was prepared during the term, and presented to the court for allowance four days before the adjournment. It was handed back to the attorney presenting it, three days before the adjournment, with the request that he submit it to the opposing counsel. Delay occurred, and the signature was not actually affixed until after the term. Under the special circumstances of that case, the signature, after the term, was recognized as proper. The particular grounds for this ruling are not stated; but it was probably for the reason, that, upon the facts stated, the consent to further time beyond the term for the settling of the exceptions might fairly be presumed. That case went to the extreme verge of the law upon this question of practice, and we are not inclined to extend its operation." Muller *v.* Ehlers, 91 U. S. 249, 250, 23 L. Ed. 319.

Bill must be presented within time fixed by agreement.—"If the bill is not delivered to counsel within the time fixed by the agreement for extension of time, objection to the failure so to deliver it should have been urged when the bill was settled. And if an objection then taken was

court,[24] the time for preparing and presenting the bill is extended. It has also been held that if the delay in not signing the bill until a term of the court succeeding that at which the case was tried, it attributable to the judge after the party excepting has done all that he can to procure the settlement and signature of the bill, a motion to strike out will be denied.[25]

Affirmance of Judgment.—Where the errors assigned arise upon a bill of exceptions signed after the adjournment of the court for the term, the judgment of the court below will be affirmed.[26]

b. *Reason of Rule.*—The reason for this is that a judge cannot act judicially upon the rights of parties, after the parties in due course of proceeding have both in law and in fact been dismissed from the court. Upon the adjournment for the term the parties are out of court, and the litigation there is at an end.[27]

c. *Application for Extension of Time.*—Application must be made to the court for an extension of time for the purpose of filing the bill.[28]

d. *Appeal from Circuit Court for Southern District of New York.*—But under rules of court in some circuits, a bill of exceptions may be perfected even after the expiration of the term at which the verdict was rendered.[29]

e. *Removal of Causes from Montana Territory.*—What is meant by § 279 of the Montana code of civil procedure is that the exception must be to some decision or ruling of the court, occurring before final judgment is rendered, and not that the exception must be taken before the decision excepted to has been made.[30]

f. *Removal of Causes from the District of Columbia.*—In the District of Columbia, the bill of exceptions must be settled before the close of the term,[31] and a case stated, filed after the adjournment of the term at which the judgment appealed from was rendered, comes too late.[32] But the rules of the supreme court of the District of Columbia provide that the term may be prolonged for the purpose of settling bills of exceptions.[33]

overruled, the question of the correctness of such action should have been then reserved. The fact is, that the only reservation made in the settlement of the bill is thus stated in the record: "Counsel for plaintiff move that the judge do not sign the same, because the defendant has not filed this bill of exceptions within the time prescribed * * * at the time the appeal was prayed." This, of course, was not sound, in view of the agreement whereby the time which had been at first fixed was extended. The only question reserved in this connection is accordingly, also, without merit." Waldron *v.* Waldron, 156 U. S. 361, 378, 39 L. Ed. 453.

24. **Standing rule of court.**—Michigan Ins. Bank *v.* Eldred, 143 U. S. 293, 298, 36 L. Ed. 162; United States *v.* Jones, 149 U. S. 262, 37 L. Ed. 726.

25. **What is excusable delay.**—Davis *v.* Patrick, 122 U. S. 138, 143, 30 L. Ed. 1090.

26. **Affirmance of judgment.**—United States *v.* Jones, 149 U. S. 262, 37 L. Ed. 726.

27. **Reason of rule.**—Walton *v.* United States, 9 Wheat. 651, 6 L. Ed. 182; Muller *v.* Ehlers, 91 U. S. 249, 23 L. Ed. 319; Ward *v.* Cochran, 150 U. S. 597, 603, 37 L. Ed. 1195.

28. **Application must be made for extension of time.**—Muller *v.* Ehlers, 91 U. S. 249, 250, 23 L. Ed. 319.

29. **Rule of court in New York circuit.**—On appeals to the federal supreme court from the circuit court for the southern district of New York, the question whether the term at which the verdict was rendered has expired is immaterial. The rules of that circuit court clearly contemplate proceedings to perfect a bill of exceptions within the time limited by those rules, without reference to the expiration of a term. Chateaugay Ore, etc., Co., Petitioner, 128 U. S. 544, 556, 32 L. Ed. 508.

30. **Removal of causes from Montana.**—Kleinschmidt *v.* McAndrews, 117 U. S. 282, 286, 29 L. Ed. 905.

31. **Time of settlement of bill under practice in the district.**—Coughlin *v.* District of Columbia, 106 U. S. 7, 27 L. Ed. 74.

32. **Case stated filed after adjournment.**—Coughlin *v.* District of Columbia, 106 U. S. 7, 10, 27 L. Ed. 74, citing Generes *v.* Bonnemer, 7 Wall. 564, 19 L. Ed. 287.

Where upon an appeal from the supreme court of the District of Columbia, the only case stated which appears of record is the case stated by the judge two months after the adjournment of the term at which he has overruled a motion made before him for a new trial, a new trial cannot be granted upon a case stated filed by the judge at a subsequent term. Coughlin *v.* District of Columbia, 106 U. S. 7, 27 L. Ed. 74, citing Generes *v.* Bonnemer, 7 Wall. 564, 19 L. Ed. 287.

33. **Prolongation of term of supreme**

g. *Certificate under Court of Appeals Act.*—And the inability of the supreme court to deal with matters of this sort after the expiration of the term, has been extended to the certificate of the circuit or district courts under the circuit court of appeals act, where the jurisdiction of the court below is in issue.[34]

h. *Presumptions on Appeal.*—Where a bill of exceptions is signed during the term, purporting to contain a recital of what transpired during the trial, it will be assumed that all things therein stated took place at the trial, unless from its language the contrary is disclosed.[35]

5. Settlement after Appeal or Writ of Error.—By the uniform course of decision, no exceptions to rulings at a trial can be considered by the federal supreme court, unless they were taken at the trial, and were also embodied in a formal bill of exceptions presented to the judge at the same term, or within a further time allowed by order entered at that term, or by standing rule of court, or by consent of parties; and, save under very extraordinary circumstances, they must be allowed by the judge and filed with the clerk during the same term. After the term has expired, without the court's control over the case being reserved by

court of district.—The rules of the supreme court of the District of Columbia also provided that the terms of court might be prolonged by adjournment for the purpose of settling bills of exceptions, and an order was accordingly entered prolonging the term at which this judgment was rendered, for the purpose of doing that in this case. This was equivalent to the practice in many jurisdictions of entering an order granting additional time, after the expiration of the term, in which to settle such bills. The provision as to the prolongation of the term for the particular purpose is a mere difference in phraseology and not of the substance, and the question as to the close of the term in other respects is quite immaterial. Hume *v.* Bowie, 148 U. S. 245, 253, 37 L. Ed. 438.

Prolongation of term only granted when requested.—The rule of court in regard to the settlement of bills of exceptions, by the supreme court of the District of Columbia is as follows: "The bill of exceptions must be settled before the close of the term, which may be prolonged by adjournment in order to prepare it, but not longer than thirty-eight days, exclusive of Sundays, save in case of a trial begun during a term but not concluded until after the expiration of the term, in which case the trial justice may extend the term in his discretion in order to prepare a bill of exceptions." Held, that the duty of the supreme court of the district under this rule was to be exercised only when invoked. "The argument of plaintiff is that the purpose of the rule was to allow thirty-eight days for the settlement of bills of exceptions, and to afford time to do so the rule provided that the term might be prolonged by adjournment, and the duty of prolonging the term was imposed on the court. We do not so interpret the rule. It provided the means for parties to secure the necessary time to present bills of exceptions. The court was not required to anticipate the intention of parties. Its duty under the rule, like its other duties, was to be exercised when invoked." Gordon *v.* Randle, 189 U. S. 417, 418, 47 L. Ed. 875.

May term of supreme court of District.—Rule 2 of the supreme court of the District of Columbia provides that the May term of the circuit court shall not extend beyond the second Saturday in July. Rule 62 provides that the bill of exceptions must be settled before the close of the term, which may be prolonged by adjournment in order to prepare it. Held, that for this purpose the May term could be extended indefinitely up to and beyond the beginning of the succeeding term. Hume *v.* Bowie, 148 U. S. 245, 37 L. Ed. 438, following Jones *v.* Pennsylvania Railroad, 18 Dist. Col. 426.

Effect of death of judge during extended time.—Where a term of the circuit court of the District of Columbia has been extended indefinitely for the purpose of settling a bill of exceptions, and the attorneys are unable to agree upon it, and the judge dies before settling it, the supreme court of the district, in general term, has authority to grant a new trial, pursuant to rule 64 of that court, which provides for new trials when the judge is unable to settle the bill of exceptions. Hume *v.* Bowie, 148 U. S. 245, 37 L. Ed. 438, distinguishing Phillips *v.* Negley, 117 U. S. 665, 29 L. Ed. 1013.

34. Certificate under court of appeals act.—Colvin *v.* Jacksonville, 158 U. S. 456, 39 L. Ed. 1053, reaffirmed in Merritt *v.* Bowdoin College, 167 U. S. 745, 42 L. Ed. 1209; Daugherty *v.* Hood, 179 U. S. 680, 45 L. Ed. 383; Trenchard *v.* Kell, 202 U. S. 613, 50 L. Ed. 1171, citing Hickman *v.* Fort Scott, 141 U. S. 415, 35 L. Ed. 775; Morse *v.* Anderson, 150 U. S. 156, 37 L. Ed. 1037; The Bayonne, 159 U. S. 687, 692, 40 L. Ed. 306. See the title APPEAL AND ERROR, vol. 1, p. 433.

35. Presumptions on appeal.—New Orleans, etc., R. Co. *v.* Jopes, 142 U. S. 18, 23, 35 L. Ed. 919.

standing rule or special order, and especially after a writ of error has been entered in the supreme court, all authority of the court below to allow a bill of exceptions then first presented, or to alter or amend a bill of exceptions already allowed and filed, is at an end.[36] But because a party who at the trial of a cause has tendered a bill of exceptions, sues out a writ of error before he has procured the judge's signature to the bill, he does not thereby waive the bill of exceptions.[37]

6. Statement of Facts in Cases from Louisiana.—In cases removed to the federal supreme court from the district of Louisiana, the statement of facts was required to be seasonably presented and filed.[38]

7. Writ of Error to State Court in Criminal Cases.—Upon a writ of error to review the decision of the highest state court in a criminal case, it has been held that a bill of exceptions to the admission of testimony, not presented to the judge for signature until two weeks after the sentence was rendered, and after a new trial had been refused and an appeal allowed, comes too late, and the judgment of the state court will be affirmed.[39]

F. Mandamus to Compel Settlement of Bill[40]—1. In General.—The federal supreme court may properly issue a writ of mandamus to compel an inferior federal court to settle and sign a bill of exceptions.[41] Because such a writ does not undertake to control the discretion of the judge as to how he shall frame the bill of exceptions, or as to how he shall decide any point arising

36. Settlement after entry of writ of error.—United States *v.* Breitling, 20 How. 252, 15 L. Ed. 900; Muller *v.* Ehlers, 91 U. S. 249, 23 L. Ed. 319; Hunnicutt *v.* Peyton, 102 U. S. 333, 26 L. Ed. 113; Davis *v.* Patrick, 122 U. S. 138, 30 L. Ed. 1090; Chateaugay Ore, etc., Co., Petitioner, 128 U. S. 544, 32 L. Ed. 508; Jones *v.* Grover, etc., Sewing Machine Co., 131 U. S., appx. cl, 24 L. Ed. 925; Michigan Ins. Bank *v.* Eldred, 143 U. S. 293, 298, 36 L. Ed. 162.

The proper bill of exceptions should be drawn up by the excepting party before suing out the writ of error. Hanna *v.* Maas, 122 U. S. 24, 30 L. Ed. 1117.

37. Waiver of bill by suing out writ of error.—Hunnicutt *v.* Peyton, 102 U. S. 333, 354, 26 L. Ed. 113, disapproving Tidd's Practice, 863 (4th Am. Ed. from the 9th London).

38. Statement of facts on appeal from Louisiana.—It was said by this court in Generes *v.* Bonnemer, 7 Wall. 564, 565, 19 L. Ed. 287, that "to permit the judge to make a statement of the facts on which the case shall be heard here, after the case is removed to this court by the service of the writ of error, or even after it is issued, would place the rights of parties who have judgments of record entirely in the power of the judge, without hearing and without remedy." This language is substantially adopted in Flanders *v.* Tweed, 9 Wall. 425, 19 L. Ed. 678, where it was said: "The statement of facts by the judge is filed upon the 29th May, 1868, nearly three months after the rendition of the judgment. This is an irregularity, for which this court is bound to disregard it, and to treat it as no part of the record." Approved in Muller *v.* Ehlers, 91 U. S. 249, 251, 23 L. Ed. 319, and distinguished in Hunnicutt *v.* Peyton, 102 U. S. 333, 354, 26 L. Ed. 113.

A statement of facts made up six months after the court has rendered its decision, to which the plaintiff refuses his assent, will not be signed by the trial judge. Martin *v.* Imhsen, 21 How. 394, 16 L. Ed. 134.

39. Writ of error to state court in criminal cases.—The action of the trial court in permitting to be read in evidence the testimony of a witness which had been taken in the presence of the accused in open court at a preliminary hearing and read to and signed by the witness, for the reason that the witness had since gone beyond the jurisdiction of the court and the state could not procure his attendance, was not reversible error where the record disclosed that the bill of exceptions to the allowance of such evidence was not presented to the judge until two weeks after the sentence was rendered and after a new trial had been refused and an appeal allowed. Murray *v.* Louisiana, 163 U. S. 101, 108, 41 L. Ed. 87. See the title APPEAL AND ERROR, vol. 1, p. 763.

40. See, generally, the title MANDAMUS.

41. Mandamus will lie to compel settlement of bill.—Chateaugay Ore, etc., Co., Petitioner, 128 U. S. 544, 32 L. Ed. 508.

The supreme court has power to issue a mandamus directed to a circuit court of the United States commanding the court to sign a bill of exceptions in a case tried before such court. Ex parte Crane, 5 Pet. 190, 8 L. Ed. 92, cited with approval in Chateaugay Ore, etc., Co., Petitioner, 128 U. S. 544, 32 L. Ed. 508; Hudson *v.* Parker, 156 U. S. 277, 288, 39 L. Ed. 424.

"The discretion of a judge, indeed, in

on its settlement; but it only compels him to settle and sign it in some form.[42]

2. Illustrative Cases.—For example, mandamus will even lie to compel a judge to sign a bill tendered after the term of court at which the action was tried upon a sufficient excuse being shown for the delay.[43] But mandamus will not lie to compel a judge to sign a bill which he does not think to be a true and correct statement of the case,[44] nor to sign a bill after the trial nunc pro tunc,[45] nor to compel a chancellor to sign a bill of exceptions, because such a bill is unknown in chancery practice.[46]

a matter entrusted by law to his judicial determination, cannot be controlled by writ of mandamus. But if he declines to exercise his discretion, or to act at all, when it is his duty to do so, a writ of mandamus may be issued to compel him to act. For instance, a writ of mandamus will lie to compel a judge to settle and sign a bill of exceptions, although not to control his discretion as to the frame of the bill. Ex parte Bradstreet, 4 Pet. 102, 7 L. Ed. 796; Ex parte Crane, 5 Pet. 190, 8 L. Ed. 92; Chateaugay Ore, etc., Co., Petitioner, 128 U. S. 544, 557, 32 L. Ed. 508. See, also, Ex parte Morgan, 114 U. S. 174, 29 L. Ed. 135; Ex parte Parker, 120 U. S. 737, 30 L. Ed. 818; Parker, Petitioner, 131 U. S. 221, 33 L. Ed. 123; Virginia *v.* Paul, 148 U. S. 107, 123, 124, 37 L. Ed. 386." Hudson *v.* Parker, 156 U. S. 277, 288, 39 L. Ed. 424.

Review of the English practice.—"That a mandamus to sign a bill of exceptions is 'warranted by the principles and usages of law,' is we think, satisfactorily proved by the fact that it is given in England by statute; for the writ given by the statute of Westminster the second is so in fact, and is so termed in the books. The judicial act speaks of usuages of law generally, not of common law. In England it is awarded by the chancellor, but in the United States it is conferred expressly on this court, which exercises both common-law and chancery powers, is invested with appellate power, and exercises extensive control over all the courts of the United States. We cannot perceive a reason why the single case of the refusal of an inferior court to sign a bill of exceptions and thus to place the law of the case on the record, should be withdrawn from that general power to issue writs of mandamus to inferior courts which is conferred by statute." Ex parte Crane, 5 Pet. 190, 8 L. Ed. 92.

42. Reason of rule.—Chateaugay Ore, etc., Co., Petitioner, 128 U. S. 544, 557, 32 L. Ed. 508.

43. Bill tendered after term.—A judge of the circuit court of the United States refused to settle and sign a bill of exceptions because of the expiration of the term of the court at which the action was tried. The delay being caused by a mistake by the parties as to whether the state or federal court rules governed, the judge was ordered by mandamus to sign the bill. Chateaugay Ore, etc., Co., Petitioner, 128 U. S. 544, 32 L. Ed. 508.

44. Bill must contain correct statement of case.—A rule had been granted on the district judge of the northern district of New York, to show cause why he did not sign a bill of exceptions in a case tried before him. The court said, that on the day of the return of the rule, the district judge has a right to show cause, whether the person who obtained the rule moved or not, he has a right to have the rule disposed of. On the trial of a cause in the district court of the United States for the Northern District of New York, exceptions were taken to opinions of the court delivered in the course of the trial; and some time after the trial was over, a bill of exceptions was tendered to the district judge, which he refused to sign, objecting to some of the matters stated in the same, and at the same time, altering the bill then tendered, so as to conform to his recollection of the facts of the case, and inserting in the bill all that he deemed proper to be contained in the same; which bill of exceptions, thus altered, was signed by the judge. On the motion of the party who had tendered the bill of exceptions, a rule was granted on the district judge, to show cause why he did not sign the bill of exceptions as first tendered to him. To this rule, the judge returned his reasons for refusing to sign the bill so tendered, and stating, that he had signed such a bill of exceptions as he considered correct. By the court: This is not a case in which the judge has refused to sign a bill of exceptions. The judge has signed such a bill as he thinks correct. The object of the rule is to oblige the judge to sign a particular bill of exceptions which has been offered to him. The court granted the rule to show cause, and the judge has shown cause, by saying he has done all that can be required from him, and that the bill offered is not such a bill as he can sign. The court cannot order him to sign such a bill. Ex parte Bradstreet, 4 Pet. 102, 7 L. Ed. 796.

45. Mandamus will not be awarded to compel a judge to sign the bill of exceptions after the trial nunc pro tunc, because the propriety of their refusal to do so on particular occasions depends on so many circumstances which cannot appear on the record, and are known only to themselves, that an appellate court ought not to presume that they had acted improperly in the exercise of their discretion. Sheppard *v.* Wilson, 6 How. 260, 12 L. Ed. 430.

46. Mandamus to compel a chancellor

3. Resettlement.—Unless a very clear case is made out, a petition for a mandamus to compel the lower court to resettle a bill of exceptions will be denied.[47]

4. Return to Rule to Show Cause.—A return by the district judge to a rule to show cause, need not be sworn to by him.[48]

VII. Filing and Service.

A. Filing—1. Of Bill of Exceptions—a. *Necessity for Filing.*—The bill of exceptions must be filed as well as certified or allowed.[49]

b. *Time of Filing.*—If a party does not file his bill of exceptions at the trial, he should move the judge to assign a reasonable time within which he may file it.[50] But where parties expressly so consent, the bill of exceptions may, at common law, be filed in vacation.[51]

c. *Original Bill or a Copy.*—The original bill is equally as good as a copy and may be filed in the appellate court in place of the copy, where it appears that the copy thereof cannot be obtained, and the original is properly identified and authenticated.[52]

2. Of Statement of Facts on Appeal—a. *Time of Filing*—(1) *In General.*—A statement of facts, made and filed by the judge several months after the rendition of the judgment,[53] or after the issuance and service of the writ of error in the case,[54] or after the case is disposed of by the circuit

to sign a bill.—The court refused to award a mandamus to the district judge of the district of Louisiana, commanding him to sign a bill of exceptions tendered to him, and to command him to have inscribed, by the clerk of the court, on the order book of the court, an order passed by him, in a case which was before him under a mandate from the supreme court of the United States, requiring him to do, and to have done, certain matters to carry into effect the decree of the supreme court, in a case which had been brought before the court by appeal from the district of Louisiana. Ex parte Story, 12 Pet. 339, 9 L. Ed. 1108. See ante, "In Chancery Cases," III, C, 2.

47. **Mandamus to compel resettlement denied.**—An application for leave to file a petition for a mandamus to require a judge of a district court acting as judge of the circuit court to resettle the bill of exceptions in a cause lately pending in the circuit court as to a certain request to charge, in respect of which request to charge affidavits to the effect that the bill of exceptions, as settled and signed by the judge, was incorrect, will be denied. In re Streep, 156 U. S. 207, 39 L. Ed. 399, citing Ex parte Bradstreet, 4 Pet. 102, 7 L. Ed. 796; Chateaugay Ore, etc., Co., Petitioner, 128 U. S. 544, 32 L. Ed. 508.

48. **Return to rule to show cause.**—Ex parte Bradstreet, 4 Pet. 102, 7 L. Ed. 796.

49. **Bill must be filed.**—Insurance Co. *v.* Lanier, 95 U. S. 171, 24 L. Ed. 383.

50. **Time of filing bill of exceptions.**—Ex parte Bradstreet, 4 Pet. 102, 7 L. Ed. 796.

51. **Bill may be filed in vacation.**—Walton *v.* United States, 9 Wheat. 651, 6 L. Ed. 182; Generes *v.* Bonnemer, 7 Wall. 564, 565, 19 L. Ed. 287; Flanders *v.* Tweed, 9 Wall. 425, 19 L. Ed. 678; Muller *v.* Ehlers, 91 U. S. 249, 250, 23 L. Ed. 319.

52. **Original bill may be filed in place of copy.**—On writ of error sued out from the supreme court of the territory of Utah, the original bill of exceptions, signed by the trial judge, certified by the clerk of the trial court and by the clerk of the supreme court of Utah, transmitted with and filed with the record of the case, was held sufficiently authenticated and identified. Bassett *v.* United States, 137 U. S. 496, 34 L. Ed. 762.

53. **Filing statement after rendition of judgment.**—Flanders *v.* Tweed, 9 Wall. 425, 19 L. Ed. 678, reaffirmed in Flanders *v.* Tweed, 154 U. S., appx., 549, 570, 19 L. Ed. 678, 681, cited and approved in Muller *v.* Ehlers, 91 U. S. 249, 251, 23 L. Ed. 319; Insurance Co. *v.* Boon, 95 U. S. 117, 142, 24 L. Ed. 395, dissenting opinion of Clifford, J.

54. **Filing statement after issuance of writ of error.**—Stimpson *v.* Baltimore, etc., R. Co., 10 How. 328, 13 L. Ed. 441; Generes *v.* Bonnemer, 7 Wall. 564, 19 L. Ed. 287; Avendano *v.* Gay, 8 Wall. 376, 19 L. Ed. 422; Coughlin *v.* District of Columbia, 106 U. S. 7, 10, 27 L. Ed. 74.

A judgment affirmed in a case where the only ruling of the court, to be found in the record, was a judgment rendered in favor of a plaintiff for the recovery of a sum of money; where there was no question raised in the pleadings, no bill of exceptions, and no instructions or ruling of the court; and where what purported to be a statement of facts, signed by the judge, was filed more than two months after the writ of error was allowed and filed in the court, and nearly a month after the citation was issued. "To permit the judge to make a statement of facts,

court,[55] is a nullity and cannot be noticed by the appellate court though both parties consent.[56]

(2) *Statement of Facts on Appeal from Arizona.*—A statement of facts on appeal after it has been settled and signed, must be filed with the clerk during the term; or the court may by an order entered upon the record during the term authorize the statement of facts to be made up and signed and filed in vacation, at any time not exceeding thirty days after the adjournment of the term.[57] A statement of facts under the Revised Statutes of Arizona is not filed in time to become a part of the bill of exceptions, if it was not on file at the time of the settlement of the bill of exceptions or did not afterwards become a part of the record.[58]

b. *Consent of Parties.*—A statement of facts, filed without consent of the parties, must be treated as a nullity.[59]

B. Service—1. Of Bill of Exceptions.—By rules of court in some of the circuits, a copy of the bill of exceptions must be served upon the opposite party within a certain time.[60]

2. Of Statement of Facts on Appeal.—The statutes provide that a statement of facts on appeal shall be submitted to the opposite party or his attorney for inspection.[61]

VIII. Amendment or Contradiction of Bill.

A. Amendment—1. In General.—The exceptions must be drawn up and settled in proper form in the court below, and cannot be amended or redrafted in the supreme court,[62] either by referring to the charge at length,[63] or to the notes of the presiding judge.[64]

2. Opening Judgment for Purpose of Amendment.—A party cannot have

on which the case shall be heard here, after the case is removed to this court by the service of the writ of error, or even after it is issued, would place the rights of parties who have judgments of record, entirely in the power of the judge, without hearing and without remedy." Generes *v.* Bonnemer, 7 Wall. 564, 19 L. Ed. 287, cited and approved in Muller *v.* Ehlers, 91 U. S. 249, 251, 23 L. Ed. 319.

55. A paper, found in the record, purporting to be a statement of facts agreed to by the parties, and filed with the clerk after the writ of error is issued, or after the case is disposed of by the circuit court, cannot be noticed here on writ of error though both parties consent. Kearney *v.* Case, 12 Wall. 275, 20 L. Ed. 395, distinguishing Insurance Co. *v.* Tweed, 7 Wall. 44, 19 L. Ed. 65.

56. Statement filed too late is a nullity.—Generes *v.* Bonnemer, 7 Wall. 564, 19 L. Ed. 287; Kearney *v.* Case, 12 Wall. 275, 20 L. Ed. 395.

57. Statement of facts on appeal from Arizona.—Cohn *v.* Daley, 174 U. S. 539, 43 L. Ed. 1077.

58. Time of filing statement of facts under revised statutes of Arizona.—Cohn *v.* Daley, 174 U. S. 539, 43 L. Ed. 1077.

A statement which is not filed until after the adjournment of the term is not filed within the time required by the Arizona revised statutes, and cannot be considered as part of the record. Cohn *v.* Daley, 174 U. S. 539, 43 L. Ed. 1077.

59. Consent of parties.—Generes *v.* Bonnemer, 7 Wall. 564, 565, 19 L. Ed. 287; Herbert *v.* Butler, 97 U. S. 319, 24 L. Ed. 958.

60. Service of bill of exceptions.—Chateaugay Ore, etc., Co., Petitioner, 128 U. S. 544, 32 L. Ed. 508.

Where the record shows that judgment was entered on the verdict on July 10th, 1890, but time is extended until November 15th to prepare the bill of exceptions and deliver it to counsel on the other side, the fact that the bill of exceptions was not handed to counsel on the other side on or before November 15th, is rendered immaterial by the action of the judge below in settling the bill. Waldron *v.* Waldron, 156 U. S. 361, 39 L. Ed. 453.

61. Service of statement of facts on appeal.—Cohn *v.* Daley, 174 U. S. 539, 43 L. Ed. 1077.

62. Amendments not allowed in appellate court.—Stimpson *v.* West Chester R. Co., 3 How. 553, 11 L. Ed. 722; Hanna *v.* Maas, 122 U. S. 24, 26, 30 L. Ed. 1117.

The federal supreme court can in no respect alter or amend the exception certified under the seals of the judges of the circuit court. Stimpson *v.* West Chester R. Co., 3 How. 553, 11 L. Ed. 722.

63. Amendment by reference to charge at length.—Stimpson *v.* West Chester R. Co., 3 How. 553, 11 L. Ed. 722.

64. Bill cannot be amended by referring to notes of judge.—Stimpson *v.* West Chester R. Co., 3 How. 553, 11 L. Ed. 722.

a judgment opened in order to correct a mistake in the bill of exceptions.[65] Where, in correcting a bill of exceptions, or causing it to be corrected before signing, there are considerable erasures or interlineations in it or an exhibit thereto, the better practice is to require such portions of the bill of exceptions or exhibits to be rewritten, or to note the fact that the erasures or interlineations were made by the judge before signing.[65a]

3. Amendments at a Subsequent Term.—Any fault or omission in framing or tendering a bill of exceptions, being the act of the party and not of the court, cannot be amended at a subsequent term as a misprision of the clerk in recording inaccurately or omitting to record an order of the court might be.[66]

B. Correcting or Supplying Omissions—1. In General.—Nor can the supreme court correct an omission in the bill.[67] Where any omissions have been made in the court below in framing the bill of exceptions, and the omission is due to a clerical error, then upon producing a copy of the exception properly certified, the plaintiff in error will be entitled to a certiorari, in order to supply the defect.[68] But the bill of exceptions is conclusive upon the federal supreme court. They cannot presume or suspect that any material part of the evidence is omitted.[69]

2. Causes Removed from District of Columbia.—On appeals from the special term of the supreme court of the District of Columbia, omissions from the bill discovered before the hearing at the general term may be remedied by amendment.[70]

C. Impeachment or Contradiction.—Bills of exception, when properly taken and duly allowed, become a part of the record, and, as such, cannot be contradicted.[71]

65. Judgment will not be opened to allow amendments.—Gayler *v.* Wilder, 10 How. 509, 13 L. Ed. 517; United States *v.* Morgan, 11 How. 154, 13 L. Ed. 643.

Generally as to opening judgments, see the title JUDGMENTS AND DECREES.

After a case has been decided, and judgment pronounced by the supreme court, it is too late to move to open the judgment for the purpose of amending the bill of exceptions, upon the ground that material evidence which might have influenced the judgment of the court was omitted in the bill. If there was any error or mistake in framing the exception, it might have been corrected by a certiorari, if the application had been made in due time and upon sufficient cause. But after the parties have argued the case upon the exception, and judgment has been pronounced, it is too late to reopen it. Gayler *v.* Wilder, 10 How. 509, 13 L. Ed. 517.

65a. Manner of correcting interlineations stated.—Stimpson *v.* West Chester R. Co., 3 How. 553, 11 L. Ed. 772.

66. Amendments not allowed at subsequent term.—Michigan Ins. Bank *v.* Eldred, 143 U. S. 293, 299, 36 L. Ed. 162, citing In re Wight, 134 U. S. 136, 33 L. Ed. 865. See, generally, the title JUDGMENTS AND DECREES.

After the term has expired, without the court's control over the case being reserved by standing rule or special order, and especially after a writ of error has been entered in the supreme court, all authority of the court below to allow or amend a bill of exceptions is at an end. Michigan Ins. Bank *v.* Eldred, 143 U. S. 293, 36 L. Ed. 162.

67. Appellate court cannot correct omissions.—Stimpson *v.* West Chester R. Co., 3 How. 553, 11 L. Ed. 722; United States *v.* Morgan, 11 How. 154, 13 L. Ed. 643.

68. How omissions in bill supplied.—Gayler *v.* Wilder, 10 How. 509, 13 L. Ed. 517. See the title CERTIORARI, vol. 3, p. 651.

If the omission of a part of the charge, which was in fact embraced in the exception, is a mere clerical error, the party will be entitled to a certiorari, upon producing a copy of the exception, properly certified. Stimpson *v.* West Chester R. Co., 3 How. 553, 11 L. Ed. 722.

69. No presumption that matter has been omitted.—Bingham *v.* Cabot, 3 Dall. 19, 1 L. Ed. 491.

70. Practice in District of Columbia.—A certificate used as evidence at a special term was accidentally omitted from a bill of exceptions until after it had been signed, but the omission being discovered before the case was heard at general term, it was remedied by amendment. No objection being made at the general term, the objection will not be considered on review of the judgment by the supreme court. Keyser *v.* Hitz, 133 U. S. 138, 146, 33 L. Ed. 531.

71. Impeachment of bill.—Chaffee *v.* Boston Belting Co., 22 How. 217, 222, 16 L. Ed. 240.

IX. Striking Out.

A motion to strike out is the proper remedy where it is contended that the bill of exceptions was improperly settled and signed;[72] as where it is contended that the bill is not authenticated in accordance with the requirements of § 953 of the Revised Statutes.[73]

X. How Made Part of Record.

It seems that a bill of exceptions, if not tacked to the record, is not a part thereof.[74]

EXCESS BAGGAGE.—See the title CARRIERS, vol. 3, p. 583.

EXCESSIVE BAIL.—See the titles BAIL AND RECOGNIZANCE, vol. 2, p. 765; CONSTITUTIONAL LAW, vol. 4, p. 513.

EXCESSIVE DAMAGES.—See the titles DAMAGES, vol. 5, p. 168, et seq.; NEW TRIALS.

EXCESSIVE FINES AND PENALTIES.—See the titles FINES; PENALTIES AND FORFEITURES. See, also, the title CONSTITUTIONAL LAW, vol. 4, p. 513.

EXCESSIVE TAXATION.—See the title TAXATION.

EXCHANGE AND RE-EXCHANGE.—See the titles BILLS, NOTES AND CHECKS, vol. 3, p. 313; INTEREST; USURY. As to municipal and other securities, see the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.

EXCHANGE, BILL OF.—See the title BILLS, NOTES AND CHECKS, vol. 3, p. 257.

EXCHANGE BROKERS.—See the title BROKERS, vol. 3, p. 531.

EXCHANGE OF PROPERTY.

CROSS REFERENCES.

See the titles POWERS; RESCISSION, CANCELLATION AND REFORMATION; SPECIFIC PERFORMANCE.

As to the statute of frauds, see the title FRAUDS, STATUTE OF. As to exchange of land between Indians, see the title INDIANS.

Definition.—An exchange is an executed contract; it operates, per se, as a reciprocal conveyance of the thing given, and of the thing received; the thing given or taken in exchange must be specific, and so distinguishable from all things of the like kind, as to be clearly known and identified.[1]

Construction of Contract for Exchange of Land—Fraud.—A contract

72. **Motion to strike out.**—Cooke *v.* Avery, 147 U. S. 375, 37 L. Ed. 209.

73. **Improper authentication is ground for motion to strike out.**—Cooke *v.* Avery, 147 U. S. 375, 37 L. Ed. 209.

74. **Bill must be tacked to record.**—Clarke *v.* Russell, 3 Dall. 415, 1 L. Ed. 660; Sire *v.* Ellithorpe Air Brake Co., 137 U. S. 579, 34 L. Ed. 801.

The narration contained in the bill of exceptions of what occurred should generally be incorporated in the body of the decree. Thus, where the decree after stating that the case was heard on the bill, answer, exhibits, etc., and had been fully argued, and that the court had duly deliberated thereon, says: "It is further ordered that the bill of exceptions tendered and signed by the court be filed as a part of the record, which is done accordingly," and there is in the record a bill of exceptions filed the same day the decree was made, and the bill of exceptions states the case, it must have the same effect as if the narration it contains of what occurred were incorporated in the body of the decree. Ensminger *v.* Powers, 108 U. S. 292, 27 L. Ed. 732.

1. **Definition.**—Preston *v.* Keene, 14 Pet. 133, 10 L. Ed. 387.

In article 2630 of the civil code of Louisiana, an exchange is defined to be "a contract by which the contractors give to one another one thing for another, whatever it be, except money; for in that case it would be a sale." This definition proves, as the term exchange, ex vi termini, imports, that it is what is denominated in the civil code, a reciprocal contract; which, by article 1758 of that code, is declared to be a contract, where the parties expressly enter into mutual engagements. Preston *v.* Keene, 14 Pet. 133, 136, 10 L. Ed. 387.

Example.—A paper was executed by R. R. K., of the city of New Orleans, stating that the grantor, for and in consideration of a certain lot or parcel of land (describ-

for an exchange of real property is not to be construed by the strict rule in regard to the quantity of land that might govern its interpretation if it were an independent purchase to be paid for in money.[2]

Exchange by an Insolvent.—An insolvent may at any time exchange his property before proceedings in bankruptcy are taken by or against him, provided the exchange be conducted in good faith.[3]

Parol Exchange as Conveying Estate in Land.—A parol exchange of lands, or parol evidence that a conveyance should operate as an exchange, will not convey any estate or interest in lands.[4]

Remedies.—It has been held that one who has made an exchange for real property, if evicted, may either sue for damages, or for the thing given in exchange; but he must be evicted, before his cause of action can accrue.[5]

Specific Performance of Rescission of Contract.—See the titles SPECIFIC PERFORMANCE; RESCISSION, CANCELLATION AND REFORMATION.

EXCHANGE, RATE OF.—See the titles INTEREST; USURY. See, also, the title INSURANCE.

ing it), conveyed and transferred to J. B. and S. B., all his right, title and interest in a certain tract or parcel of land (describing it), "hereby warranting and defending unto" the said J. B. and S. B., all his right and title in the same, unto all persons claiming under them; the paper, called, under the laws of Louisiana, "an act of sale," was signed by R. R. K., J. B., S. B., and a notary of New Orleans, and was deposited in the office of the notary. This was not "an exchange," according to the laws of Louisiana. Preston *v.* Keene, 14 Pet. 133, 10 L. Ed. 387.

2. Not construed strictly.—Lawson *v.* Floyd, 124 U. S. 108, 118, 31 L. Ed. 347. See, generally, the title VENDOR AND PURCHASER.

In Lawson *v.* Floyd, 124 U. S. 108, 115, 31 L. Ed. 347, a bill in equity for relief from a contract for the exchange of lands, it was alleged that defendant L. apart from the written contract and at or about the time it was made, made representations in regard to the number of acres within the boundaries of the tract which he was selling, under circumstances that authorized plaintiff F. to rely upon them as true, and that these representations were either intentionally false and made to deceive or were in fact untrue and known to L. to be so. It was held, the evidence did not leave the impression that L. made any positive representations as to the quantity of land within the boundaries described, and especially as to the tract containing a thousand acres, much less any statements on that subject which were intended to deceive, and which he knew to be false or untrue.

3. Insolvent may exchange land.—Cook *v.* Tullis, 18 Wall. 332, 21 L. Ed. 933. See the title BANKRUPTCY, vol. 2, p. 947.

4. Parol exchange no conveyance of estate in land.—Clark *v.* Graham, 6 Wheat. 577, 5 L. Ed. 334; Purcell *v.* Miner, 4 Wall. 513, 18 L. Ed. 435; Union Pac. R. Co. *v.* McAlpine, 129 U. S. 305, 32 L. Ed. 673. See the title FRAUDS, STATUTE OF.

But possession and improvement will take the contract out of the operation of the statute. Union Pac. R. Co. *v.* McAlpine, 129 U. S. 305, 32 L. Ed. 673.

5. Remedies.—So held under the civil code of Louisiana. Preston *v.* Keene, 14 Pet. 133, 10 L. Ed. 387.

EXCHANGES.

CROSS REFERENCES.

See the titles BANKRUPTCY, vol. 2, p. 892; BROKERS, vol. 3, p. 531; DOCUMENTARY EVIDENCE, vol. 5, p. 431; GAMBLING CONTRACTS; PARTIES; PRINCIPAL AND AGENT.

As to violation of interstate commerce law by stock exchanges, see the title INTERSTATE AND FOREIGN COMMERCE. As to attempt to monopolize trade, see the titles MONOPOLIES AND CORPORATE TRUSTS; RESTRAINT OF TRADE. As to taxation on sales of stock, see the title REVENUE LAWS. As to the right of a party who has deposited funds in trust, with a governing committee of an exchange, who were to see that the purpose of the trust was fulfilled, see the title TRUSTS AND TRUSTEES.

Nature and Object.—Exchanges are generally voluntary associations for business purposes. Their object is to furnish a meeting place for those engaged in the purchase and sale of commodities, to give them the advantages provided by the exchange and to promote honest and fair dealing among their members.[1]

Membership—Property in Seat.—Membership of a stock and exchange board is not a matter of absolute sale. Although property, it is, when purchased, qualified and encumbered by conditions which the creators of it had the right to impose, and a compliance with which is necessary to obtain it.[2] While the property in a seat is peculiar and in its nature a personal privilege, yet such value as it may possess, notwithstanding the restriction to which it is subject, is susceptible of being realized by creditors. A provision in the constitution of a stock and exchange board, whose members are limited in number, and elected by ballot, that a member, upon failing to perform his contracts, or becoming insolvent, may assign his seat to be sold, and that the proceeds shall, to the exclusion of his outside creditors, be first applied to the benefit of the members to whom he is indebted, is not open to objection on the ground of public policy.[3] Nor does such exclusion violate the bankrupt act.[4]

1. **Nature and object.**—The San Francisco Stock and Exchange Board is a voluntary association for business purposes, organized in 1862, in that city. Hyde *v.* Woods, 94 U. S. 523, 24 L. Ed. 264.

Sale at an exchange distinguished from private sale.—Nichol *v.* Ames, 173 U. S. 509, 522, 43 L. Ed. 786.

They furnish a meeting place for those engaged in the purchase and sale of commodities or other things to be sold, and in that way they offer facilities for a market for them. Nicol *v.* Ames, 173 U. S. 509, 517, 43 L. Ed. 786.

2. **Membership.**—Hyde *v.* Woods, 94 U. S. 523, 24 L. Ed. 264.

3. **Seats may be sold by creditors.**—Sparhawk *v.* Yerkes, 142 U. S. 1, 12, 35 L. Ed. 915; Hyde *v.* Woods, 94 U. S. 523, 24 L. Ed. 264.

The membership is elective, with certain provisions for a right to sell and assign the seat, subject to an election of the purchasing member by the board. This is generally done, unless special reasons appear to the contrary; and the result is, that, as the number of members is limited, the right to a seat at the board has a moneyed value. When a member fails to perform his contracts, or becomes insolvent, he can no longer be a member of the board, until he resumes payment; but his seat may be sold for his benefit, or for that of his creditors, among the other members of the board. Hyde *v.* Woods, 94 U. S. 523, 524, 24 L. Ed. 264.

In Hyde *v.* Woods, 94 U. S. 523, 24 L. Ed. 264, it was ruled that the ownership of a seat in a stock and exchange board is property not absolute and unqualified, but limited and restricted by the rules of the association; that such rules in imposing the condition upon the disposition of membership that the proceeds should be first applied to the benefit of creditor members are not open to objection on the ground of public policy. Sparhawk *v.* Yerkes, 142 U. S. 1, 12, 35 L. Ed. 915.

4. **Not in violation of bankrupt act.**—Hyde *v.* Woods, 94 U. S. 523, 24 L. Ed. 264; Page *v.* Edmunds, 187 U. S. 596, 47 L. Ed. 518. See the title BANKRUPTCY, vol. 2, p. 854.

It has been held in Pennsylvania that

Contracts Made with Reference to Rules.—All transactions regarding the sales and purchases of shares of stock, which are made subject to the rules of a board of trade, must be regarded as having taken place with direct reference and subject to those rules.[5] But one contracting with reference to the rules and regulations of an exchange, which provide a means by which the parties may seek and obtain relief in accordance with their terms, but which do not assume to exclude the jurisdiction of the courts, in pursuing a remedy, is not confined to that which the rules provide, to the exclusion of the jurisdiction of ordinary courts of justice.[6]

Rules and Regulations as Evidence.—The rules and regulations of a board of trade are competent evidence in an action upon a contract where the contract was to be conducted under the rules and regulations, and they were understood by the party contracting with the board of trade.[7]

Ratification of Contracts.—The mere retention of an account and statement rendered by a board of trade that they have offset one contract for another does not amount to a ratification of the change.[8] But where under a rule of a board of trade, a commission merchant of the board assumes to offset or cancel a contract, made by him for the board by substituting therefor another equivalent contract with some person who shall be bound for its performance, it is a question of law whether there has been an actual substitution within the meaning of the rule.[9]

Quotations—Property Right Therein.—A board of trade, which has collected at its own expense quotations of prices offered and accepted, may distribute the use of them under contract to any persons it chooses, and upon any condition, and may equally exclude them from whom it chooses; nor is this property right lost by communicating the quotations to any number of persons approved by the board. The fact that this collection of information concerns an illegal act, does not affect the property right therein. And as the board of trade can refrain from communicating the quotations at all, a contract excluding a certain class of persons is not against public policy.[10]

these seats are not exempt from sale by the trustee in bankruptcy. Page *v.* Edmunds, 187 U. S. 596, 47 L. Ed. 518.

5. **Contracts made with reference to rules.**—Clews *v.* Jamieson, 182 U. S. 461, 482, 45 L. Ed. 1183; Bibb *v.* Allen, 149 U. S. 481, 37 L. Ed. 817.

6. **Does not exclude remedy in court.**—Clews *v.* Jamieson, 182 U. S. 461, 495, 45 L. Ed. 1183.

7. **Are admissible in evidence.**—Hansen *v.* Boyd, 161 U. S. 397, 40 L. Ed. 746; Bibb *v.* Allen, 149 U. S. 481, 37 L. Ed. 817.

8. Plaintiffs and defendant had contracted for buying and selling wheat. The plaintiffs' board of trade, asked for authority to transfer May wheat to June wheat. To this request the defendant made no answer. The transfer was made, and the defendant was notified. It was held that the failure to complain of the statement of the change, rendered him, did not amount to a ratification. Hansen *v.* Boyd, 161 U. S. 397, 40 L. Ed. 746. See the title PRINCIPAL AND AGENT.

9. **Whether substitution is a sufficient question of law.**—Under this rule a commission merchant, having many similar contracts to the one cancelled, designated no particular contract, but intended to substitute a similar contract at the time of settlement. It was held that this was not a sufficient substitution within the meaning of the rule, and therefore an instruction to the jury to that effect was proper. Higgins *v.* McCrea, 116 U. S. 671, 29 L. Ed. 764.

10. **Property right in quotations.**—Board of Trade *v.* Christie Grain, etc., Co., 198 U. S. 236, 49 L. Ed. 1031; Hunt *v.* New York Cotton Exchange, 205 U. S. 322, 51 L. Ed. 821.

Injunction to restrain use of quotations.—An injunction will lie to restrain the use of quotations used without authority of a board of trade. Board of Trade *v.* Christie Grain, etc., Co., 198 U. S. 236, 49 L. Ed. 1031. See, generally, the title INJUNCTIONS.

Jurisdiction of circuit court to enjoin the use of quotations depending upon amount in controversy.—See the title COURTS, vol. 4, p. 978.

EXCHEQUER BILLS.—Exchequer bills are a class of bills of credit, in England issued by the officers of the exchequer, when a temporary loan is necessary to meet the exigencies of government. They were first termed tallies of loan, and orders of repayment, charged on the credit of the exchequer in general, and made assignable from one person to another.[1]

EXCISE.—See the titles REVENUE LAWS; TAXATION; TERRITORIES. "An excise duty is an inland impost, levied upon articles of manufacture or sale, and also upon licenses to pursue certain trades or to deal in certain commodities."[2]

EXCLAMATIONS.—See the title RES GESTÆ.

EXCLUSION.—Of aliens, see the titles ALIENS, vol. 1, p. 245, et seq.; CHINESE EXCLUSION ACTS, vol. 3, p. 769. Of passengers by carrier, see the title CARRIERS, vol. 3, p. 566. See, also, the titles BENEFICIAL AND BENEVOLENT ASSOCIATION, vol. 3, p. 212; INDIANS; RELIGIOUS SOCIETIES; STOCK AND STOCKHOLDERS; WAR.

EXCLUSIVE.—Exclusive is defined to mean "Appertaining to the subject alone; not including, admitting or pertaining to any other or others; undivided; sole; as, an exclusive right or privilege; exclusive jurisdiction."[3]

EXCLUSIVE PRIVILEGES.—See the title MONOPOLIES AND CORPORATE TRUSTS. As to exclusive ferry privilege, see the title FERRIES. As to bridges, see the title BRIDGES, vol. 3, pp. 520, 521. As to fish, see the title FISH AND FISHERIES. See, also, the titles CONSTITUTIONAL LAW, vol. 4, pp. 372-383; 409-412; CORPORATIONS, vol. 4, pp. 679, et seq.; 687-713; 779; 784; IMPAIRMENT OF OBLIGATION OF CONTRACTS; MUNICIPAL CORPORATIONS; STREETS AND HIGHWAYS; WATER COMPANIES AND WATERWORKS.

EXCLUSIVE RIGHTS.—As to minerals, see the title MINES AND MINERALS. As to patents, see the title PATENTS.

EXCOMMUNICATION.—See the title RELIGIOUS SOCIETIES.

EXCURSION TICKETS.—See the title CARRIERS, vol. 3, p. 570, et seq.

EXCUSABLE HOMICIDE.—See the title HOMICIDE.

EXCUSE.—For nonperformance or delay, see the title CONTRACTS, vol. 4, p. 585, et seq. See, also, the titles CARRIERS, vol. 3, p. 556; MASTER AND SERVANT; SALES.

1. Briscoe *v.* Bank, 11 Pet. 257, 328e, 9 L. Ed. 709. See the title CONSTITUTIONAL LAW, vol. 4, p. 305, et seq.

2. **Excise.**—Pollock *v.* Farmers' Loan, etc., Co., 158 U. S. 601, 622, 39 L. Ed. 1108; Patton *v.* Brady, 184 U. S. 608, 46 L. Ed. 713.

In Patton *v.* Brady, 184 U. S. 608, 46 L. Ed. 713, it is said: "If we turn to the general dictionaries, Webster's International calls it 'an inland duty or impost, operating as an indirect tax on the consumer, levied upon certain specified articles, as tobacco, ale, spirits, etc., grown or manufactured in the country. It is also levied on licenses to pursue certain trades and deal in certain commodities.' The definition in the Century Dictionary is substantially the same, though in addition this is quoted from Andrews on Revenue Laws, § 133: '**Excises** is a word generally used in contradistinction to imposts in its restricted sense, and is applied to internal or inland impositions, levied sometimes upon the consumption of a commodity, sometimes upon the retail sale of it, and sometimes upon the manufacture of it.'"

In Pollock *v.* Farmers' Loan, etc., Co., 157 U. S. 429, 592, 39 L. Ed. 759, it is said: "**Excises** are a species of tax consisting generally of duties laid upon the manufacture, sale, or consumption of commodities within the country, or upon certain callings or occupations, often taking the form of exactions for licenses to pursue them."

In Pacific Ins. Co. *v.* Soule, 7 Wall. 443, 445, 19 L. Ed. 95, it is said: "**Excise** is defined to be an inland imposition, sometimes upon the consumption of the commodity, and sometimes upon the retail sale; sometimes upon the manufacturer, and sometimes upon the vendor."

3. Vicksburg *v.* Vicksburg Waterworks Co., 202 U. S. 453, 471, 50 L. Ed. 1102, citing Century Dictionary.

Exclusive jurisdiction of the United States.—The phrase, "'within the **exclusive** jurisdiction of the United States,' is well understood as applying to the crimes which are committed within the premises, grounds, forts, arsenals, navy yards, and other places within the boundaries of a state, or even within a territory, over which the federal government has by cession, by agreement, or by reservation **exclusive** jurisdiction." Gon-Shay-Ee, 130 U. S. 343, 352, 32 L. Ed. 973. See the title CRIMINAL LAW, vol. 5, p. 76, et seq.

EXECUTED.—See note 1.

EXECUTED CONTRACT.—See the title CONTRACTS, vol. 4, p. 568.

EXECUTED TRUST.—See the title TRUSTS AND TRUSTEES.

EXECUTION.—Of criminal, see the title SENTENCE AND PUNISHMENT. Of process, see the title SUMMONS AND PROCESS. Of the various written instruments, see the titles treating thereof.

EXECUTION AGAINST THE BODY AND ARREST IN CIVIL CASES.

BY R. E. MAXWELL.

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CROSS REFERENCES.

See the title ARREST, vol. 2, p. 541; BAIL AND RECOGNIZANCE, vol. 2, p. 767; DISMISSAL, DISCONTINUANCE AND NONSUIT, vol. 5, p. 356; ESCAPE, vol. 5, p. 893; FINES; PRISONS AND PRISONERS; RESCISSION, CANCELLATION AND REFORMATION; SHERIFFS AND CONSTABLES; PRINCIPAL AND SURETY.

1. Executed.—In Young *v.* Clarendon Tp., 132 U. S. 340, 351, 33 L. Ed. 356, in construing a statute authorizing the issuance of bonds by a township to a railroad, the court said: "The bonds were to be executed; that is to say, written or printed, signed and sealed by the supervisor and clerk of the township. Here the powers of those persons ceased. They could not perfect the instruments by delivery. The word executed, used in the statute in connection with the acts mentioned, manifestly does not import the final delivery, for that is expressly directed to be done by the treasurer. Such delivery as they could make was clearly not the technical delivery needed to complete the bonds as negotiable instruments, because the power to hand over to the payee was not conceded to them in any event. The delivery which they were directed to make to the treasurer in his capacity of statutory trustee was only such as amounted to a 'giving up' or the 'committing' of them to the treasurer for his safe-keeping. The word was used in its ordinary and popular sense, not in the technical one." See the title MUNICIPAL, COUNTY, STATE AND FEDERAL AID.

As to scope of review upon an appeal from a decision refusing the discharge of an imprisoned debtor upon habeas corpus proceedings, see the title APPEAL AND ERROR, vol. 2, p. 371. As to bail in civil cases, see the title BAIL AND RECOGNIZANCE, vol. 2, p. 767, et seq. As to privilege from arrest in civil cases, see the titles BANKRUPTCY, vol. 2, p. 855; PRIVILEGE. As to release of an indorser by discharging a maker of a note from custody under a ca. sa., see the title BILLS, NOTES AND CHECKS, vol. 3, p. 353. As to including cost of first ca. sa. in second ca. sa., see the title COSTS, vol. 4, p. 802. As to discharge of a person confined upon a ca. sa. by a writ of habeas corpus, see the title HABEAS CORPUS. As to service of a capias ad respondendum, see the title SUMMONS AND PROCESS. As to a discharge of the principal on a bond who is imprisoned under a ca. sa. releasing the sureties, see the title PRINCIPAL AND SURETY. As to liability of officer for allowing an escape of a person arrested in a civil case, see the title ESCAPE, vol. 5, p. 893. As to marshal's fee on capias ad satisfaciendum, see the title UNITED STATES' MARSHALS.

I. Nature of Capias Ad Satisfaciendum.

The writ of capias ad satisfaciendum in some states is similar to the original of the English practice,[1] and in its terms applies to civil suits only.[2]

II. Grounds for Issuance.

A capias ad satisfaciendum is the proper writ to take the body of a person, against whom a judgment has been recovered.[3] Also, it has been held that a capias ad satisfaciendum is the only mode by which the equitable estate of a debtor or his choses in action can be in any way reached by any legal process.[4] And it is provided by statute in some states that the writ may issue for fines, and such proceedings shall be had as in cases where similar suits of capias ad satisfaciendum are issued in personal suits.[5]

III. Against Whom Execution May Issue.

It has been held that though where two joint debtors are sued, and only one is brought into court on process, and judgment passes for plaintiff, he may have judgment against both joint debtors, but it is not lawful to issue or execute an execution against the body of the one not brought into court.[6]

IV. Election of Remedies.

The plaintiff in a judgment has an undoubted right to an execution against the person and the property of the defendant. He has his election, but his adoption of an execution against the property does not preclude him from resorting to an execution against the body, if he does not obtain satisfaction of the debt on the first execution. His remedies are cumulative and successive which he may pursue until he reaches that point at which the law declares his debt satisfied.[7]

1. **Nature.**—So held in Pennsylvania, Schlosser *v.* Lesher, 1 Dall. 411, 1 L. Ed. 200.

It may be here stated, that writs of capias ad satisfaciendum in Maryland are the same in substance in their exigency as those prescribed in the common law. Ex parte Watkins, 7 Pet. 568, 575, 8 L. Ed. 786.

2. **Applies to civil suits only.**—Ex parte Watkins, 7 Pet. 568, 576, 8 L. Ed. 786.

3. **To take body of person.**—Snead *v.* McCoull, 12 How. 407, 417, 13 L. Ed. 1043; Bank *v.* Tyler, 4 Pet. 366, 7 L. Ed. 888; Ex parte Watkins, 7 Pet. 568, 576, 8 L. Ed. 786; Tayloe *v.* Thomson, 5 Pet. 358, 8 L. Ed. 154; Bank *v.* Weisiger, 2 Pet. 331, 7 L. Ed. 441.

4. **To reach equitable estate of debtor.**—So held under the law of Kentucky. Bank *v.* Tyler, 4 Pet. 366, 7 L. Ed. 888.

5. **May issue for recovery of fines.**—Ex parte Watkins, 7 Pet. 568, 8 L. Ed. 786. See the title FINES.

6. **Issuance against person not brought unto court.**—So held under the New York law. D'Arcy *v.* Kelchum, 11 How. 165, 13 L. Ed. 648.

7. **Election of remedies.**—Tayloe *v.* Thomson, 5 Pet. 358, 8 L. Ed. 154.

"This execution or seizing of lands by elegit is of so high a nature that after it the body of the defendant cannot be taken, but if execution can only be had of the goods because there are no lands, and such goods are not sufficient to pay

V. Requisites of Writ.

The writs of capias ad satisfaciendum must always specify the nature of the action declared on.[8]

VI. Duty to Produce Body in Court.

It has been by statute in some states made the duty of the officer, who has taken the body of the defendant, if he cannot acknowledge in open court the receipt of the amount due from the defendant, to produce the body to the court to which the writ of capias ad satisfaciendum is returnable.[9]

VII. Privilege from Arrest.

See the title PRIVILEGE.

VIII. Duration of Imprisonment.

The prisoner in a criminal case cannot be detained in jail longer than the return day of the process of capias ad satisfaciendum without a committitur. The writ becomes functus officio after the return day.[10]

IX. Discharge.

A. Ground for.—A defendant may be discharged from an arrest under an execution by a justice of the peace, when the execution was issued, for a sum beyond the jurisdiction of the justice of the peace.[11] Also provisions have been made by statute for the discharge of insolvent persons confined under execution, by giving notice to the plaintiff of the defendants' intention to claim his discharge as an insolvent.[12]

X. Rearrest.

If the plaintiff consent to the defendant being discharged out of execution, he cannot afterwards rearrest him, although the security given by the defendant on his discharge should be afterwards set aside.[13] But where the defendant is arrested and brought into court on the return day, and it not then prayed into

the debt, a capias ad satisfaciendum may then be had after the elegit, for such elegit is in this case no more than a fieri facias, so that body and goods may be taken in execution, or lands and goods; but not body and land too, upon any judgment between subject and subject in the course of the common law." Snead *v.* McCoull, 12 How. 407, 416, 13 L. Ed. 1043.

With regard to the effect of the capias ad satisfaciendum upon the rights of the parties to a judgment, we are told by Blackstone, vol. 3, p. 415, that: "The writ of capias ad satisfaciendum is an execution of the highest nature, in as much as it deprives a man of his liberty till he makes the satisfaction awarded, and therefore, when a man is once taken in execution upon this writ, no other process can be sued out against his lands or his goods." Snead *v.* McCoull, 12 How. 407, 416, 13 L. Ed. 1043.

8. Must specify nature of action declared on.—Schlosser *v.* Lesher, 1 Dall. 411, 413, 1 L. Ed. 200.

9. Duty to produce body to the court.—Ex parte Watkins, 7 Pet. 568, 575, 8 L. Ed. 786.

The Maryland act of December 24, 1795, ch. 74, declares it to be the duty of the sheriffs to return the writ of capias ad satisfaciendum of the courts to which they are returnable, at the term succeeding the issuing of the same; and wherever the sheriff shall make return, that he has taken the body of the party, he shall be obliged either to acknowledge in open court the receipt of the amount of the fine or forfeiture, or to produce the body of the party to the court, to which the said writ shall be returned. Ex parte Watkins, 7 Pet. 568, 575, 8 L. Ed. 786.

10. Cannot be detained longer than the return day of the writ.—Ex parte Watkins, 7 Pet. 568, 579, 8 L. Ed. 786.

Maryland courts assert the uniform practice upon writs of capias ad satisfaciendum to be to bring the party into court and then to award a committitur. No instance is shown, in which a party has ever been held in custody after the return term, upon such a capias ad satisfaciendum, without a committitur. Ex parte Watkins, 7 Pet. 568, 577, 8 L. Ed. 786.

11. Execution issued by justice without jurisdiction.—Geyger *v.* Stoy, 1 Dall. 135, 1 L. Ed. 70. See the title JUSTICE OF THE PEACE.

12. See the title IMPRISONMENT FOR DEBT.

13. Rearrest.—Snead *v.* McCoull, 12 How. 407, 416, 13 L. Ed. 1043.

commitment, though he is no longer to be detained in custody, he may be re-arrested upon a new capias ad satisfaciendum.[14]

XI. Liability to Marshal for Poundage.

It has been held that the plaintiff in the execution, and not the defendant, is liable to a marshal for poundage on a capias ad satisfaciendum; especially so where the plaintiff releases the defendant, and thereby deprives the marshal of all recourse against the defendant.[15]

XII. Execution of Ca. Sa. as Binding Real Estate.

It has been enacted by statutes in some states that executions of capias ad satisfaciendum shall bind the real estate of the defendant from the time when they shall be levied.[16]

XIII. Effect of Commitment on a Ca. Sa.

A. Suspension of Other Remedies.—The greatest effect which the law gives to a commitment on a capias ad satisfaciendum, is a suspension of the other remedies, during its continuance; whenever it terminates, without the consent of the creditor, the plaintiff is restored to them as fully as if he had never made use of any.[17]

B. As Discharging Judgment.—See the title JUDGMENTS AND DECREES.

XIV. Alias Capias.

It is necessary that an alias capias be tested at the return of the original capias,[18] and it must be made returnable to the next issuing term.[19]

XV. Right of Creditor against Third Persons for Rescuing Debtor from Arrest.

The right of a judgment creditor to proceed by action against those who rescue the person of his debtor arrested on mesne or final process, is well recognized at common law.[20]

EXECUTION AND PROOF OF DOCUMENTS.—See the titles BEST AND SECONDARY EVIDENCE, vol. 3, p. 214; CONTRACTS, vol. 4, p. 556, et seq.; DEEDS, vol. 5, p. 245; DOCUMENTARY EVIDENCE, vol. 5, p. 431; WILLS; ETC. See, also, the titles HANDWRITING; LOST INSTRUMENTS AND RECORDS. As to admissions, see the title DECLARATIONS AND ADMISSIONS, vol. 5, p. 214. As to admissions in pleadings, see the titles EQUITY, vol. 5, p. 803; PLEADING.

EXECUTION OF WILLS.—See the title WILLS.

14. The case of West *v.* Hayland, 3 Har. & Johns. 200, decides that a new capias ad satisfaciendum may issue against a person who has been arrested and brought into court, but was not committed, which presupposes that he is not then deemed in custody upon the old one. Ex parte Watkins, 7 Pet. 568, 577, 8 L. Ed. 786.

15. **Plaintiff liable for poundage.**—United States *v.* Ringgold, 8 Pet. 150, 162, 8 L. Ed. 899.

16. **Virginia statute.**—In the revisal of the laws of Virginia, made in the year 1819 (going into operation in the year 1820), a provision was introduced by the tenth section of the law concerning execution, declaring that all executions of capias ad satisfaciendum, levied after the commencement of this act, shall bind the real estate of the defendant from the time when they shall be levied. Snead *v.* McCoull, 12 How. 407, 419, 13 L. Ed. 1043.

17. **Only temporarily suspends remedies.**—Taylor *v.* Thomson, 5 Pet. 358, 8 L. Ed. 154. See ante, "Election of Remedies," IV.

18. **Must be tested at time of the original capias.**—United States *v.* Parker, 2 Dall. 373, 378, 1 L. Ed. 421.

19. **Must be returned to next issuing term.**—United States *v.* Parker, 2 Dall. 373, 378, 1 L. Ed. 421.

20. **May have action for damages.**—"In Comyns's Digest, under the head of Action on the Case for Misfeasance, A. 5, it is stated that an action will lie for rescue of a person arrested upon mesne or judicial process, citing 2 Cro. 419, 486; Cro. Car. 109; or of goods taken in execution. And the action lies by the party to the suit in which the arrest was citing 2 Cro. 486; Cro. Car. 109; 2 Rolle's Ab. 556, pl. 14, 15." Findlay *v.* McAllister, 113 U. S. 104, 111, 28 L. Ed. 930.

EXECUTIONS.

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CROSS REFERENCES.

See the titles ATTACHMENT AND GARNISHMENT, vol. 2, p. 660; EXECUTION AGAINST THE BODY AND ARREST IN CIVIL CASES, ante, p. 80; HOMESTEAD EXEMPTIONS; JUDGMENTS AND DECREES; SHERIFFS', CONSTABLES' AND MARSHALS' SALES; VENDITIONI EXPONAS.

I. Definition and Purpose.

An execution is a writ, issuing from a court,[1] and is an authority to the sheriff or other officer to do what it commands.[2] An execution is the end and life of the law,[3] and is indispensably necessary to the beneficial exercise of the jurisdiction of a court.[4] The purpose of an execution is to give effect to the judgment on which issued.[5]

II. Classification.

A. Fieri Facias.—This is the ordinary writ of execution,[6] and is treated in this title.

B. Capias Ad Satisfaciendum.—For treatment of this subject, see elsewhere.[7]

1. Definition.—Wayman *v.* Southard, 10 Wheat. 1, 32, 6 L. Ed. 253.

2. Insurance Co. *v.* Hallock, 6 Wall. 556, 559, 18 L. Ed. 948; Wayman *v.* Southard, 10 Wheat. 1, 32, 6 L. Ed. 253.

An execution is legal process within the bankruptcy laws, and a bankrupt may commit an act of bankruptcy by suffering a preference to be acquired thereby. Rogers *v.* Palmer, 102 U. S. 263, 26 L. Ed. 164. See the title BANKRUPTCY, vol. 2, p. 811.

3. End of law.—United States *v.* Nourse, 9 Pet. 8, 28, 9 L. Ed. 31; Central Nat. Bank *v.* Stevens, 169 U. S. 432, 465, 42 L. Ed. 807; Bank *v.* Halstead, 10 Wheat. 51, 86, 6 L. Ed. 264.

4. Bank *v.* Halstead, 10 Wheat. 51, 55, 6 L. Ed. 264.

"A judgment is given that execution may follow thereon." Watson *v.* Taylor, 21 Wall. 378, 384, 22 L. Ed. 576.

The award of execution is a part, and an essential part, of every judgment passed by a court exercising judicial power. There is no judgment, in the legal sense of the term, without it. Without such an award the judgment would be inoperative and nugatory, leaving the aggrieved party without a remedy. South Dakota *v.* North Carolina, 192 U. S. 286, 320, 48 L. Ed. 448; Watson *v.* Taylor, 21 Wall. 378, 384, 22 L. Ed. 576.

5. Purpose—To enforce judgment.—An execution follows the nature of the judgment, and its precept is to carry into effect the rights of the plaintiff as declared by the judgment, with that mode and measure of redress which in such cases the law gives. Harshman *v.* Knox County, 122 U. S. 306, 319, 30 L. Ed. 1152.

6. Fieri facias.—Insurance Co. *v.* Hallock, 6 Wall. 556, 559, 18 L. Ed. 948.

It is declared by Stat. of 22 Geo. II that there shall be a fieri facias for taking the goods—an elegit for taking lands, and a capias ad satisfaciendum for taking the body of any person against whom a judgment is obtained. Snead *v.* McCoull, 12 How. 407, 418, 13 L. Ed. 1043.

7. Capias ad satisfaciendum.—See the title EXECUTION AGAINST THE

C. Elegit.—For treatment of this subject, see elsewhere.[8]

D. Extendi Facias.—The statute of Westminster, the second, provides that the chattels and land of the debtor may be extended under this writ.[9]

E. Venditioni Exponas.—For treatment of this subject, see elsewhere.[10]

III. Property Subject to Execution.

A. In General.—An execution may ordinarily be levied upon all property that has a visible and tangible existence,[11] within the jurisdiction of the court and the precinct of the officer;[12] and all rents, profits and rights, arising from or appurtenant or appendant thereto.[13] By the common law, the body, lands, and goods of the king's debtor were liable to be levied on to obtain payment.[14] The property need not be the subject of sale.[15] It is the title of the defendant, and not the property itself, which is subject to execution.[16]

B. Conflict of Laws.—Liability of property to be subjected to execution is, in the case of real estate, to be determined by the law of the jurisdiction of the situs;[17] in the case of personal property, by law of the state where the property actually is, regardless of the domicile of the owner;[18] and, in the case of choses in action and trusts, where created or to be found.[19]

C. Effect of State Laws in United States Courts.—The different states have the power to subject property within their territory to execution,[20] and such state laws can be availed of in the United States courts, when adopted.[21]

D. Personal Property—1. Money.—Though not subject to sale, money may be taken in execution;[22] but the legal or actual possession of the specific pieces

BODY AND ARREST IN CIVIL CASES, ante, p. 80.

8. Elegit.—See the title JUDGMENTS AND DECREES.

9. Extendi facias.—Snead *v.* McCoull, 12 How. 407, 412, 13 L. Ed. 1043. See post, "At Common Law," III, E, 1.

10. Venditioni exponas.—See the title VENDITIONI EXPONAS.

11. Property subject to execution.—Ager *v.* Murray, 105 U. S. 126, 130, 26 L. Ed. 942; Gue *v.* Tidewater Canal Co., 24 How. 257, 263, 16 L. Ed. 635; East Alabama R. Co. *v.* Visscher, 114 U. S. 340, 353, 29 L. Ed. 136.

12. Ager *v.* Murray, 105 U. S. 126, 130, 26 L. Ed. 942.

13. If the incorporeal right in question is a parcel of the corporeal thing levied upon, as a right appendant or appurtenant thereto—not a distinct and independent right unannexed to any other corporeal thing—it is subject to execution. Stevens *v.* Gladding, 17 How. 447, 453, 15 L. Ed. 155.

"By the levy of an execution on a mill, the incorporeal rights actually annexed to the mill, and necessary to its use, pass with the mill. So does what is parcel of the mill, though temporarily removed from it—as a millstone, which has been taken from its place to be picked." Stevens *v.* Gladding, 17 How. 447, 453, 15 L. Ed. 155.

14. Murray *v.* Hoboken Land, etc., Co., 18 How. 272, 277, 15 L. Ed. 372.

15. Salability of property is not an infallible test of its being subject to execution. Turner *v.* Fendall, 1 Cranch 117, 134, 2 L. Ed. 53.

16. Title of debtor.—By the common-law process of execution, property is reached only through a personal defendant, and then only to the extent of his title. Under a sale, therefore, upon a judgment in a common-law proceeding, the title acquired can never be better than that possessed by the personal defendant. It is his title, and not the property itself, which is to be sold. The Moses Taylor, 4 Wall. 411, 427, 18 L. Ed. 397.

17. Conflict of laws—Realty.—Spindle *v.* Shreve, 111 U. S. 542, 547, 28 L. Ed. 512. See the title CONFLICT OF LAWS, vol. 3, pp. 1035, 1088. And see post, "Equitable Estates and Interests," III, F.

18. Personalty.—Where personal property is seized and sold under an execution, issuing from a court of the state where the property is, the question of the liability of the property to be sold under such writ must be determined by the law of that state, notwithstanding the domicile of all the claimants to the property may be in another state. Green *v.* Van Buskirk, 5 Wall. 307, 18 L. Ed. 599; Hervey *v.* Rhode Island Locomotive Works, 93 U. S. 664, 23 L. Ed. 1003.

19. Choses and trusts.—Spindle *v.* Shreve, 111 U. S. 542, 547, 28 L. Ed. 512.

20. Effect of state laws in United States courts.—McGoon *v.* Scales, 9 Wall. 23, 30, 19 L. Ed. 545.

21. Bank *v.* Halstead, 10 Wheat. 51, 63, 6 L. Ed. 264; Ward *v.* Chamberlain, 2 Black 430, 440, 17 L. Ed. 319. See the title COURTS, vol. 4, p. 1086.

22. Money—Nonsalability not objection.—The court can perceive no reason, in the nature of the thing, why an execution should not be levied on money. That given in the books, viz, that it cannot be sold, seems not to be a good one. The reason of a sale is that money only will

of money must be first obtained by the debtor.[23] Money in the hands of a sheriff under a levy by him is not considered as in his possession.[24]

2. Choses in Action.—At common law, a chose in action is not subject to be levied upon by a fieri facias;[25] but, by statute in many states, this rule has been changed in regard to a number of choses.[26]

3. Patents and Copyrights.—Patent and copyrights, being invisible and intangible,[27] not existing within the jurisdiction of any particular court nor the precinct of any particular officer,[28] and not attached to any corporeal thing,[29] are not subject to execution;[30] but the tangible thing patented or copyrighted

satisfy the execution, and if anything else be taken, it must be turned into money; but surely that the means of converting the thing into money need not be used, can be no adequate reason for refusing to take the very article to produce which is the sole object of the execution. The object is, not the sale, but money, and if the money can be made, without a sale, it cannot be unlawful to do so. But in the case of an execution for tobacco, money may be sold, and therefore may be executed, and it would be strange, if, by an execution ordering a sheriff to make the money, money could not be taken, and yet might be taken on an execution ordering him to make some other article. Turner *v.* Fendall, 1 Cranch 117, 134, 2 L. Ed. 53.

23. Necessity for possessing debtor.—"A right to specific pieces of money can only be acquired, by obtaining the legal or actual possession of them, and until this is done, there can be no such absolute ownership, as that an execution may be levied on them." Turner *v.* Fendall, 1 Cranch 117, 134, 2 L. Ed. 53.

24. Money collected by a sheriff on an execution cannot be levied upon under execution placed in his hands against the judgment creditor, and the latter can maintain an action against the sheriff for a failure to pay the money thus collected. Turner *v.* Fendall, 1 Cranch 117, 134, 2 L. Ed. 53; Clarke *v.* Larremore, 188 U. S. 486, 489, 47 L. Ed. 556.

A sheriff makes the money upon a fi. fa. at the suit of A. v. B., and afterwards a fi fa. against A. is put into his hands. He cannot levy it upon the money of A., made by the fi. fa. of A. v. B., for it does not become the goods and chattels of A., until it is paid over to him; and by the command of the writ, the sheriff is, in strictness, bound to bring the money into court, there to be paid to the plaintiff. Turner *v.* Fendall, 1 Cranch 117, 2 L. Ed. 53.

25. Choses in action—At common law.—Van Ness *v.* Hyatt, 13 Pet. 294, 10 L. Ed. 168.

A conditional right to purchase, is, in effect, nothing more than a chose in action, upon which an execution of fieri facias cannot be levied. Van Ness *v.* Hyatt, 13 Pet. 294, 301, 10 L. Ed. 168.

May be reached in equity.—Ager *v.* Murray, 105 U. S. 126, 129, 26 L. Ed. 942.

26. By statute.—New Orleans *v.* Stempel, 175 U. S. 309, 321, 44 L. Ed. 174. See Buck *v.* Beach, 206 U. S. 392, 411, 412, 51 L. Ed. 1106.

"**In Louisiana**, the debts due to an execution debtor may be seized and sold on execution, like other movable property, and equally with the immovable property." Collier *v.* Stanbrough, 6 How. 14, 21, 12 L. Ed. 324.

27. Patents and copyrights.—The incorporeal right, secured to an author, to multiply copies of a map, by the use of a copperplate, being intangible, and resting altogether in grant, is not the subject of seizure or sale by means of this process—certainly not at common law. Stephens *v.* Cady, 14 How. 528, 531, 14 L. Ed. 528.

28. Have no locality.—There would certainly be great difficulty in assenting to the proposition that patent and copyrights, held under the laws of the United States, are subject to seizure and sale on execution. Not to repeat what is said on this subject, in Stephens *v.* Cady, 14 How. 528, 531, 14 L. Ed. 528, it may be added that these incorporeal rights do not exist in any particular state or district; they are coextensive with the United States. There is nothing in any act of congress, or in the nature of the rights themselves, to give them locality anywhere, so as to subject them to the process of courts having jurisdiction limited by the lines of states and districts. Stevens *v.* Gladding, 17 How. 447, 451, 15 L. Ed. 155.

29. The incorporeal right of an author or patents does not pass by a sale of the corporeal thing patented or copyrighted; for instance, the seizure and sale, under execution, of "one copperplate for the map of the state of Rhode Island," did not carry with it the right to fit and publish the map. Stevens *v.* Gladding, 17 How. 447, 448, 15 L. Ed. 155.

30. Ager *v.* Murray, 105 U. S. 126, 130, 26 L. Ed. 942; Stephens *v.* Cady, 14 How. 528, 14 L. Ed. 528; Stevens *v.* Gladding, 17 How. 447, 15 L. Ed. 155; Root *v.* Railway Co., 105 U. S. 189, 193, 26 L. Ed. 975.

"It has been said by an English textwriter that 'a patent right may be seized and sold in execution by the sheriff under a fieri facias, being in the nature of a personal chattel.' Webster on Patents, 23. We are not aware of any instance in

is.[31] This incorporeal right may be reached in equity.[32]

4. Franchises.—A franchise being an incorporeal hereditament cannot be seized on a fieri facias,[33] unless authorized by a statute of the state which granted such franchise.[34] Neither can the lands or works essential to the enjoyment of a franchise be separated from it and sold under a fieri facias, so as to destroy or impair the value of the franchise.[35]

5. Corporate Stocks.—Corporate stock is subject to execution, if declared so by statute.[36]

which such a course has been judicially approved." Ager *v.* Murray, 105 U. S. 126, 129, 26 L. Ed. 942. See the titles COPYRIGHT, vol. 4, p. 602; PATENTS.

31. A copperplate engraving of a map, which has been copyrighted, like any other tangible personal property, is the subject of seisure and sale, on execution, and the title passes to the purchaser, the same as if made at a private sale, but without the right to multiply copies therefrom. Stephens *v.* Cady, 14 How. 528, 531, 14 L. Ed. 528; Ager *v.* Murray, 105 U. S. 126, 129, 26 L. Ed. 942.

32. Supplemental proceedings in equity.—"We are not aware of any instance in which such a course has been judicially approved. But it is within the general jurisdiction of a court of chancery to assist a judgment creditor to reach and apply to the payment of his debt any property of the judgment debtor, which, by reason of its nature only, and not by reason of any positive rule exempting it from liability for debt, cannot be taken on execution at law." Ager *v.* Murray, 105 U. S. 126, 129, 26 L. Ed. 942.

By creditor's bill.—The property may be reached by a creditor's bill, and be applied to the payment of the debts of the author, the court compelling a transfer and sale of the stock for the benefit of creditors; but in such case it would be necessary for the court to compel a transfer to the purchaser, in conformity with the requirements of the copyright act, in order to vest him with a complete title to the property. Ager *v.* Murray, 105 U. S. 126, 129, 26 L. Ed. 942.

33. Franchises—At common law.—Gue *v.* Tidewater Canal Co., 24 How. 257, 263, 16 L. Ed. 635. See Hammock *v.* Loan, etc., Co., 105 U. S. 77, 90, 26 L. Ed. 1111.

Franchise to take tolls.—This court decided, in Gue *v.* Tidewater Canal Co., 24 How. 257, 16 L. Ed. 635, that a corporate franchise to take tolls on a canal could not be seized and sold under a fieri facias. This decision was put on the ground that the franchise or right to take toll on boats going through the canal would not pass to the purchaser under the execution on a judgment at law against the corporation, because it was an incorporeal hereditament, and, upon the settled principles of the common law, could not be seized on a fieri facias; and was made in a case where the corporation owned in fee the real estate, toll houses, canal locks and wharf seized, all of which were necessary for the uses and working of the canal. East Alabama R. Co. *v.* Visscher, 114 U. S. 340, 353, 29 L. Ed. 136.

The right to take tolls of a bridge built over and partially obstructing a navigable stream conferred by the sovereign power, being a franchise, and sole right in the corporation, and the bridge a mere easement, the corporation not owning the fee in the land at either bank of the river, or under the water, it is difficult to say how an execution could attach to either the franchise or the structure of the bridge as real or personal property. Covington Drawbridge Co. *v.* Shepherd, 21 How. 112, 124, 16 L. Ed. 38.

34. Under statute.—Gue *v.* Tidewater Canal Co., 24 How. 257, 268, 16 L. Ed. 635.

Under the laws of Maryland the sale of the canal property and the franchise can be affected only by a proceeding in a court of chancery where the rights and priorities of all creditors may be considered and protected—not by levy and sale under execution. Gue *v.* Tidewater Canal Co., 24 How. 257, 263, 16 L. Ed. 635.

35. Property essential to enjoyment of franchise.—Gue *v.* Tidewater Canal Co., 24 How. 257, 16 L. Ed. 635; East Alabama R. Co. *v.* Visscher, 114 U. S. 340, 29 L. Ed. 136. See the titles CORPORATIONS, vol. 4, p. 625; RAILROADS.

Neither can the lands or works essential to the enjoyment of the franchise be separated from it and sold under a fi. fa., so as to destroy or impair the value of the franchise. Gue *v.* Tidewater Canal Co., 24 How. 257, 16 L. Ed. 635.

36. Corporate stocks.—Wilson *v.* Seligman, 144 U. S. 41, 36 L. Ed. 338. See the title STOCK AND STOCKHOLDERS.

By the law of Michigan the share or interest of a stockholder may be taken in execution, a copy of the execution being left by the officer with the clerk, treasurer or cashier of the company. The authority of the state to establish such regulations in reference to the stock of a corporation organized and existing under its laws cannot be doubted. Jellenik *v.* Huron Copper Min. Co., 177 U. S. 1, 12, 44 L. Ed. 647.

"By the laws of Indiana, stocks in a corporation may be sold by virtue of an execution against the owner of the stocks, which the sheriff may transfer to the purchaser." Covington Drawbridge Co. *v.* Shepherd, 21 How. 112, 124, 16 L. Ed. 38.

May be reached in equity.—Ager *v.*

6. Pensions and Bounties.—Money paid by the government under a claim of a bounty or pension is not subject to execution.[37]

7. Chattels Real.—The general rule of law is that all chattels real may be taken in execution.[38] At common law, a leasehold interest in land is personal property and subject to execution before the expiration of the term.[39]

8. Fixtures.—Fixtures, in the sense of chattels annexed to land, yet which may be severed and removed therefrom, are subject to execution.[40]

E. Real Property—1. At Common Law.—At common law, real property is not subject to be levied upon and sold under a writ of fieri facias;[41] but is under a writ of extendi facias,[42] or under a writ of elegit.[43]

2. By Statute.—Land has been made subject to levy under fieri facias in the different states, by statutes,[44] that may be proceeded under in the United States

Murray, 105 U. S. 126, 129, 26 L. Ed. 942.

37. Emerson *v.* Hall, 13 Pet. 409, 413, 10 L. Ed. 223. See the title PENSIONS.

38. Chattels real.—Turner *v.* Fendall, 1 Cranch 117, 134, 2 L. Ed. 53.

39. Freeman *v.* Dawson, 110 U. S. 264, 270, 28 L. Ed. 141. It was not decided in this case whether or not this is the law in Tennessee.

Chattels real in Indiana are subject to execution. Hyatt *v.* Vincennes Nat. Bank, 113 U. S. 408, 414, 28 L. Ed. 1009.

40. Fixtures.—Van Ness *v.* Pacard, 2 Pet. 137, 7 L. Ed. 374.

Trade fixtures put up by the lessee, although real estate as between the lessor and himself, while annexed to the land, yet may, during the term of the lease, be severed by the lessee, or by one deriving title from him, and thus reconverted to their original condition of chattels. At any time before the expiration of the term, therefore, the fixtures may be taken on execution against the lessee, like other personal property. Freeman *v.* Dawson, 110 U. S. 264, 270, 28 L. Ed. 141. See the title FIXTURES.

41. Real property—At common law.—Gantly *v.* Ewing, 3 How. 707, 714, 11 L. Ed. 794; Erwin *v.* Dundas, 4 How. 58, 77, 11 L. Ed. 875.

"The reason why lands were not liable to be taken in execution at common law is thus stated by Bacon (2 Bac. Ab. Execution, A): 'The lands were not liable because they were obliged to answer the duties of the feudal lord, and a new tenant could not be forced upon him without his consent in the alienation; and the person was not liable because he was obliged by the tenure to serve the king in the wars, and at home the several lords, according to the distinct nature of the tenure.'" Morsell *v.* First Nat. Bank, 91 U. S. 357, 360, 23 L. Ed. 436.

42. Smith *v.* McCann, 24 How. 398, 404, 16 L. Ed. 714.

43. "The statute of Westm., 2, ch. 18 (13 Ed. I), first subjected the lands of the debtor to execution on a judgment recovered against him, and gave the plaintiff the writ of elegit by virtue of which the sheriff seized and delivered a moiety of the lands until the debt was levied out of the rents and profits. Under this statute a moiety of the land is deemed bound from the rendition of the judgment." Erwin *v.* Dundas, 4 How. 58, 77, 11 L. Ed. 875; Massingill *v.* Downs, 7 How. 760, 765, 12 L. Ed. 903; Morsell *v.* First Nat. Bank, 91 U. S. 357, 360, 23 L. Ed. 436; United States *v.* Morrison, 4 Pet. 124, 136, 7 L. Ed. 804; Burton *v.* Smith, 13 Pet. 464, 480, 10 L. Ed. 248.

The Virginia statute giving the creditor the right to an elegit is almost a transcript of the statute of Westminster II. Burton *v.* Smith, 13 Pet. 464, 480, 10 L. Ed. 248.

Relief in equity on death of debtor.—"If the judgment debtor died after the elegit was executed upon his lands, and before the judgment was satisfied, a court of equity, upon being applied to, would decree a sale of the land upon which it had been executed, and payment of the judgment out of the proceeds." Morsell *v.* First Nat. Bank, 91 U. S. 357, 360, 23 L. Ed. 436.

44. Under Virginia statute.—See United States *v.* Morrison, 4 Pet. 124, 136, 7 L. Ed. 804.

Under Ohio statute.—Ward *v.* Chamberlain, 2 Black 430, 17 L. Ed. 319.

Under Indiana statute realty is subject to execution, but personal property must be first taken. Hyatt *v.* Vincennes Nat. Bank, 113 U. S. 408, 413, 28 L. Ed. 1009; Covington Drawbridge Co. *v.* Shepherd, 21 How. 112, 124, 16 L. Ed. 38.

"The law of Tennessee, following the rule established in the colonies by the English statute of 5 Geo. II, ch. 7, § 4, authorizes real estate, as well as personal property, to be levied upon and sold under a writ of fieri facias. Code of Tennessee, § 2999." Freeman *v.* Dawson, 110 U. S. 264, 270, 28 L. Ed. 141.

In Pennsylvania.—"Lands are to be considered as chattels, in Pennsylvania, for the payment of debts." Andrew *v.* Fleming, 2 Dall. 93, 94, 1 L. Ed. 303.

By statute in Wisconsin, the real estate held by a banking corporation is made subject to execution. McGoon *v.* Scales, 9 Wall. 23, 29, 19 L. Ed. 545.

Maryland and District of Columbia.—The act of parliament 5 Geo. II, 7, subjecting lands in the colonies to executions as chattels, has been adopted by, and is the law of Maryland, the laws of which

courts.[45] In some states, before real estate can be resorted to, the rents thereof for a term of years and the personal property of the debtor must first be sold.[46]

3. PARTICULAR ESTATES—a. *Estates for Life.*—An estate for life, under the Pennsylvania practice, cannot be extended; but may be sold without an inquest on its value.[47]

b. *Estates in Remainder and Reversion.*—An estate in vested remainder is treated as one in possession, as regards the debts of the tenant.[48] An estate in reversion is subject to execution.[49]

c. *Naked Legal Estates.*—Where the grantee in a deed takes only a naked legal title, he has no interest therein subject to seizure and sale under a fieri facias.[50]

d. *Equitable Estates.*—This subject is treated elsewhere in this title.[51]

e. *Estates for Years.*—For treatment of this subject, see elsewhere in this title.[52]

F. Equitable Estates and Interests.—The well-established rule at common law is that an equitable interest in real or personal property is not subject to execution.[53] Such interests have been made subject to execution by statute.[54] Whether or no equitable interests are subject to execution is to be determined,

state are in force in the District of Columbia. Tayloe *v.* Thomson, 5 Pet. 358, 366, 8 L. Ed. 154.

It is admitted, that though this statute extends in terms only to executions in favor of British merchants, it has long received an equitable construction, applying it to all judgment creditors; and that this construction has been uniform throughout this state. Tayloe *v.* Thomson, 5 Pet. 358, 8 L. Ed. 154.

45. Effect of statute in United States courts.—See ante, "Effect of State Laws in United States Courts," III, C.

46. Rents and profits to be sold before fee in Indiana.—Gantly *v.* Ewing, 3 How. 707, 11 L. Ed. 794.

Personalty to be first exhausted in Tennessee.—Walker *v.* Turner, 9 Wheat. 541, 548, 6 L. Ed. 155.

47. Estates for life.—The inquest, having issued in this case, was quashed. Howell *v.* Wolfert, 2 Dall. 75, 77, 1 L. Ed. 295.

48. Vested remainders.—Nichols *v.* Levy, 5 Wall. 433, 18 L. Ed. 596.

"A vested remainder in tail may be taken in execution, and sold by the sheriff." Humphrey *v.* Humphries, 2 Dall. 223, 1 L. Ed. 357.

Estates in reversion and remainder may be sold under Indiana statute. Hyatt *v.* Vincennes Nat. Bank, 113 U. S. 408, 413, 28 L. Ed. 1009.

Under § 2871 of the Code of Alabama of 1867, executions may be levied on estates in remainder and reversion. Beebe *v.* United States, 161 U. S. 104, 109, 40 L. Ed. 632.

49. Reversions.—Burton *v.* Smith, 13 Pet. 464, 479, 10 L. Ed. 248. See Beebe *v.* United States, 161 U. S. 104, 109, 40 L. Ed. 632, for practice under Alabama Code. See the title REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS.

50. Naked legal estates.—Smith *v.* McCann, 24 How. 398, 405, 16 L. Ed. 714. See post, "Equitable Estates and Interests," III, F.

51. Equitable estates.—See post, "Equitable Estates and Interests," III, F.

52. Estates for years.—See ante, "Chattels Real," III, D, 7.

53. Equitable estates and interests.—Morsell *v.* First Nat. Bank, 91 U. S. 357, 359, 23 L. Ed. 436; Van Ness *v.* Hyatt, 13 Pet. 294, 298, 10 L. Ed. 168; Nichols *v.* Eaton, 91 U. S. 716, 718, 23 L. Ed. 254; Hyde *v.* Woods, 94 U. S. 523, 24 L. Ed. 264; Bank *v.* Guttschlick, 14 Pet. 19, 29, 10 L. Ed. 335.

This grew out of the fact that courts of law did not recognize any such titles and could not deal with them. Freedman's Savings, etc., Co. *v.* Earle, 110 U. S. 710, 712, 28 L. Ed. 301. See the title TRUSTS AND TRUSTEES.

In equity by analogy to elegit.—"As judgment creditors, after the statute of Westminster, 13 Ed. I, c. 18, were entitled, by the writ of elegit, to be put in the possession of a moiety of the lands of the debtor, until satisfaction of the judgment; and as it would be contrary to equity to permit a debtor to withdraw his lands from liability to his judgment creditors, this analogy was at an early date extended, so as to give to judgment creditors similar benefits in respect to the equitable estate of their debtors; and as the remedies in favor of judgment creditors by way of executor upon the legal estate of their debtors have been enlarged, they have been imitated by a corresponding analogy as to equitable estates by courts of equity. This is in pursuance of the principle stated in a pregnant sentence by Lord Northington, in Burgess *v.* Wheate, 1 Eden 177-261, where he said: 'For my own part, I know no instance where this court ever permitted the creation of a trust to affect the right of a third party.'" Freedman's Savings, etc., Co. *v.* Earle, 110 U. S. 710, 713, 28 L. Ed. 301.

54. "The Statute of Frauds, 29 Car. II,

by the law of the situs in the case of real property, and where the trust was created or is to be administered in the case of personal property.[55]

G. Property Mortgaged or Conveyed by Deed of Trust.—It has been held by many courts that a mortgagee cannot, upon a judgment recovered for a debt secured by his mortgage, levy an execution upon the mortgaged property.[56] By the common law, an equity of redemption, is not liable to execution;[57] and if this be so, in the case of a mortgage, the principle applies most strongly, in case of a deed of trust;[58] but this has been changed in some states by statute,[59] and in others by practice.[60]

c, 3, made trust estates in fee simple assets for the payment of debts, and subject to an elegit upon judgment against the cestui que trust. "But this statute did not extend to chattels real, to trusts under which the debtor had not the whole interest, to equities of redemption, or to any equitable interest which had been parted with before execution sued out." Freedman's Savings, etc., Co. *v.* Earle, 110 U. S. 710, 714, 28 L. Ed. 301.

The statute of 5 Geo. II, which made "houses, lands, negroes, and other hereditaments and real estate," liable to execution "in like manner as personal estate," etc., did not subject an equitable interest to seizure under a fieri facias. Morsell *v.* First Nat. Bank, 91 U. S. 357, 361, 23 L. Ed. 436; Smith *v.* McCann, 24 How. 398, 16 L. Ed. 714; Freedman's Saving, etc., Co. *v.* Earle, 110 U. S. 710, 714, 28 L. Ed. 301.

The Code of Alabama, § 2871, subjects perfect equities to execution. Beebe *v.* United States, 161 U. S. 104, 109, 40 L. Ed. 632.

Under Indiana statute.—See Hyatt *v.* Vincennes Nat. Bank, 113 U. S. 408, 414, 28 L. Ed. 1009.

Under act of assembly of Maryland.—See Van Ness *v.* Hyatt, 13 Pet. 294, 299, 10 L. Ed. 168.

Under Iowa statute.—Levi *v.* Thompson, 4 How. 17 19, 11 L. Ed. 856.

Under statute of Wisconsin.—See McGoon *v.* Scales, 9 Wall. 23, 29, 19 L. Ed. 545.

Under Illinois statute.—See Potter *v.* Couch, 141 U. S. 296, 319, 320, 35 L. Ed. 721; Brandies *v.* Cochrane, 112 U. S. 344, 28 L. Ed. 760.

Under statute of Missouri.—See Landes *v.* Brant, 10 How. 348, 13 L. Ed. 449.

55. Spindle *v.* Shreve, 111 U. S. 542, 546, 28 L. Ed. 512. See ante, "Conflict of Laws," III, B.

56. Mortgaged property.—Pugh *v.* Fairmount Gold, etc., Min. Co., 112 U. S. 238, 243, 244, 28 L. Ed. 684.

57. Equity of redemption—At common law.—Van Ness *v.* Hyatt, 13 Pet. 294, 298, 10 L. Ed. 168; Bank *v.* Guttschlick, 14 Pet. 19, 10 L. Ed. 335; Morsell *v.* First Nat. Bank, 91 U. S. 357, 361, 23 L. Ed. 436.

The equity of redemption of a mortgagor of land, in that part of the District of Columbia ceded by the state of Maryland to the United States, cannot be taken in execution under a fieri facias; at the time of the cession to the United States, the rule of the common law was the law of Maryland. Van Ness *v.* Hyatt, 13 Pet. 294, 10 L. Ed. 168.

"The interest of the mortgagor, according to the common law, is not liable to execution as real estate." Bank *v.* Guttschlick, 14 Pet. 19, 28, 10 L. Ed. 335.

Equity will not enforce an execution against a mortgagor's equity of redemption where third persons, without notice and for valuable consideration have acquired a previous equitable right and also acquired the legal estate. Van Ness *v.* Hyatt, 13 Pet. 294, 300, 10 L. Ed. 168.

58. Conveyed by deed of trust—At common law.—Bank *v.* Guttschlick, 14 Pet. 19, 29, 10 L. Ed. 335. See Webb *v.* Sharp, 13 Wall. 14, 16, 20 L. Ed. 478.

"A deed of trust does not protect goods from sale by execution. The owner has still an interest, or equity of redemption in them, which is subject to sale; and a purchaser at an execution sale would be entitled to redeem the goods from the deed of trust by paying the debt secured thereby." Webb *v.* Sharp, 13 Wall. 14, 16, 20 L. Ed. 478.

It has been held in Virginia, that the resulting interest of a grantor in a deed of trust made to secure debts, cannot be reached by execution. And this principle is not without some strong reasons in its support, independently of mere authority. Van Ness *v.* Hyatt, 13 Pet. 294, 298, 10 L. Ed. 168.

59. By statute.—Beebe *v.* United States, 161 U. S. 104, 109, 40 L. Ed. 632; Hammock *v.* Loan, etc., Co., 105 U. S. 77, 90, 26 L. Ed. 1111.

In Indiana the right of redemption is subject to execution. Hyatt *v.* Vincennes Nat. Bank, 113 U. S. 408, 413, 28 L. Ed. 1009.

60. By practice.—It is said, in 4 Kent's Com. 153-4, that courts of law have, by a gradual and almost insensible progress adopted the views of the court, of equity, on the subject of mortgages, which are founded in justice, and accord with the true intent and inherent nature of the transaction; that except as against the mortgagee, the mortgagor, while in possession, and before foreclosure, is regarded as the real owner; and that, in this country, the rule has very extensively prevailed, that an equity of redemption was vendible as real property, on an

H. Property of Cotenants and Partners.—In Alabama, executions can be levied on real property in which the defendant has the entire estate or is entitled to it in common with others.[61]

I. Property of Decedents.—The assets of the estate are first liable before the property of the representative.[62] In the state of Missouri, the lands of a deceased debtor may be taken in execution to satisfy a judgment against the administrator, as such.[63]

The laws of Mississippi direct that, where the insolvency of the estate of a deceased person shall be reported to the orphans' court, that court shall order a sale of the property, and distribute the proceeds thereof among the creditors pro rata, and that in the meantime no execution shall issue upon a judgment obtained against such insolvent estate. A judgment obtained against the administrator before the declaration by the orphans' court of the insolvency of the estate, is not, upon that account, entitled to a preference, but must share in the general distribution.[64]

J. Property or Interest Conveyed or Assigned.—Where there has been, before judgment, a bona fide alienation or assignment of any property or interest, an execution cannot issue thereon against the alienator or assignor;[65] but property, alienated or assigned after judgment, remains subject to execution in the hands of the alienee or assignee;[66] so does real property sold on credit under a

execution at law. Van Ness *v.* Hyatt, 13 Pet. 294, 298, 10 L. Ed. 168.

61. Estates of cotenants.—Beebe *v.* United States, 161 U. S. 104, 109, 40 L. Ed. 632. See the title JOINT TENANTS AND TENANTS IN COMMON.

Partnership property.—McCarty *v.* Emlen, 2 Dall. 277, 278, 1 L. Ed. 380; Clagett *v.* Kilbourne, 1 Black 346, 349, 17 L. Ed. 213. See the title PARTNERSHIP.

62. Property of decedents.—The execution should be levied upon the assets in the hands of the executor, when no devastavit is averred and proved, unless it appear that no such assets can be found; in which event, the rule is, that, if so ordered, the execution may be levied upon the executor's own goods. Smith *v.* Chapman, 93 U. S. 41, 43, 23 L. Ed. 795. See the title EXECUTORS AND ADMINISTRATORS.

63. By statute—In Missouri.—But a sale thereof cannot be made until after the expiration of eighteen months from the date of the letters of administration. Griffith *v.* Bogert, 18 How. 158, 15 L. Ed. 307.

Under the Pennsylvania practice, on a judgment obtained against a personal representative, lands of the decedent are subject to execution, although there has been a bona fide conveyance thereof by the heir for valuable consideration. Morris *v.* Smith, 4 Dall. 119, 1 L. Ed. 766.

64. In Mississippi.—Williams *v.* Benedict, 8 How. 107, 12 L. Ed. 1007.

65. Property alienated before judgment.—Heryford *v.* Davis, 102 U. S. 235, 243, 26 L. Ed. 160.

Where there was a judgment which had been recorded under the laws of Louisiana, and thus made equivalent to a mortgage upon the property of the debtor, and the plaintiff assigned this judgment, and was then himself sued and had an execution issued against him, his rights under the recorded judgment could not be sold under this execution, because he had previously transferred all those rights. Stockton *v.* Ford, 11 How. 232, 13 L. Ed. 676.

Where, by an agreement between the parties, certain property should become absolutely and unconditionally the property of the purchaser upon the property being counted and piled, such property is not subject to execution by the creditors of the vendor. Hatch *v.* Oil Co., 100 U. S. 124, 25 L. Ed. 554.

In 1883, the petitioner who then and for about twenty-five years prior thereto, had resided upon and worked a large farm, made a contract with his son, under which it was agreed that the latter should undertake the management of the farm, farm implements and live stock, make all repairs, pay taxes and other expenses, replace all implements as they were worn out, keep up all live stock, and have as his own the net profits. It was further stipulated that each party should be at liberty to terminate the arrangement at any time, and that the son should turn back to his father the farm with its implements, stock and other personalty, of the same kind and amount as was on the farm when the father retired, and in as good condition as when he took them. Held, that the farm property remained in the ownership of the father and was not subject to execution by creditors of the son. Arnold *v.* Hatch, 177 U. S. 276, 277, 44 L. Ed. 769.

66. Property conveyed after judgment.—A plaintiff may proceed and sell land aliened after judgment without a scire facias against the alienee. Tayloe *v.* Thomson, 5 Pet. 358, 369, 8 L. Ed. 154.

Under judicial sale.—The judgment creditor is not permitted to treat a convey-

prior execution on the same judgment;[67] or property conveyed to defraud creditors,[68] but property conveyed or assigned to secure creditors is not subject to execution.[69]

K. Property in Custody of Law.—Property in the custody of the law is not subject to execution.[70] Property is considered in the custody of the law when in the hands of receivers,[71] sequestrators,[72] executors and administrators,[73] execution debtors to whom property has been redelivered on giving forthcoming bond,[74]

ance from the defendant in the judgment made by authentic act, or in pursuance of a judicial sale, as null and void, and to seize and sell the property which had thus passed to the vendee. Ford *v.* Douglas, 5 How. 143, 166, 12 L. Ed. 89.

By the laws of Louisiana, where there has been a judicial sale of the succession by a probate judge, a creditor of the estate, who obtains a judgment, cannot levy an execution upon the property so transferred, upon the ground, that the sale was fraudulent and void. He should first bring an action to set the sale aside. Ford *v.* Douglas, 5 How. 143, 12 L. Ed. 89. See the title JUDICIAL SALES.

67. Real property sold on credit under an execution may be levied on by another execution in the same judgment in the hands of such gratuitous donee, and such execution may be levied on the property of the donee's sureties as well as on that of their principal. Evans *v.* Pike, 118 U. S. 241, 247, 30 L. Ed. 234.

68. Property fraudulently conveyed.—The well-known rule is that property fraudulently conveyed may be levied upon under an execution and sold. And the proceeds of a fraudulent assignment may be levied upon. Ford *v.* Douglas, 5 How. 143, 12 L. Ed. 89.

Property fraudulently conveyed may be sold under Indiana statute. Hyatt *v.* Vincennes Nat. Bank, 113 U. S. 408, 413, 28 L. Ed. 1009. See the title FRAUDULENT AND VOLUNTARY CONVEYANCES.

69. Conveyed to secure creditors.—Morsell *v.* First Nat. Bank, 91 U. S. 357, 23 L. Ed. 436.

70. Property in custody of law.—Taylor *v.* Carryl, 20 How. 583, 15 L. Ed. 1028; Hagan *v.* Lucas, 10 Pet. 400, 9 L. Ed. 470; Buck *v.* Colbath, 3 Wall. 334, 18 L. Ed. 257; Wiswall *v.* Sampson, 14 How. 52, 14 L. Ed. 322; Marks *v.* Dickson, 20 How. 501, 503, 15 L. Ed. 1002; Covell *v.* Heyman, 111 U. S. 176, 28 L. Ed. 390; Freeman *v.* Howe, 24 How. 450, 16 L. Ed. 749. See post, "Grounds for Relief," VII, C, 2.

71. In hands of receivers.—Wiswall *v.* Sampson, 14 How. 52, 14 L. Ed. 322; Peale *v.* Phipps, 14 How. 368, 375, 14 L. Ed. 459; Barton *v.* Barbour, 104 U. S. 126, 129, 26 L. Ed. 672.

It is competent, and might, in some cases, be proper for the court, where the property in dispute is ample, and the litigation protracted, to permit the execution to issue, and compel the prosecuting creditor to pay off the judgment. But it is manifest that these proceedings should be under the control of and subject to the discretion of the court. Wiswall *v.* Sampson, 14 How. 52, 67, 14 L. Ed. 322. See the title RECEIVERS.

72. Sequestrators.—Wiswall *v.* Sampson, 14 How. 52, 53, 68, 14 L. Ed. 322.

73. Executors and administrators.—Griffith *v.* Bogert, 18 How. 158, 15 L. Ed. 307. See the title EXECUTORS AND ADMINISTRATORS.

A nonresident creditor cannot recover judgment in a federal court and have execution issued thereon against the property of a decedent in the custody of a state probate court subject to the equal rights of all creditors. Yonley *v.* Lavender, 21 Wall. 276, 22 L. Ed. 536. See, also, Byers *v.* McAuley, 149 U. S. 608, 615, 37 L. Ed. 867.

74. Custody of claimant substitute for that of officer.—The custody of the claimant is substituted for the custody of the sheriff. The property is not withdrawn from the custody of the law. In the hands of the claimant, under the bond for its delivery to the sheriff, the property is as free from the reach of the other processes, as it would have been in the hands of the sheriff. Hagan *v.* Lucas, 10 Pet. 400, 404, 9 L. Ed. 470. See the title ADMIRALTY, vol. 1, p. 172.

Executions issuing from different jurisdictions—Sheriff and marshal.—If previous to the levy by a marshal, property has been levied on by a sheriff, and been delivered to the plaintiff on his making oath and giving bond, as required by the statute, and the proceedings on said claims are still pending and undetermined in the circuit court, the property is considered as in the custody of the law, and consequently not subject to be levied on by the marshal. Hagan *v.* Lucas, 10 Pet. 400, 401, 9 L. Ed. 470.

"Had the property remained in the possession of the sheriff, under the first levy, it is clear the marshal could not have taken it in execution; for the property could not be subject to two jurisdictions at the same time. The first levy, whether it were made under the federal or state authority, withdraws the property from the reach of the process of the other. Under the state jurisdiction, a sheriff having execution in his hands, may levy on the same goods; and where there is no priority on the sale of the goods, the proceeds should be applied in proportion to the sums named in the executions. And where a sheriff has made a levy, and afterwards

in the registry of admiralty,[75] or which has been levied upon by another officer under judicial process.[76] Especially is this true, in the last instance, where the previous levy has been made by an officer of a court of another jurisdiction as, for example, a marshal under process of a United States court seeking to levy upon property which has previously been levied upon by an officer of a state court, or vice versa.[77] Property negligently suffered to remain in the hands of the execution debtor after the levy for a long time is subject to execution;[78] so is property which has been distrained for rent and replevied.[79]

L. Property in Possession of Third Persons.—Goods in the possession of a third person cannot be seized under execution against the defendant.[80]

M. Property Subject to Homestead.—Land in fee can be sold under execution, subject to a homestead right, and the purchaser has the absolute title when the homestead right ceases.[81]

N. Property Held by Particular Persons.—For treatment of this subject, see other titles.[82]

receives executions against the same defendant, he may appropriate any surplus that shall remain, after satisfying the first levy, by the order of the court. But the same rule does not govern, where the executions, as in the present case, issue from different jurisdictions. The marshal may apply moneys, collected under several executions, the same as the sheriff; but this cannot be done as between the marshal and the sheriff." Hagan *v.* Lucas, 10 Pet. 400, 403, 9 L. Ed. 470. See the title COURTS, vol. 4, pp. 1173, 1175.

75. In registry of admiralty.—A creditor by judgment in a state court, of the owners of the vessel, even though he have a decree in personam also in the admiralty against them, cannot seize, on execution, proceeds of the vessel in the registry of the admiralty. The Lottawanna, 20 Wall. 201, 22 L. Ed. 259. See the title ADMIRALTY, vol. 1, p. 172.

76. Property levied upon.—Buck *v.* Colbath, 3 Wall. 334, 344, 18 L. Ed. 257; Covell *v.* Heyman, 111 U. S. 176, 182, 28 L. Ed. 390; Pulliam *v.* Osborne, 17 How. 471, 475, 15 L. Ed. 154; Hagan *v.* Lucas, 10 Pet. 400, 9 L. Ed. 470.

77. Where personal property is levied on by the marshal, by virtue of mesne process out of a federal court, it cannot be taken out of his possession by a sheriff, under process from a state court. Freeman *v.* Howe, 24 How. 450, 16 L. Ed. 749; Buck *v.* Colbath, 3 Wall. 334, 335, 18 L. Ed. 257. And see Covell *v.* Heyman, 111 U. S. 176, 181, 28 L. Ed. 390; Hagan *v.* Lucas, 10 Pet. 400, 9 L. Ed. 470.

By officer of another jurisdiction.—Frey *v.* Leeper, 2 Dall. 131, 1 L. Ed. 319; Hagan *v.* Lucas, 10 Pet. 400, 9 L. Ed. 470; Harris *v.* Dennie, 3 Pet. 292, 7 L. Ed. 283; Freeman *v.* Howe, 24 How. 450, 16 L. Ed. 749; Buck *v.* Colbath, 3 Wall. 334, 341, 18 L. Ed. 257; Lammon *v.* Feusier, 111 U. S. 17, 19, 28 L. Ed. 337; Krippendorf *v.* Hyde, 110 U. S. 276, 25 L. Ed. 145, followed in Covell *v.* Heyman, 111 U. S. 176, 184, 28 L. Ed. 390; Gumbel *v.* Pitkin, 124 U. S. 131, 144, 31 L. Ed. 374; Chapman *v.* Brewer, 114 U. S. 158, 173, 29 L. Ed. 83; Taylor *v.* Carryl, 20 How. 583, 15 L. Ed. 1028; Pulliam *v.* Osborne, 17 How. 471, 15 L. Ed. 154; Yonley *v.* Lavender, 21 Wall. 276, 22 L. Ed. 536.

"A most injurious conflict of jurisdiction would be likely, often, to arise between the federal and the state courts, if the final process of the one could be levied on property which had been taken by the process of the other. The marshal or the sheriff, as the case may be, by a levy, acquires a special property in the goods, and may maintain an action for them. But if the same goods may be taken in execution, at the same time, by the marshal and the sheriff, does this special property vest in the one, or the other, or both of them? No such case can exist; property once levied on remains in the custody of the law, and it is not liable to be taken by another execution, in the hands of a different officer; and especially, by an officer acting under a different jurisdiction." Hagan *v.* Lucas, 10 Pet. 400, 403, 9 L. Ed. 470, quoted in Pulliam *v.* Osborne, 17 How. 471, 476, 15 L. Ed. 154. See the title COURTS, vol. 4, pp. 1173, 1175.

78. Property remaining with debtor.—Property consisting of household furniture, which has been suffered to remain in the possession of the execution debtor for more than a year after the levy was made, is liable to levy under a subsequent execution. United States *v.* Conyngham, 4 Dall. 358, 1 L. Ed. 865.

79. Property distrained and replevied.—The goods are subject to execution on a judgment against the tenant, as soon as they have been replevied and redelivered. Frey *v.* Leeper, 2 Dall. 131, 1 L. Ed. 319. See the title REPLEVIN.

80. Property in possession of third person.—Chapman *v.* Smith, 16 How. 114, 134, 14 L. Ed. 868. See, also, Marks *v.* Shoup, 181 U. S. 562, 566, 45 L. Ed. 1002. See post, "Grounds for Relief," VII, C, 2.

81. Property subject to homestead.—Black *v.* Curran, 14 Wall. 463, 20 L. Ed. 849. See, generally, the title HOMESTEAD EXEMPTIONS.

82. Private corporations.—See the titles

O. Property Subject to Execution in Equity.—For treatment of this subject, see elsewhere in this title.[83]

P. Property Exempt from Execution.—This subject is treated elsewhere.[84]

IV. Form and Requisites of Writ.

A. Congressional Regulation.—Congress possesses the uncontrolled power to legislate with respect to the form of writs of execution in the courts of the United States.[85]

B. Conformity to Forms in State Courts.—The act of congress directing that executions in the United States courts should conform to those of the state courts was passed with consideration to convenience and practice.[86] The conformity to the process in the state courts is adopted under such guards and checks as might be necessary to insure the due exercise of the powers of the courts of the United States, and such courts have the power to add to and alter their process.[87] The acts of congress of May 8, 1792, adopted the forms of writs as then existing in the different states;[88] subject to such alterations as the courts of the United States might make, but not subject to alterations since made by state laws,[89]

CORPORATIONS, vol. 4, p. 621; FOREIGN CORPORATIONS.

Public corporations.—See the titles COUNTIES, vol. 4, p. 842; MUNICIPAL CORPORATIONS; STATES; STREETS AND HIGHWAYS; UNITED STATES.

Quasi-public corporations.—See the titles RAILROADS; STREET RAILWAYS; WATER COMPANIES AND WATERWORKS; WATERS AND WATERCOURSES.

Persons under disabilities.—See the titles HUSBAND AND WIFE; INFANTS; INSANITY; SEPARATE ESTATE OF MARRIED WOMEN.

83. Property subject to execution in equity.—See post, "Supplementary Proceedings." XIII.

84. See the titles HOMESTEAD EXEMPTIONS; PENSIONS.

85. Power of congress to prescribe.—Such power necessarily results, by implication, from the power given congress to ordain and establish such courts. "But it does not rest altogether upon such implication; for express authority is given to congress to make all laws which shall be necessary and proper for carrying into execution all the powers vested by the constitution in the government of the United States, or in any department or officer thereof. The right of congress, therefore, to regulate the proceedings on executions, and direct the mode and manner, and out of what property of the debtor satisfaction may be obtained, is not to be questioned, and the only inquiry is, how far this power has been exercised." Bank *v.* Halstead, 10 Wheat. 51, 54, 6 L. Ed. 264. See the title COURTS, vol. 4, p. 1123.

86. Conformity to forms in state courts.—Bank *v.* Halstead, 10 Wheat. 51, 57, 6 L. Ed. 264.

"The endeavor of congress and the court has been to assimilate the proceedings in the federal courts for the levying of executions issued on judgments and decrees for the payment of money to those prevailing in the courts of the states." Ward *v.* Chamberlain, 2 Black 430, 443, 17 L. Ed. 319. See the title COURTS, vol. 4, pp. 1124, 1145.

87. Bank *v.* Halstead, 10 Wheat. 51, 60, 6 L. Ed. 264. See the title COURTS, vol. 4, p. 1151.

88. Ward *v.* Chamberlain, 2 Black 430, 440, 17 L. Ed. 319; Bank *v.* Halstead, 10 Wheat. 51, 58, 6 L. Ed. 264. See 4 Fed. Stat. Annot. 580. And see the title COURTS, vol. 4, p. 1123.

89. Ward *v.* Chamberlain, 2 Black 430, 440, 17 L. Ed. 319; Wayman *v.* Southard, 10 Wheat. 1, 6 L. Ed. 253.

Writs of execution issuing from the courts of the United States are not controlled or controllable by any collateral regulations which the state laws have imposed upon the state courts to govern them in the actual use, suspension or superseding of them; such regulations and restrictions are exclusively addressed to the state tribunals, and have no efficacy in the courts of the United States, unless adopted by them. Boyle *v.* Zacharie, 6 Pet. 648, 8 L. Ed. 532, citing Palmer *v.* Allen, 7 Cranch 550, 564, 3 L. Ed. 436; Wayman *v.* Southard, 10 Wheat. 1, 6 L. Ed. 253, and Bank *v.* Halstead, 10 Wheat. 51, 6 L. Ed. 264.

At the time of the passage of the act of May 8, 1792, entitled "an act to regulate process in the courts of the United States," congress had in mind the forms and effect of executions as they then existed in the different states; but, as it could be anticipated that convenience would necessitate certain changes, it was left to the discretion of the United States courts to follow such changes as would be made by the state courts, rather than adopt in anticipation all changes which may be made by such courts. Bank *v.*

unless adopted by express rules of court.[90]

C. Title and Direction.—Under the Indiana code, executions must issue in the name of the state, and be directed to the sheriff of the county.[91]

D. Command of Writ.—The mandate of a writ of fieri facias, as originally formed, is that the officer have the money in court on the return day, there to be paid to the creditor.[92]

E. Conformity to Judgment.—An execution must conform to the judgment on which issued;[93] but an execution at variance with the judgment on which issued may be amended to conform thereto.[94]

F. Teste and Seal.—Executions are to be attested by a judge, and to be under the seal of the court from which they issue.[95] Where so required by statute, an

Halstead, 10 Wheat. 51, 58, 6 L. Ed. 264. See 4 Fed. Stat. Annot. 580.

"The act of 1828 was passed, shortly after the decision of the cases of Wayman *v.* Southard, and the United States Bank *v.* Halstead; and was intended as a legislative sanction to the opinions of the court in those cases." Ross *v.* Duval, 13 Pet. 45, 64, 10 L. Ed. 51.

90. Adoption by rule of court.—A state law regulating executions, enacted subsequently to September, 1789, is not applicable to executions issuing on judgments rendered by the courts of the United States, unless expressly adopted by the regulations and rules of those courts. Wayman *v.* Southard, 10 Wheat. 1, 6 L. Ed. 253. See the title COURTS, vol. 4, p. 1128.

The circuit court of Virginia never adopted any rule, regulating executions, and the execution law of Virginia in 1789, adopted by the process acts, is in force. No subsequent changes in the process law of the state of Virginia can be obligatory on the circuit court. Ross *v.* Duval, 13 Pet. 45, 60, 10 L. Ed. 51; Wayman *v.* Southard, 10 Wheat. 1, 6 L. Ed. 253.

How adopted.—No rule, under the third section of the act of 1828, which authorizes the courts of the United States to alter final process, so far as to conform it to any changes which may be adopted by state legislation and state adjudications, made by a district judge, will be recognized by the supreme court as binding, except those made by the district courts exercising circuit court powers. Amis *v.* Smith, 16 Pet. 303, 10 L. Ed. 973. See post, "Not Authorized by Judgment," VII, B, 3, e.

91. Title and direction.—Insurance Co. *v.* Hallock, 6 Wall. 556, 560, 18 L. Ed. 948.

92. Mandatory writ.—Turner *v.* Fendall, 1 Cranch 117, 136, 2 L. Ed. 53; Wayman *v.* Southard, 10 Wheat. 1, 44, 6 L. Ed. 253.

The writ commands the officer to levy upon property of the defendant. Covell *v.* Heyman, 111 U. S. 176, 28 L. Ed. 390.

The form of the writ contains substantially all the directions as to what is to be done under it. Bank *v.* Halstead, 10 Wheat. 51, 57, 6 L. Ed. 264; Turner *v.* Fendall, 1 Cranch 117, 136, 2 L. Ed. 53.

"An ordinary execution upon a judgment at law commands the officer to whom it is addressed to perform a series of acts—to levy on goods and chattels, lands and tenements of the judgment debtor, and, if on the latter, to appraise their value, to advertise the same for sale, to make sale of the same at the time and place and in the manner prescribed by law, and apply the proceeds to the payment of the judgment—and these are to be performed successively. There is no incongruity in such a writ. It would not be complete or effective without it embraced all the particulars which, in law, are essential to the full duty contemplated by it, the performance of which is necessary to secure its benefits to the party who sues it out." Labette County Comm'rs *v.* Moulton, 112 U. S. 217, 223, 28 L. Ed. 698.

93. Where original judgment omitted interest.—The rule in some states is that a levy for an amount exceeding the amount of the judgment, or the amount actually due upon the judgment with interest and costs, is void. Schroeder *v.* Young, 161 U. S. 334, 341, 40 L. Ed. 721; Amis *v.* Smith, 16 Pet. 303, 311, 10 L. Ed. 973.

The original judgment having omitted to name interest, and the federal supreme court having affirmed the judgment as it stood, it was proper for the court below to issue an execution for the amount of the judgment and costs, leaving out interest. Early *v.* Rogers, 16 How. 599, 14 L. Ed. 1074.

But where the judgment was affirmed upon writ of error, the execution may include the interest, from the date of the original judgment. Respublica *v.* Nicholson, 2 Dall. 256, 1 L. Ed. 371.

On death of party to record.—In case of a judgment against two defendants, and the death of one, the writ must be in form against both, to correspond with the record; but, on making a suggestion of the death upon the record, the writ could be against the survivor alone. Erwin *v.* Dundas, 4 How. 58, 77, 78, 11 L. Ed. 875; Ransom *v.* Williams, 2 Wall. 313, 317, 17 L. Ed. 803.

94. Black *v.* Wistar, 4 Dall. 267, 1 L. Ed. 828. See post, "Amendments," VI.

95. Teste and seal.—Wayman *v.* Southard, 10 Wheat. 1, 32, 6 L. Ed. 253; Mitchell

execution issued without a seal is void.[96] A seal may be supplied by amendment under the Wisconsin practice.[97]

V. Issuance of Writ.

A. What Amounts to Issuance.—An execution is not issued until it is placed beyond the control of the clerk. So long as it remains with him, or under his control, it is like any other paper in his office.[98]

B. Election of Writs.—A plaintiff having a right to issue an execution against either the body or the property of a defendant, may elect to proceed against either, but his election of one does not preclude him from resorting to the other, if satisfaction of the debt is not obtained by the first execution.[99]

C. Jurisdiction—1. In General.—The right of a court to issue execution depends upon its own powers and organization. Its judgments may be complete and perfect, and have full effect, independent of the right to issue execution.[1] The general rule is that the power to issue an execution is a necessary consequence to the power to render judgment;[2] but the courts of the United States have no inherent authority in such case, except as has been conferred upon them by congress.[3] Congress has power to control the issuance of executions in the United States courts, resulting from the power to ordain and establish such courts.[4] The

v. St. Maxent, 4 Wall. 237, 243, 18 L. Ed. 326.

"**Executions in Illinois** are required to bear teste on the day they are issued." Ransom *v.* Williams, 2 Wall. 313, 317, 17 L. Ed. 803.

In Indiana.—See Insurance Co. *v.* Hallock, 6 Wall. 556, 560, 18 L. Ed. 948.

In Tennessee.—See Clements *v.* Berry, 11 How. 398, 13 L. Ed. 745.

96. Effect of omission.—Insurance Co. *v.* Hallock, 6 Wall. 556, 558, 18 L. Ed. 948; McGoon *v.* Scales, 9 Wall. 23, 31, 19 L. Ed. 545.

Under the civil code of Indiana, requiring executions to be sealed with the seal of the court, an execution if not so sealed, is void. Insurance Co. *v.* Hallock, 6 Wall. 556, 18 L. Ed. 948.

97. Supplied by amendment.—McGoon *v.* Scales, 9 Wall. 23, 31, 19 L. Ed. 545.

98. What constitutes issuance.—Board of Commissioners *v.* Gorman, 19 Wall. 661, 665, 22 L. Ed. 226.

99. Election of writs.—Voorhees *v.* Bank, 10 Pet. 449, 477, 9 L. Ed. 490; Tayloe *v.* Thomson, 5 Pet. 358, 369, 8 L. Ed. 154; United States *v.* Stansbury, 1 Pet. 573, 7 L. Ed. 267. See post, "Alias and Plures Writs," V, L.

By statute in Virginia "all persons who have recovered, or shall hereafter recover, any debt, damages or costs, in any court of record, may, at their election, prosecute writs of fieri facias, elegit and capias ad satisfaciendum, within the year, for taking the goods, lands and body of the debtor." By the construction put by the circuit court on this section, the party who had sued out a fieri facias could not resort to an elegit, until the remedy on the fieri facias was shown by the return to be exhausted. This court, according to its uniform course, adopts that construction of the act which is made by the highest court of the state. United States *v.* Morrison, 4 Pet. 124, 136, 7 L. Ed. 804.

See Snead *v.* McCoull, 12 How. 407, 13 L. Ed. 1043, as to practice prior to 1819. And see the title EXECUTION AGAINST THE BODY AND ARREST IN CIVIL CASES, ante, p. 80.

This has been adopted by and is in force in the federal court of Virginia. Ross *v.* Duval, 13 Pet. 45, 60, 10 L. Ed. 51.

Presumption of satisfaction.—See Magniac *v.* Thomson, 15 How. 281, 301, 14 L. Ed. 696.

"**The law is settled in England, and Pennsylvania**, that a ca. sa. operates as a satisfaction of the debt, as an extinguishment of the lien of the judgment. Freeman *v.* Ruston, 4 Dall. 214, 217, 1 L. Ed. 806.

"**The right to take out an elegit** is not suspended by suing out a writ of fieri facias." United States *v.* Morrison, 4 Pet. 124, 137, 7 L. Ed. 804.

1. Jurisdiction.—Mills *v.* Duryee, 7 Cranch 481, 485, 3 L. Ed. 411.

2. Consequence of power to render judgment.—Bank *v.* Halstead, 10 Wheat. 51, 64, 6 L. Ed. 264.

"The jurisdiction of a court is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied." Wayman *v.* Southard, 10 Wheat. 1, 23, 6 L. Ed. 253; Bank *v.* Halstead, 10 Wheat. 51, 64, 6 L. Ed. 264; Union Bank *v.* Geary, 5 Pet. 99, 8 L. Ed. 60.

To deprive a court of the power to execute its decrees is to essentially impair its jurisdiction. Central Nat. Bank *v.* Stevens, 169 U. S. 432, 465, 42 L. Ed. 807.

3. United States courts dependent upon grant from congress.—Fink *v.* O'Neil, 106 U. S. 272, 280, 27 L. Ed. 198.

4. Bank *v.* Halstead, 10 Wheat. 51, 53, 6 L. Ed. 264; Riggs *v.* Johnson County, 6 Wall. 166, 187, 18 L. Ed. 768; Wayman *v.* Southard, 10 Wheat. 1, 22, 6 L. Ed. 253; Board of Commissioners *v.* Aspinwall, 24 How. 376, 384, 16 L. Ed. 735.

power to issue executions was granted to the United States courts by the judiciary act of 1789.[5] This gives the United States courts the same power as had been possessed by the state courts,[6] and such courts have power to adopt the changes made by state laws.[7] The United States courts in the states admitted to the Union subsequent to 1789, possessed the same powers in regard to executions as the courts in states previously admitted.[8] The rendition of judgment does not exhaust jurisdiction, but jurisdiction continues until satisfaction for judgment.[9] An execution may issue out of a superior court without a remittitur on affirmance of a judgment from a justice's court on certiorari.[10]

2. CONFLICTING AND CONCURRENT.—In cases of conflicting executions, issued out of the federal and state courts, a priority is given to that under which there is first an actual seizure of the property.[11]

D. Who May Issue Writ.—The act of issuing an execution is merely ministerial,[12] and may be performed by the clerk of the court, who may be compelled to issue the writ by mandamus,[13] and who is entitled to compensation for his services.[14]

E. Who May Have Writ Issued.—By the act of parliament of 5 Geo. II 7, lands in the colonies were subject to execution as chattels, in favor of British merchants. Although this statute extends in terms only to executions in favor of British merchants, it has long received an equitable construction, applying it to all judgment creditors.[15] An execution may issue upon the application of an as-

5. The fourteenth section of the act of September 24, 1789, c. 20, commonly known as the judiciary act, provided that the courts of the United States should have "power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law;" and this was held to embrace executions upon judgments. Wayman *v.* Southard, 10 Wheat. 1, 6 L. Ed. 253; Fink *v.* O'Neil, 106 U. S. 272, 277, 27 L. Ed. 196.

"On the clearest principles of just construction, then, the fourteenth section of the judiciary act must be understood as giving to the courts of the Union, respectively, a power to issue executions on their judgments." Wayman *v.* Southard, 10 Wheat. 1, 24, 6 L. Ed. 253. See Riggs *v.* Johnson County, 6 Wall. 166, 190, 18 L. Ed. 768; Weber *v.* Lee County, 6 Wall. 210, 18 L. Ed. 781.

Courts of admiralty.—Such judicial power extends to all cases of admiralty and maritime jurisdiction, as well as to the cases of law and equity described in the constitution. Ward *v.* Chamberlain, 2 Black 430, 443, 17 L. Ed. 319.

6. Canal, etc., St. R. Co. *v.* Hart, 114 U. S. 654, 662, 29 L. Ed. 226.

7. Bank *v.* Halstead, 10 Wheat. 51, 58, 6 L. Ed. 264.

"And this power to adopt rules, so as to conform to the state laws, extends to the future legislation of the state; and as well to the modes of proceeding on executions, as to the forms of the writs." Beers *v.* Haughton, 9 Pet. 329, 363, 9 L. Ed. 145; Ross *v.* Duval, 13 Pet. 45, 64, 10 L. Ed. 51.

The power given to courts to adopt the changes made in the procedure in the different states subsequent to 1789 is not an unlawful delegation of legislative authority of congress. Wayman *v.* Southard, 10 Wheat. 1, 46, 6 L. Ed. 253.

8. The federal courts of Kansas have a right to issue execution. Smith *v.* Crockrill, 6 Wall. 756, 18 L. Ed. 973.

9. Jurisdiction not exhausted by rendition of judgment.—Express determination of the federal supreme court is that the jurisdiction of a court is not exhausted by the rendition of the judgment, but continues until that judgment shall be satisfied. Process subsequent to judgment is as essential to jurisdiction as process antecedent to judgment, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the constitution. Riggs *v.* Johnson County, 6 Wall. 166, 187, 18 L. Ed. 768; Weber *v.* Lee County, 6 Wall. 210, 18 L. Ed. 781.

10. Of appellate courts.—Robbins *v.* Whitman, 1 Dall. 410, 1 L. Ed. 199.

11. Conflicting and concurrent.—Brown *v.* Clarke, 4 How. 4, 11 L. Ed. 850. See the title COURTS, vol. 4, p. 1173.

12. Clerk may issue.—Wayman *v.* Southard, 10 Wheat. 1, 24, 6 L. Ed. 253.

13. Stafford *v.* Union Bank, 17 How. 275, 15 L. Ed. 101; Postmaster-General *v.* Trigg, 11 Pet. 173, 9 L. Ed. 676. See the title MANDAMUS.

14. A clerk of a circular district court is entitled to fees for making docket entries and indexes by orders of the court for the issuance of alias fieri facias. United States *v.* Payne, 147 U. S. 687, 689, 37 L. Ed. 332. See post, "Alias and Plures Writs," V. L.

15. Who may apply for writ—All judgment creditors.—Tayloe *v.* Thomson, 5 Pet. 358, 366, 8 L. Ed. 154.

signee of the judgment,[16] an attorney,[17] or a libelant in admiralty.[18]

F. Against Whom Writ May Issue.—After appeal and security given, a justice of the peace cannot issue an execution against the original defendant, but must proceed against the bail upon the recognizance.[19]

G. Into What County Writs May Issue.—Under the practice in Pennsylvania, before an execution can issue into a county other than that in which the venue is laid, a fi. fa. must issue and be returned nulla bona in the latter. An execution issued before such return must be quashed. It is also necessary that a term of court must intervene.[20]

H. Judgments on Which Writ May Issue—1. NECESSITY FOR JUDGMENT.—No execution can issue except upon a valid judgment.[21] It cannot issue upon a mere order of a court.[22]

2. NATURE OF JUDGMENT—a. *In General.*—The Indiana code provides that an execution may issue a judgment which requires the payment of money, or the delivery of real or personal property.[23]

b. *Judgment on Confession.*—An execution may issue on a judgment on the confession of a defendant,[24] or his attorney.[25]

c. *Dormant Judgment.*—An execution issued on a dormant judgment is voidable but not void.[26]

d. *Erroneous Judgment.*—It is a settled rule of law, that upon an erroneous judgment, if there be a regular execution, the party or the officer may justify

16. Assignee of judgment.—Prevost *v.* Gratz, 6 Wheat. 481, 510, 5 L. Ed. 311.

An assignee who acquired a judgment in good faith acquires the same rights in regard to an execution thereon as his assignor; but a collusive agreement between the assignor and one of the codefendants of the judgment by which such codefendant was to be exempted from the levy of the execution, is not valid in law and does not prevent a levy by the assignee upon the property of the defendant. Selz *v.* Unna, 6 Wall. 327, 18 L. Ed. 799.

17. Attorney.—An attorney at law, by virtue of his general authority as such, is entitled to take out execution upon a judgment recovered by him for his client, and to procure a satisfaction thereof by a levy on lands or otherwise, and to receive the money due on the execution. Erwin *v.* Blake, 8 Pet. 18, 26, 8 L. Ed. 852; Union Bank *v.* Geary, 5 Pet. 99, 8 L. Ed. 60; Rogers *v.* The Marshall, 1 Wall. 644, 651, 17 L. Ed. 714. See the title ATTORNEY AND CLIENT, vol. 2, p. 715.

18. Libelant in admiralty.—"Libelants, under the 21st rule in admiralty, adopted at the last session of this court, may have a writ of execution in the nature of a fieri facias in all cases of a final decree for the payment of money, commanding the marshal or his deputy to levy and collect the amount thereof out of the goods and chattels, lands and tenements, or other real estate of the defendant or stipulator." Ward *v.* Chamberlain, 2 Black 430, 435, 17 L. Ed. 319.

19. Against whom may issue.—Plowman *v.* Abrams, 1 Dall. 316, 317, 1 L. Ed. 154.

20. Into what county writs may issue.—Lesher *v.* Gehr, 1 Dall. 330, 1 L. Ed. 161.

21. Necessity for valid judgment.—Fink *v.* O'Neil, 106 U. S. 272, 280, 27 L. Ed. 198; Clements *v.* Berry, 11 How. 398, 410, 13 L. Ed. 745.

Judgment need not have been formally entered. Clements *v.* Berry, 11 How. 398, 410, 13 L. Ed. 745.

22. Cannot issue upon order.—In Kansas, an order of a court in a proceeding in aid of execution directing a garnishee to pay to the judgment creditor money which he owes to the judgment debtor is not a judgment, and does not determine finally the liability of the garnishee. Therefore, in such a proceeding, an order of the circuit court of the United States, sitting in that state, awarding execution against a garnishee, is erroneous. Atlantic, etc., R. Co. *v.* Hopkins, 94 U. S. 11, 24 L. Ed. 48.

23. Nature of judgment.—Insurance Co. *v.* Hallock, 6 Wall. 556, 560, 18 L. Ed. 948. See the title JUDGMENTS AND DECREES.

24. Judgment or confession.—"A debtor who confesses a judgment cannot be heard to say that he did not contemplate the issuing of an execution thereon." Watson *v.* Taylor, 21 Wall. 378, 384, 22 L. Ed. 576. See post, "Grounds for Relief," VII, C, 2.

25. Union Bank *v.* Geary, 5 Pet. 99, 8 L. Ed. 60.

Where the attorney appears for the defendant without the knowledge of his principal and consents to judgment and issuance of execution, the remedy of the defendant is in equity. Robb *v.* Vos, 155 U. S. 13, 39 L. Ed. 52.

26. Dormant judgment.—Beebe *v.* United States, 161 U. S. 104, 114, 40 L. Ed. 632. See post, "Time within Which Writ May Issue," V, K; "Dormancy of Judgment," VII, B, 3, f.

under it, until the judgment is reversed, for an erroneous judgment is the act of the court.[27]

e. *Void Judgment.*—If a judgment is void, an execution founded thereon is also void.[28]

f. *Foreign Judgment.*—The constitution did not make the judgments of other states domestic judgments to all intents and purposes, but only gave a general validity, faith and credit to them, as evidence. No execution can issue upon such judgments without a new suit in the tribunals of the state in which issuance is sought.[29]

g. *Judgment Sought to Be Set Aside.*—An execution may issue upon a judgment, to set aside which, an application has been made to the court, and a continuance of the application until the next term granted without prejudice to either party.[30]

h. *Judgment without Service of Process.*—An execution issued on a judgment, void for want of service of process, is of no validity.[31]

i. *Judgment upon Mandate of Appellate Court.*—When the mandate of the federal supreme court goes to the court below, it is necessary that that court, with a view to execution, should enter a further judgment in accordance with the mandate.[32]

j. *On Judgment for Injuries Growing Out of the Civil War.*—The constitutional provision of a state that no execution should issue on any judgment rendered because of any act done according to civilized warfare during the Civil War, does not contravene the United States constitution by impairment of the obligation of contract.[33]

k. *Judgment Appealed from.*—"We are by no means prepared to say that a complainant, after having appealed from a decree in his favor, can be permitted, pending the appeal, to carry into execution the decree which he is seeking to reverse in the appellate court, in order to obtain a decree for a larger sum."[34]

27. Erroneous judgment.—The defendants in an execution paid to the agents of the plaintiff the amount of the debt, and gave a verbal notice that it was their intention to sue out a writ of error to reverse the judgment; this was afterwards done, and the judgment was reversed; the agents of the plaintiff paid over to him forthwith the amount received, and the defendants instituted a suit against the agent, to recover the sum paid to them. Held, that they could not recover; for "whatever * * * was done under the execution, towards enforcing payment of the judgment, was done under authority of law. Had the marshal * * * gone with the execution, and received the money, or coerced payment, he would have been fully justified by authority of the execution. * * * Suppose, it had become necessary for the marshal to sell some of the property of the bank, to satisfy the execution, the purchaser would have acquired a good title under such sale." Bank *v.* Bank, 6 Pet. 8, 16, 8 L. Ed. 299. See the title APPEAL AND ERROR, vol. 2, p. 384.

28. Void judgment.—Walker *v.* Turner, 9 Wheat. 541, 547, 6 L. Ed. 155.

29. Thompson *v.* Whitman, 18 Wall. 457, 462, 463, 21 L. Ed. 897; McElmoyle *v.* Cohen, 13 Pet. 312, 325, 10 L. Ed. 177; Andrews *v.* Andrews, 188 U. S. 14, 37, 47 L. Ed. 366; Wabash R. Co. *v.* Tourville, 179 U. S. 322, 45 L. Ed. 210; Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265, 292, 32 L. Ed. 239; Lynde *v.* Lynde, 181 U. S. 183, 186, 45 L. Ed. 810. See the title FOREIGN JUDGMENTS; RECORDS AND JUDICIAL PROCEEDINGS. And see post, "Different Judgment in Another State," VII, B, 3, b.

30. Judgment sought to be set aside.—"The judgments were duly recovered. The filing of application to set them aside did not affect the validity of the judgments, nor suspend the right to take out executions thereon. The continuance of those applications to the next term, 'without prejudice to either party,' left both parties in statu quo, the applications of the judgment debtor to set aside the judgments undetermined, and the right of the judgment creditor to enforce the judgments unaffected." Freeman *v.* Dawson, 110 U. S. 264, 269, 28 L. Ed. 141. See, also, Planters' Bank *v.* Union Bank, 16 Wall. 483, 21 L. Ed. 473.

31. Without service of process.—Pennoyer *v.* Neff, 95 U. S. 714, 24 L. Ed. 565. See the title SUMMONS AND PROCESS.

32. Judgment upon mandate of appellate court.—Schell *v.* Cochran, 107 U. S. 625, 628, 27 L. Ed. 543; Holmes *v.* Jennison, 14 Pet. 540, 586n, 10 L. Ed. 579.

33. Judgment for injuries growing out of Civil War.—Freeland *v.* Williams, 131 U. S. 405, 416, 33 L. Ed. 193.

34. Judgment appealed from.—Taylor *v.*

l. *Judgment against Wrong Person.*—If a judgment be rendered against one, as executor, who is not executor, it does not bind the estate of the testator; and an execution upon such a judgment cannot legally be levied upon such estate.[35]

m. *Judgment on Which Ca. Sa. Had Issued.*—A judgment on which a capias ad satisfaciendum has issued and which the defendant has been arrested is not satisfied, and may be enforced by an execution against the property of the defendant.[36]

J. Decrees on Which Execution May Issue.—On a decree other than for a specified sum of money, no execution can issue,[37] except for costs.[37a]

K. Time within Which Execution May Issue—1. In General.—An execution cannot issue before the judgment is rendered,[38] after expiration of judgment lien,[39] nor later than a year at common law,[40] but this has been the subject of statutory regulation in the different states.[41] It cannot issue within ten days after rendition of judgment, where a writ of error may operate as a supersedeas.[42] But there is nothing to prevent the preparation by the clerk of an execution before the expiration of the ten days.[43] The issuance of an execution during the time agreed upon for stay is presumed regular.[44] The premature issuance of an execution is

Savage, 1 How. 282, 285, 11 L. Ed. 132. See the title APPEAL AND ERROR, vol 2, p. 279.

35. Judgment against wrong person.—Griffith *v.* Frazier, 8 Cranch 9, 3 L. Ed. 471.

36. Judgment on which ca. sa. has issued.—The right to have an execution issued is merely suspended by a commitment under a ca. sa., and is restored on determination thereon without the consent of the creditor. Tayloe *v.* Thomson, 5 Pet. 358, 369, 8 L. Ed. 154.

37. Decrees on which execution may issue.—Hovey *v.* McDonald, 109 U. S. 150, 160, 27 L. Ed. 888; Riddle *v.* Mandeville, 6 Cranch 86, 3 L. Ed. 161.

37a. The court is always competent to award costs in a chancery suit and may issue execution therefor, except in cases of which it has no jurisdiction. The Mayor *v.* Cooper, 6 Wall. 247, 18 L. Ed. 851.

38. Time of issuance—After judgment.—Wayman *v.* Southard, 10 Wheat. 1, 29, 6 L. Ed. 253.

39. During duration of lien.—Norris *v.* Jackson, 9 Wall. 125, 19 L. Ed. 608.

40. During year—At common law.—But an execution so issued is not void, but voidable, and may be regularly enforced unless set aside on motion. Erwin *v.* Dundas, 4 How. 58, 79, 11 L. Ed. 875; Griffith *v.* Bogert, 18 How. 158, 162, 15 L. Ed. 307; United States *v.* Morrison, 4 Pet. 124, 136, 7 L. Ed. 804.

41. Under statute.—Under the laws of Colorado an execution may issue within a year from the judgment. Gottlieb *v.* Thatcher, 151 U. S. 271, 38 L. Ed. 157.

Under the Virginia act of 1792, where an execution has been issued and not returned, other executions and proceedings may be had, within the ten years; but not afterwards. If this, then, be a limitation law, it is a rule of property; and under the 34th section of the judiciary act, it is a rule of decision for the courts of the United States. Ross *v.* Duval, 13 Pet. 45, 60, 10 L. Ed. 51.

A judgment was obtained in the circuit court of the United States for the district of Virginia, in December, 1821, and a writ of fieri facias was issued on this judgment, in January, 1822, which was not returned; and no other execution was issued, until August, 1836, when a capias ad satisfaciendum was issued against the defendant. Held, that this execution issued illegally, in consequence of the lapse of time between the rendition of the judgment, and the issuing of execution in 1836. Ross *v.* Duval, 13 Pet. 45, 10 L. Ed. 51.

42. Where writ of error operates as supersedeas.—Section 1007 of the Revised Statutes, which, as amended by the act of February 18, 1875 (18 Stat., part 3, p. 316), provides that, where a writ of error may operate as a supersedeas, execution shall not issue until the expiration of ten days after the rendition of the judgment, has reference only to the judgments of the courts of the United States. Doyle *v.* Wisconsin, 94 U. S. 50, 24 L. Ed. 64.

43. Board of Commissioners *v.* Gorman, 19 Wall. 661, 665, 22 L. Ed. 226.

44. During time agreed for stay.—Where the following memoranda appeared on the judgment records: "By consent execution stayed until the 25th day of March, A. D 1877," and executions were issued before the expiration of that time, the presumption is, nothing appearing to the contrary, that they were rightly issued, and that either the agreement lacked consideration, or was not authorized, or had been by mutual assent annulled, or that the terms of the agreement had not been complied with by defendants. Beebe *v.* United States, 161 U. S. 104, 112, 40 L. Ed. 632.

But where a defendant executed a bond, with warrant of attorney to confess judgment an execution cannot be issued on such judgment until time of maturity of

an irregularity merely,[45] and the same is true of the tardy issuance thereof.[46] In computing the time within which an execution may issue, the period of a stay is not counted.[47]

2. After Death of Party—a. *In General.*—The general rule is that the death of a party to a suit after judgment but before execution is tested, abates the suit and the writ thereafter issued is void, unless issued upon scire facias or the statutory substitute therefor by notice.[48]

the bond, although there was no provision for a stay of execution inserted in the warrant of attorney. Shoemaker *v.* Shirtliffe, 1 Dall. 127, 1 L. Ed. 66.

45. Effect of premature issuance.—Although prematurely issued, an execution is not absolutely void. It is merely erroneous and must be respected and may be enforced until it is vacated in some manner prescribed by law; no one but the defendant can complain of it, and even he cannot do so in any collateral proceeding. Beebe *v.* United States, 161 U. S. 104, 113, 40 L. Ed. 632; The Charles Carter, 4 Cranch 328, 333, 2 L. Ed. 636.

Premature issuance is not collusive.—An execution issued by consent on a judgment in favor of a mortgagee against an insolvent corporation is not collusive merely because consented to and issued hastily. Dickerman *v.* Northern Trust Co., 176 U. S. 181, 190, 44 L. Ed. 423.

46. Effect of tardy issuance.—"An execution issued after a year and a day is voidable but not void; even the defendant cannot attack it collaterally; and a levy and sale, made under it, are sufficient to transfer his title." Beebe *v.* United States, 161 U. S. 104, 113, 40 L. Ed. 632.

47. Computation of time.—The time during which a supersedeas is in force is not counted as a part of the year. Gottlieb *v.* Thatcher, 151 U. S. 271, 38 L. Ed. 157.

48. After death of party.—Insley *v.* United States, 150 U. S. 512, 516, 37 L. Ed. 1163; Ransom *v.* Williams, 2 Wall. 313, 317, 17 L. Ed. 803; Erwin *v.* Dundas, 4 How. 58, 76, 11 L. Ed. 875; Mitchell *v.* St. Maxent, 4 Wall. 237, 18 L. Ed. 326.

When a defendant dies after judgment, and execution is subsequently issued without notice as required by statute being given to the representatives of the defendant, or the judgment being revived by scire facias, the execution is a nullity, and all proceedings under it are void. But the execution is good, if it is tested before the death occurred. The law in such cases, however, acts upon the theory that the defendant is interested in the case, and, therefore, upon his death his personal representatives should be called in. In this case, however, the judgment has been satisfied by the sale of the land, and there are no proceedings existing in which the estate is interested. Insley *v.* United States, 150 U. S. 512, 516, 37 L. Ed. 1163; Ransom *v.* Williams, 2 Wall. 313, 317, 17 L. Ed. 803.

Such is the settled law where there is but one defendant. Erwin *v.* Dundas, 4 How. 58, 11 L. Ed. 875.

Judgment entered after death.—"If a judgment is entered in vacation against a defendant who died the preceding term, an execution tested on a day in the said term prior to the defendant's death may be sued out without a scire facias; for, as the judgment signed in vacation relates to and is considered as a judgment of the first day of the preceding term, and as the execution relates to the judgment, it may, in point of form, be considered as having commenced before the death of the defendant, on account of the date or teste, and, of course, upon the ground above stated, being an entire thing, be completed afterwards." Erwin *v.* Dundas, 4 How. 58, 75, 76, 11 L. Ed. 875.

"The writ is regarded as having been issued in the lifetime of the defendant himself, and, inasmuch as he had not taken any steps to arrest it before his death, no good reason could be given for the interposition of his representatives. They, upon the view taken, were not new parties, nor parties at all to the proceedings, as the last step in the appropriation of the goods to the satisfaction of the judgment had been taken in the lifetime of their intestate." Erwin *v.* Dundas, 4 How. 58, 76, 11 L. Ed. 875; Taylor *v.* Doe, 13 How. 287, 294, 14 L. Ed. 149.

Writ against king's debtors.—"It is otherwise as respects the writ of extent issued against the king's debtor; for, as that cannot be antedated, but must bear teste on the day it issues, it can only be issued against the lands and goods in the lifetime of the defendant." Erwin *v.* Dundas, 4 How. 58, 76, 11 L. Ed. 875.

Where property has been attached.—The same rule applies where the proceedings are commenced by seizing property under a writ of attachment, under the laws of Florida, as at the common law. In Florida the service of the writ of attachment binds the property, and retains it in custody of the law, for the benefit of the attaching creditor, if he obtains a judgment and execution, and the property is to be disposed of as in other cases of property levied upon and taken in execution. Mitchell *v.* St. Maxent, 4 Wall. 237, 243, 18 L. Ed. 326.

Elegit at common law.—The same rules applied to a writ of elegit sued out under the statute of 13 Edward I. Ransom *v.* Williams, 2 Wall. 313, 317, 17 L. Ed. 803;

b. *On Scire Facias*—(1) *In General.*—"Where a new person who was not a party to the judgment or recognizance derives a benefit or becomes chargeable to the execution, there must be a scire facias to make him a party to the judgment or recognizance."[49]

(2) *Where There Is Sole Defendant.*—The death of a defendant, before the teste of an execution, compels the plaintiff to sue out a writ of scire facias, for the alteration of the person alters the process.[50]

(3) *Where There Are Several Defendants*—(a) *Personal Property.*—In case of a judgment against two defendants, and the death of one, execution may be taken out against the personal representative within the year without a scire facias.[51]

(b) *Real Property.*—Where there are two or more defendants, some of whom have died, the judgment cannot be enforced by execution against the real estate of the survivors alone; and, as it has to issue against the real estate of all, the estate of those deceased is protected by the same law which would govern the case if there had been a sole defendant.[52]

c. *On Notice under Statute.*—By statute in some of the states, execution may issue against the lands and tenants of a deceased judgment debtor, provided the plaintiffs in execution shall have given to the executor or administrator of such deceased debtor notice in writing of the existence of said judgment.[53]

Erwin *v.* Dundas, 4 How. 58, 76, 11 L. Ed. 875.

The act of 29 Car. II, which has been re-enacted in most of the states, took away this relation as respected the rights of bona fide purchasers, and confined its binding effect upon the goods as to them to the time of the delivery of the writ to the sheriff; but as between the parties, it remained as it stood at common law. Erwin *v.* Dundas, 4 How. 58, 75, 11 L. Ed. 875.

Effect of relation back.—In consequence of this relation back, if the execution was regularly tested in the lifetime of a deceased defendant, it may be taken out and executed against his goods and chattels after his death, the same as if that event had not intervened. Erwin *v.* Dundas, 4 How. 58, 85, 11 L. Ed. 875.

"It is regarded in the same light as if delivered into the hands of the sheriff and the goods bound in the lifetime of the defendant, for the reason the officer being entitled to seize them at any time after the teste, the death of the party could not alter the right; and, therefore, though the execution came to the sheriff after, still if tested before, his death, the goods may be seized, in whose hands soever they may be found." Erwin *v.* Dundas, 4 How. 58, 75, 11 L. Ed. 875.

49. On scire facias.—Erwin *v.* Dundas, 4 How. 58, 77, 11 L. Ed. 875; Taylor *v.* Savage, 1 How. 282, 285, 11 L. Ed. 132.

50. Sole defendant.—Erwin *v.* Dundas, 4 How. 58, 11 L. Ed. 875; Browne *v.* Chavez, 181 U. S. 68, 45 L. Ed. 752.

The heirs, devisees, and terre tenants of the deceased must have notice before an execution can regularly issue, for they are the parties in interest, and should have an opportunity to interpose a defense, if any they have, to the enforcement of the judgment. Erwin *v.* Dundas, 4 How. 58, 11 L. Ed. 875, is an authority in point, and it is unnecessary to refer to any other. But it is contended that the doctrines of that case have been overturned by the decision of Taylor *v.* Doe, 13 How. 287, 14 L. Ed. 149. This is an erroneous view of that decision. The court held, in that case, that it is not necessary to revive a judgment by scire facias, where an execution regularly issued during the life of the defendant had been levied on land, but that the officer who had made the levy could proceed to sell, under a venditioni exponas. That writ was regarded as a completion of the previous execution, by which the property had been appropriated, and not as an original or independent proceeding. Mitchell *v.* St. Maxent, 4 Wall. 237, 242, 18 L. Ed. 326.

51. Several defendants—Personalty.—Erwin *v.* Dundas, 4 How. 58, 77, 78, 11 L. Ed. 875; United States *v.* Price, 9 How. 83, 96, 13 L. Ed. 56.

Before and since the Statute of Westminster 2d, a judgment against two defendants survives against the personal estate of the survivor, and execution could be taken out against him, within a year, without a scire facias. Erwin *v.* Dundas, 4 How. 58, 11 L. Ed. 875.

52. Realty.—Erwin *v.* Dundas, 4 How. 58, 11 L. Ed. 875.

Before the real estate of the deceased can be subjected to execution, the judgment, which does not survive as to the real estate, must be revived by scire facias against the surviving defendants, and against the heirs, devisees, and terre tenants of the deceased. The interest of new parties would otherwise be liable to be suddenly divested without notice. Erwin *v.* Dundas, 4 How. 58, 11 L. Ed. 875.

53. Notice under statute.—Ransom *v.*

L. Alias and Plures Writs.—The remedies of an execution creditor are cumulative and successive, and he may pursue them until he reaches that point of which the law declares his debt satisfied;[54] he may elect between an alias writ and a writ of venditioni exponas.[55] These writs relate back to the issuance and levy of the originals,[56] which are presumed to have been regularly issued.[57] The clerk is entitled to his fee for issuing alias writs,[58] and may include cost of issuing the original.[59]

M. Presumptions.—Proceedings of a court, having jurisdiction to render judgment, in carrying it into effect are presumed regular.[60]

VI. Amendments.

An execution at variance with a judgment on which issued may be so amended so as to conform thereto,[61] and a variance between the writ and præcipe may be cured by amendment.[62] The amendment relates back to the date of the writ.[63]

VII. Staying, Quashing and Vacating Writ.

A. Stay—1. JURISDICTION.—The inherent power to prevent abuse, oppression and injustice is possessed equally by courts of law and equity over their process,[64] and the eighteenth section of the judiciary act of 1789, ch. 20, empowers a federal

Williams, 2 Wall. 313, 317, 17 L. Ed. 803.

"The notice under the statute is cumulative. The plaintiff may give it, or resort to the common-law remedy by scire facias." Ransom *v.* Williams, 2 Wall. 313, 317, 17 L. Ed. 803.

A statute of Illinois authorizes execution to issue against the lands of a deceased debtor, provided that the plaintiff in the execution shall give notice to the executor or administrator, if there be any, of the decedent—a sale without either such notice or scire facias, as at common law, is void. Ransom *v.* Williams, 2 Wall. 313, 17 L. Ed. 803.

By the law of South Carolina, the thirty day rule is substituted for scire facias on a judgment, in those cases only, where lapse of time prevents the plaintiff from suing out execution. Griffith *v.* Frazier, 8 Cranch 9, 3 L. Ed. 471.

54. Alias and plures writs.—Tayloe *v.* Thomson, 5 Pet. 358, 369, 8 L. Ed. 154; Ross *v.* Duval, 13 Pet. 45, 59, 10 L. Ed. 51.

Under the law of Kentucky a new execution cannot issue while a former levy is in force. Bank *v.* Tyler, 4 Pet. 366, 7 L. Ed. 888.

Although, by the law of Alabama, where an execution has issued during the lifetime of a defendant, but has not been actually levied, an alias or plures may go after his death, and the personal estate of the deceased levied upon and sold to satisfy the judgment, yet this is not so with respect to the real estate. Erwin *v.* Dundas, 4 How. 58, 75, 11 L. Ed. 875.

55. Election.—It rests within the election of the plaintiff in execution to take out an alias execution, or a writ of venditioni exponas. If merely a sale of the property on which a levy has been made is desired and not of other property, or the acquisition of a lien on other property, a venditioni exponas is the proper writ. Beebe *v.* United States, 161 U. S. 104, 111, 40 L. Ed. 632. See ante, "Election of Writs," V, B.

56. Relation bank.—Beebe *v.* United States, 161 U. S. 104, 110, 40 L. Ed. 632.

57. Beebe *v.* United States, 161 U. S. 104, 110, 40 L. Ed. 632.

58. Fees for issuing.—"While a writ of alias fi. fa. is ordinarily issued upon a simple precipe, it is perfectly competent for the district attorney to apply to the court for an order for that purpose, and, if such an order be made, the clerk is clearly bound to enter it, and is entitled to his fee therefor, whether such order be necessary or not, or, indeed, whether the court had any right to enter it or not. The propriety of such an order cannot be tested upon the application of the clerk for his fee for entering it." United States *v.* Payne, 147 U. S. 687, 689, 37 L. Ed. 332.

59. Under the Virginia statute, if the first execution is not returned or executed; that is, where it is out and may be served, the clerk in issuing a second execution may include the cost of issuing both. Peyton *v.* Brooke, 3 Cranch 92, 95, 2 L. Ed. 376. See ante, "Who May Issue Writ," V, D.

60. Presumption of validity.—McGoon *v.* Scales, 9 Wall. 23, 30, 19 L. Ed. 545. See ante, "Alias and Plures Writs," V, L.

61. Amendments.—Black *v.* Wistar, 4 Dall. 267, 1 L. Ed. 828. See ante, "Conformity to Judgment," IV, E; "Teste and Seal," IV, F.

62. Black *v.* Wistar, 4 Dall. 267, 1 L. Ed. 828; Shoemaker *v.* Knorr, 1 Dall. 197, 1 L. Ed. 97.

63. Tilton *v.* Cofield, 93 U. S. 163, 23 L. Ed. 858.

64. Stay—Jurisdiction.—Krippendorf *v.* Hyde, 110 U. S. 276, 282, 25 L. Ed. 145. See, also, Bank *v.* Turnbull, 16 Wall. 190, 21 L. Ed. 296; Bank *v.* Halstead, 10 Wheat. 51, 64, 6 L. Ed. 264; Freeman *v.* Dawson, 110 U. S. 264, 270, 28 L. Ed. 141.

court to suspend execution, in order to give time for granting a new trial.[65]

2. Time Allowed for Stay.—A supersedeas, in order to stay proceedings on an execution, must come before there is a levy made under the execution; for if it come afterwards, the sheriff is at liberty to proceed, upon a writ of venditioni exponas, to sell the goods.[66]

3. Grounds for Stay—a. *Matters of Defense at Trial.*—Matter of defense to the action, by way of set-off, which was not pleaded at the trial, is not ground for stay of execution.[67]

b. *Matters Arising Prior to Judgment.*—A rule to show cause why execution should not be stayed upon a judgment, until it should be determined in another action whether or not such judgment was rendered upon a usurious contract, was properly refused.[68]

c. *Discharge from Bankruptcy.*—A discharge from bankruptcy may be set up in a state court to stay an execution, though judgment on which issued was recovered after commencement of bankruptcy proceedings but before discharge, and a stay of execution need not have been asked for before judgment.[69]

d. *Appeal or Writ of Error.*—The suing out of a writ of error, giving bond and citation of parties, operate as a stay of execution.[70]

4. Bond for Stay.—Under the act of the assembly of Pennsylvania of December 23, 1784, providing for a stay of execution, upon bond given by defendant, the date expressed in the bond cannot be contradicted by evidence aliunde.[71]

5. Stay by Injunction.—See post, "Injunction against Execution," VII, C.

6. By Legislative Enactment.—Executions have been stayed by acts of a state legislature.[72]

65. Wayman *v.* Southard, 10 Wheat. 1, 23, 6 L. Ed. 253.

A circuit court may order execution stayed to examine credits claimed on judgment. United States *v.* McLemore, 4 How. 286, 11 L. Ed. 977. See the title SUPERSEDEAS AND STAY OF PROCEEDINGS.

66. Time allowed for stay.—Boyle *v.* Zacharie, 6 Pet. 648, 659, 8 L. Ed. 532; United States *v.* Dashiel, 3 Wall. 688, 700, 18 L. Ed. 268.

Where the levy of a fieri facias was made more than a week before an injunction was granted, to stay the proceedings under the execution according to the course of the common law, it will not operate as a supersedeas to the venditioni exponas. Boyle *v.* Zacharie, 6 Pet. 648, 659, 8 L. Ed. 532. See post, "Discharge from Bankruptcy," VII, A, 3, c.

67. Grounds for—Matters of defense.—Avery *v.* United States, 12 Wall. 304, 20 L. Ed. 405.

68. Matters arising before judgment.—Shoemaker *v.* Shirtliffe, 1 Dall. 127, 1 L. Ed. 66.

69. Discharge from bankruptcy.—Boynton *v.* Ball, 121 U. S. 457, 467, 30 L. Ed. 985.

70. Appeal or writ of error.—Stockton *v.* Bishop, 2 How. 74, 11 L. Ed. 184. See the titles APPEAL AND ERROR, vol. 2, pp. 173, 279; SUPERSEDEAS AND STAY OF PROCEEDINGS.

71. Bond for stay.—Snowden *v.* Hemming, 1 Dall. 83, 1 L. Ed. 47. See the title APPEAL AND ERROR, vol. 1, p. 997.

72. By a legislative enactment in Maryland executions were stayed from the 10th of May, 1861, until the 1st of November, 1862. Watson *v.* Sutherland, 5 Wall. 74, 79, 18 L. Ed. 580.

A convention of the state of Virginia passed an ordinance of secession, on the 18th of April, 1861, and, on the 30th of that month, a law entitled, "An ordinance to provide against the sacrifice of property and to suspend proceedings in certain cases." This ordinance declared that thereafter no execution should be issued, without the consent of the parties interested, until otherwise provided by law; and that where executions were in the hands of the officer, whether levied or not, if the debtors should offer bond and security for the payment of the debt, interest, and costs, when the operation of the ordinance should cease, the property should be restored and the bond should be returned, as in the case of a forthcoming bond, and should be alien on the realty of the obligors. One against whom an execution was issued in March of the same year took advantage of the above ordinance by giving the prescribed bond and security, and allowed the judgment against him to remain unpaid. After this ordinance had ceased to operate, action was brought upon the bond. Held, that the obligors were estopped from raising the invalidity of the ordinance. Daniels *v.* Tearney, 102 U. S. 415, 416, 26 L. Ed. 187.

As to constitutionality of such laws, see Bronson *v.* Kinzie, 1 How. 311, 317, 11 L. Ed. 143. And see the title IMPAIRMENT OF OBLIGATION OF CONTRACTS.

B. Quashing—1. Nature of Relief—Discretion of Court.—Motions to quash executions are addressed to the sound discretion of the court and are a summary relief, which the court is not compellable to allow. The party is deprived of no right by the refusal; and he is at full liberty to redress the grievance by writ of error, or audita querela, or other remedy known to the common law.[73]

2. Time Allowed for Quashing.—The party seeking to have an execution quashed must be free from laches and unreasonable delay in making a motion to quash.[74]

3. Grounds for Quashing—a. *Issuance of Executions after Supersedeas.*—An execution, issued in the court below, after a writ of error has been sued out, a bond given, and a citation issued, all in due time, may be quashed either in the court below or in the appellate court—these things operating as a stay of execution.[75] But the court will not quash an execution, issued by the court below, to enforce its decree, pending the writ of error, if the writ of error be not a supersedeas to the decree.[76]

b. *Different Judgment in Another State.*—The fact that a judgment exists in another state different from the one in this state is no ground for quashing execution issued on the latter.[77]

c. *Satisfaction of Execution.*—A motion to quash a second fieri facias, on the ground that the execution is satisfied, will be denied, where the pretended satisfaction consists in the officer's unauthorized acceptance of bank notes.[78]

d. *Garnishment Proceedings.*—Whether a court will quash an execution on account of proceedings against the debtor, as the garnishee of the creditor, is a question appealing to the discretion of the lower court, and a court of error cannot revise its decision thereon.[79]

e. *Not Authorized by Judgment.*—If an execution should be issued not authorized by the judgment, the court, on motion, would set it aside or quash it.[80]

f. *Dormancy of Judgment.*—The issuing of an execution on a judgment after a year and a day without reviving the judgment may be sufficient ground for setting aside the execution.[81]

4. Appeal.—A judgment or order, quashing or, refusing to quash, an execution is not a final judgment to which a writ of error will lie.[82]

C. Injunction against Execution—1. Nature of Proceedings.—An injunction against an execution is a proceeding in due process of law.[83] Strictly speaking, at the common law, an injunction in equity does not operate as a supersedeas; although it may furnish a proper ground for the court of law, in

73. Quashing.—Boyle *v.* Zacharie, 6 Pet. 648, 656, 8 L. Ed. 532; McCargo *v.* Chapman, 20 How. 555, 556, 15 L. Ed. 1021.

But see McCargo *v.* Chapman, 20 How. 555, 557, 15 L. Ed. 1021, where it was thought that the court might be compelled to act by mandamus.

74. Time allowed for quashing.—"After a delay of seven years in this case, without explanation or excuse, we think the motion comes too late." Beebe *v.* United States, 161 U. S. 104, 114, 40 L. Ed. 632.

75. Grounds for quashing.—Stockton *v.* Bishop, 2 How. 74, 11 L. Ed. 184; Griffith *v.* Bogert, 18 How. 158, 164, 15 L. Ed. 307. See the title APPEAL AND ERROR, vol. 1, p. 333, vol. 2, pp. 173, 279.

76. Wallen *v.* Williams, 7 Cranch 278, 3 L. Ed. 342.

77. Different judgment in another state.—An execution so issued is not in violation of full faith and credit clause of the United States constitution. Wabash R. Co. *v.* Tourville, 179 U. S. 322, 45 L. Ed. 210.

78. Satisfaction of execution.—Griffin *v.* Thompson, 2 How. 244, 11 L. Ed. 253. See post, "Satisfaction and Discharge of Lien," XII.

79. Garnishment proceedings.—Early *v.* Rogers, 16 How. 599, 14 L. Ed. 1074; McCargo *v.* Chapman, 20 How. 555, 556, 15 L. Ed. 1021.

80. Not authorized by judgment.—Should the court refuse to do so, a mandamus would seem to be the proper remedy. McCargo *v.* Chapman, 20 How. 555, 557, 15 L. Ed. 1021. See ante, "Conformity to Judgment," IV, E; "Amendments," VI.

81. Dormancy of judgment.—Griffith *v.* Bogert, 18 How. 158, 164, 15 L. Ed. 307. See ante, "Dormant Judgment," V, H, 2, c; "In General," V, K, 1.

82. Appeal.—United States *v.* Abatoir Place, 106 U. S. 160, 162, 27 L. Ed. 128. See the title APPEAL AND ERROR, vol. 1, p. 996.

83. Injunctions against execution.—

which the judgment is rendered, to interfere by summary order to quash or stay the proceedings on the execution. If the injunction is disobeyed, a court of equity has its own mode of administering suitable redress. But a court of law is under no obligation to enforce it as a matter of right or duty.[84]

2. Grounds for Relief.—In ordinary cases of wrongful levy of an execution on property not subject thereto, the proper relief is by motion to have the levy discharged,[85] but in some cases there may be circumstances upon which equity may maintain jurisdiction and grant an equitable remedy,[86] as where there is no legal remedy,[87] the proceedings under the execution are contrary to equity and justice,[88] irreparable injury would result from the proceedings under the execution,[89] or where the judgment was wrongfully obtained,[90] the property is in custody of the law,[91] belongs to a public corporation,[92] is that of a third person,[93] or where stay or supersedeas has been granted,[94] or where proceedings are under Louisiana statute.[95] Where a judgment was confessed on

Freeland *v.* Williams, 131 U. S. 405, 418, 33 L. Ed. 193.

84. Boyle *v.* Zacharie, 6 Pet. 648, 657, 8 L. Ed. 532. See the title INJUNCTIONS.

85. Grounds for relief.—The remedy of a claimant of goods wrongfully levied upon under an execution, is by application to the court issuing the execution, and not by bill in equity. Van Norden *v.* Morton, 99 U. S. 378, 25 L. Ed. 453; New Orleans *v.* Morris, 105 U. S. 600, 602, 26 L. Ed. 1184; United States *v.* McLemore, 4 How. 286, 11 L. Ed. 977.

86. New Orleans *v.* Morris, 105 U. S. 600, 602, 26 L. Ed. 1184.

87. Want of legal remedy.—Watson *v.* Sutherland, 5 Wall. 74, 80, 18 L. Ed. 580.

88. Contrary to equity and justice.—Gue *v.* Tidewater Canal Co., 24 How. 257, 16 L. Ed. 635.

Although equal contribution in the discharge of a joint liability is not inequitable as between wrongdoers, equity will not assist in compelling an equal contribution by enjoining the levy of an execution on the property of one of the tort feasors. Selz *v.* Unna, 6 Wall. 327, 336, 18 L. Ed. 799.

89. Irreparable injury.—Hence where a creditor of A. levied on goods, a miscellaneous stock in retail trade, suitable for the then current season, and intended to be paid for out of the sales—in the possession of B., a young man recently established in trade and doing a profitable business, alleging that they had been conveyed to B. by A. to defeat his creditors—the court, upon being satisfied that they had not been so conveyed, held that the execution had been rightly enjoined; that as at law the measure of damages, if the property were not sold, could not extend beyond the injury done to it, or, if sold, to the value of it, when taken, with interest from the time of the taking down to the trial—loss of trade, destruction of credit, and failure of business prospects—commercial ruin, in short—collateral or consequential damages, which might nevertheless ensue, would not be compensated for at law, but were properly prevented in equity. Watson *v.* Sutherland, 5 Wall. 74, 18 L. Ed. 580.

Watson *v.* Sutherland, 5 Wall. 74, 18 L. Ed. 580, is declared a borderland case in Van Norden *v.* Morton, 99 U. S. 378, 379, 25 L. Ed. 453, but this latter case was itself distinguished in New Orleans *v.* Morris, 105 U. S. 600, 602, 26 L. Ed. 1184.

90. Judgment wrongfully obtained.—Phillips *v.* Negley, 117 U. S. 665, 675, 29 L. Ed. 1013.

91. Property in custody of law.—A marshal of a United States court may be enjoined from levying an execution on property in the control of an insolvency court of a state. Geilinger *v.* Philippi, 133 U. S. 246, 33 L. Ed. 614.

92. Property of public corporation.—New Orleans *v.* Morris, 105 U. S. 600, 602, 26 L. Ed. 1184, distinguishing Van Norden *v.* Morton, 99 U. S. 378, 25 L. Ed. 453.

An injunction was properly granted to enjoin proceedings under an execution against the property of a public service corporation, and such injunction was properly made perpetual. Gue *v.* Tidewater Canal Co., 24 How. 257, 264, 16 L. Ed. 635.

93. Property belongs to third person.—Where a complainant filed a bill on the equity side of the circuit court, for an injunction to prevent the sale of slaves which had been taken in execution as the property of another person, the evidence shows that they were the property of the complainant, and the circuit court was directed to make the injunction perpetual. Amis *v.* Myers, 16 How. 492, 14 L. Ed. 1029.

A court has no jurisdiction to enjoin sale of a boat owned by a third person under execution against defendant. Plaintiff should resort to his legal remedy of trespass or replevin. Van Norden *v.* Morton, 99 U. S. 378, 380, 25 L. Ed. 453.

94. Supersedeas granted.—United States *v.* Dashiel, 3 Wall. 688, 702, 18 L. Ed. 268.

95. Proceedings under Louisiana statute.—Although the code of Louisiana provides for the issuance of an injunction, such provision is applicable to state courts

agreement and such agreement violated, the issuance of an execution thereon may be enjoined.[96]

3. Who Entitled to Relief.—A person having no interest or title in land has no standing in a court of equity to ask that the levy and sale under execution be enjoined.[97] An injunction will not be granted to one of several co-defendants in pursuance to a secret agreement between such defendant and the plaintiff by which the property of such defendant was not to be subjected to the levy of the execution.[98]

4. Vacating Injunction.—A purchaser under a judicial sale having filed a bill and obtained an injunction upon the creditor to stay an execution, it was an irregular mode of raising the question of fraud for the creditor to file an answer setting it forth, and alleging the sale to be void upon that ground.[99]

VIII. Levy of Writ.

A. Statutory Provision.—The 34th section of the judiciary act of 1789, ch. 20, has no application to the practice of the court, or to the conduct of its officer, in the service of an execution. The 17th section would seem, both from the context and from the particular words which have been cited as applicable to this question, to be confined to business actually transacted in court, and not to contemplate proceedings out of court.[1]

B. Who May Make Levy.—The sheriff of the county, who has levied an execution upon a certain tract of land, has power to complete the process by sale of such land, although by subdivision of his county such land has been annexed to and become a part of another county.[2] If an execution should come to the hands of a sheriff to be executed, and his term of office expire before he executes it, he is bound nevertheless to complete the execution; and the same rule applies to a marshal.[3]

C. Mode and Sufficiency of Levy.—The modes of levying an execution must vary according to the property levied upon.[4] Lands cannot be seized as movable chattels may.[5] Actual manucaption cannot be taken of stocks and credits.

only and not to the United States courts. Van Norden *v.* Morton, 99 U. S. 378, 25 L. Ed. 453; New Orleans *v.* Louisiana Const. Co., 129 U. S. 45, 46, 32 L. Ed. 607.

96. Judgment confessed on agreement and agreement violated.—Union Bank *v.* Geary, 5 Pet. 99, 8 L. Ed. 60.

97. Who entitled to relief.—Selz *v.* Unna, 6 Wall. 327, 334, 18 L. Ed. 799.

98. Selz *v.* Unna, 6 Wall. 327, 18 L. Ed. 799.

99. Vacating injunction.—He should have filed a cross bill. Exceptions to the answer upon this account were properly sustained by the court below. Ford *v.* Douglas, 5 How. 143, 12 L. Ed. 89.

But if the court below should perpetuate the injunction, upon the defendants' refusal to answer further, the injunction should be free from doubt, in leaving the creditor to pursue other property under his judgment, and also at liberty to file a cross bill. If the injunction does not clearly reserve these rights to the creditor, it goes too far, and the judgment of the court below must be reversed. Ford *v.* Douglas, 5 How. 143, 12 L. Ed. 89.

1. Statutory provision.—Wayman *v.* Southard, 10 Wheat. 1, 24, 6 L. Ed. 253.

"This act, so far as respects the writ, is plainly confined to form. But form, in this particular, it has been argued, has much of substance in it, because it consists of the language of the writ, which specifies precisely what the officer is to do. His duty is prescribed in the writ, and he has only to obey its mandate. This is certainly true, so far as respects the object to be accomplished, but not as respects the manner of accomplishing it. In a fi. fa., for example, the officer is commanded to make of the goods and chattels of A. B., the sum of money specified in the writ; and this sum must, of course, be made by a sale. But the time and manner of the sale, and the particular goods and chattels which are liable to the execution, unless, indeed, all are liable, are not prescribed." Wayman *v.* Southard, 10 Wheat. 1, 27, 6 L. Ed. 253; Ross *v.* Duval, 13 Pet. 45, 59, 10 L. Ed. 51.

2. Who may make levy.—Tyrell *v.* Roundtree, 7 Pet. 464, 8 L. Ed. 749.

3. McFarland *v.* Gwin, 3 How. 717, 720, 11 L. Ed. 799.

4. Mode and sufficiency.—Miller *v.* United States, 11 Wall. 268, 296, 20 L. Ed. 135.

5. Miller *v.* United States, 11 Wall. 268, 296, 20 L. Ed. 135; Ronkendorff *v.* Taylor, 4 Pet. 349, 7 L. Ed. 882.

Cotenant's estate in land.—"The authorities are not entirely in harmony, as to whether a levy upon the interest of a cotenant in a specific part, designated by

Seizure may be either actual or constructive. It does not always involve taking into manual possession. Even in case of chattels movable, taking part of the goods in a house, under a fi. fa., in the name of the whole, is a good seizure of all. An assertion of control, with a present power and intent to exercise it, is sufficient.[6]

D. Time of Making Levy.—Property which has been seized under a fi. fa. before the return day thereof, may be sold afterwards.[7] By the common law, the writ of fieri facias had relation back of its teste, and if the execution was tested during the lifetime of a deceased defendant, it might be taken out and levied upon his goods and chattels after his death.[8]

E. Custody of Property—1. ACTUAL CUSTODY OF OFFICER.—After levying upon a leasehold interest it is not necessary for the officer to keep actual custody thereof to preserve the lien of the execution.[9]

2. CUSTODY OF DEFENDANT—a. *In General.*—It cannot be implied that a levy is incomplete, on account of the property having been left where it was when the levy was made, where it had been kept by one while he continued to be a receiver.[10] The act of permitting goods to remain in the custody of the defendant after levy of an execution, creates no presumption of fraud, and such levy has priority over another subsequent in time; but, if goods were so left with fraudulent intent, a subsequent levy takes priority.[11]

b. *Under Forthcoming Bond.*—This subject is treated elsewhere.[12]

3. CUSTODY OF THIRD PERSON.—"After a levy has been made with a fi. fa. upon goods and chattels, the officer may confide them to another person for safe-keeping, until there has been a settlement of the judgment and payment of all costs."[13]

F. Operation and Effect—1. ON PROPERTY.—The levy of fieri facias sequestrates the property to answer the exigencies of the writ,[14] takes it out of

metes and bounds, of a certain larger quantity of land, is valid. In view of the other manifest irregularities, we do not feel called upon to express an opinion upon this point." Schroeder *v.* Young, 161 U. S. 334, 342, 40 L. Ed. 721.

By the law of Louisiana, it is indispensably necessary to a valid levy of execution against land that there should be an actual seizure thereof. Watson *v.* Bondurant, 21 Wall. 123, 127, 22 L. Ed. 509.

6. Miller *v.* United States, 11 Wall. 268, 296, 20 L. Ed. 135.

7. **Time of making levy.**—Remington *v.* Linthicum, 14 Pet. 84, 10 L. Ed. 364; Rockhill *v.* Hanna, 15 How. 189, 196, 14 L. Ed. 656.

8. Erwin *v.* Dundas, 4 How. 58, 11 L. Ed. 875. See ante, "In General," V, K, 2, a.

9. **Custody of officer.**—"The leasehold interest, though personal property, is an interest in land. The lessee's interest in the fixtures arises out of the agreement contained in the lease, and of the manner and purpose of their annexation to the land, from which they could not be separated and removed without much labor and expense. It was not necessary that the officer should retain actual possession in order to keep alive a levy upon such property." Freeman *v.* Dawson, 110 U. S. 264, 271, 28 L. Ed. 141.

10. **Custody of defendant.**—Very *v.* Watkins, 23 How. 469, 474, 16 L. Ed. 522; Wayman *v.* Southard, 10 Wheat. 1, 44, 6 L. Ed. 253.

11. Levy *v.* Wallis, 4 Dall. 167, 1 L. Ed. 785.

Where property levied on has been suffered to remain in the possession of the execution debtor, as against a bona fide purchaser, the levy of the execution was lost. Chancellor *v.* Phillips, 4 Dall. 213, 1 L. Ed. 805. See ante, "Property Held by Particular Persons," III, N.

12. **Under forthcoming bond.**—See the titles ADMIRALTY, vol. 1, p. 171; FORTHCOMING AND DELIVERY BONDS.

13. **Custody of third person.**—Very *v.* Watkins, 23 How. 469, 474, 16 L. Ed. 522.

He may, therefore, leave them in the hands of a receiver appointed by the court. Very *v.* Watkins, 23 How. 469, 16 L. Ed. 522.

14. **Operators and effect.**—In re Tyler, 149 U. S. 164, 183, 37 L. Ed. 689.

But the seizure of the goods of a third person, on the execution, does not change the title or make them the goods of the defendant on the execution. The only effect is, if after this the sheriff returns the execution nulla bona, the burden is thrown upon him in a suit for a false return to show that the goods were not the defendant's, and therefore not liable to the execution. Chapman *v.* Smith, 16 How. 114, 134, 14 L. Ed. 868.

the possession of the defendant,[15] and brings the plaintiff into privity therewith.[16]

2. On Judgment.—The general doctrine is that the levy of an execution upon personal property, sufficient to satisfy the execution, operates per se as an extinguishment of the judgment, but to this doctrine there are numerous exceptions,[17] as where the levy is upon real property,[18] or as where the levy has been abandoned at the request of the defendant.[19]

3. On Subsequent Proceedings.—All proceedings under an execution date from the levy thereof,[20] and the levy takes effect from the time it is made by seizure of the property,[21] and all subsequent proceedings in the due course and completion of the levy, for collecting the debt out of the property, have relation back to the time of the seizure.[22]

G. Duty and Liability of Officer.—This subject is treated elsewhere.[23]

IX. Return of Writ.

A. Indorsement.—A marshal may be authorized to make the indorsement,

15. Hagan *v.* Lucas, 10 Pet. 400, 404, 9 L. Ed. 470.

16. And such plaintiff is then in position to attack the validity of a mortgage given by the debtor on such property. People's Savings Bank *v.* Bates, 120 U. S. 556, 562, 30 L. Ed. 754.

17. Effect of levy on judgment.—There are many qualifications to the general rule as applied to the levy of an execution upon the goods of the judgment debtor, as might be illustrated and enforced by numerous decided cases. "Where the goods seized are taken out of the possession of the debtor, and they are sufficient to satisfy the execution, it is doubtless true, that if the marshal or sheriff wastes the goods, or they are lost or destroyed by the negligence or fault of the officer, or if he misapplies the proceeds of the sale, or retains the goods and does not return the execution, the debtor is discharged; but if the levy is overreached by a prior lien, or is abandoned at the request of the debtor or for his benefit, or is defeated by his misconduct, the levy is not a satisfaction of the judgment. Rightly understood, the presumption is only a prima facie one in any case, and the whole extent of the rule is that the judgment is satisfied when the execution has been so used as to change the title of the goods, or in some way to deprive the debtor of his property." Unted States *v.* Dashiel, 3 Wall. 688, 698, 18 L. Ed. 268.

18. "None of those cases, however, afford any support to the theory that any such effect will flow from the issuing of an execution, and the levying of the same upon land. On the contrary, the rule is well settled that in the latter case no such presumption arises, because the judgment debtor sustains no loss by the mere levy of the execution, and the creditor gains nothing beyond what he already had by the lien of his judgment. Reason given for the distinction is that the land in the case supposed remains in the possession of the defendant, and he continues to receive and enjoy the rents and profits." United States *v.* Dashiel, 3 Wall. 688, 698, 18 L. Ed. 268.

19. Levy of an execution, even if made on personal property sufficient to satisfy the execution, is not satisfaction of the judgment, and, accordingly, therefore, does not extinguish it if the levy have been abandoned at the request of the debtor and for his advantage. United States *v.* Dashiel, 3 Wall. 688, 18 L. Ed. 268.

20. On subsequent proceedings.—Tyrell *v.* Rountree, 7 Pet. 464, 8 L. Ed. 749.

21. Freeman *v.* Dawson, 110 U. S. 264, 270, 28 L. Ed. 141.

22. Boyle *v.* Zacharie, 6 Pet. 648, 659, 8 L. Ed. 532; United States *v.* Dashiel, 3 Wall. 688, 18 L. Ed. 268; Freeman *v.* Dawson, 110 U. S. 264, 270, 28 L. Ed. 141; Taylor *v.* Doe, 13 How. 287, 14 L. Ed. 149.

If the writ of fi. fa. was levied by the marshal, upon the property in question, before the return day of the writ, it was lawful for him to sell the same, under and by virtue of said writ, and the facts respecting the said sale might be proved by parol. Wheaton *v.* Sexton, 4 Wheat. 503, 504, 4 L. Ed. 626.

"Whether the marshal sells, before or after the return, whether he makes a correct return, or any return at all, to the writ, is immaterial to the purchaser, provided the writ was duly issued, and the levy made before the return." Wheaton *v.* Sexton, 4 Wheat. 503, 506, 4 L. Ed. 626.

Proceedings in an execution relate back to the judgment for their force and effect. Evans *v.* Pike, 118 U. S. 241, 247, 30 L. Ed. 234.

When a levy is actually made on the land affected by the lien, the title of the creditor generally relates back to the time of the judgment, so as to cut out intermediate encumbrances. Conrad *v.* Atlantic Ins. Co., 1 Pet. 438, 443, 7 L. Ed. 212; Massingill *v.* Downs, 7 How. 760, 767, 12 L. Ed. 903; Ward *v.* Chamberlain, 2 Black 430, 437, 17 L. Ed. 319.

23. Duty and liability of officer.—See

after the regular return term, in cases when a sale was made afterwards.[24]

B. How Construed.—A return is to be considered as a whole.[25]

C. Conclusiveness.—The return is conclusive evidence of the question whether the proceeding by execution has proved an effectual remedy.[26] It cannot be questioned by the sureties on an appeal bond which operates as a supersedeas.[27] But where a sheriff's return to a fieri facias alleges that under a proceeding to foreclose a mortgage the sheriff seized the mortgaged premises, but does not purport to be signed by the sheriff, the return is traversable, and if the law requires an actual seizure, it may be shown that none was made.[28]

D. Remedy Where Return False.—If the return be false, the law furnishes to the injured party ample remedy.[29]

X. Control of Officer by Court.

This subject is treated elsewhere.[30]

XI. Lien and Priorities.

A. Lien—1. EFFECT OF STATE LAWS IN FEDERAL COURTS.—The lien of an execution in the federal courts arises under the state laws.[31]

2. COMMENCEMENT AND DURATION OF LIEN.—No specific lien arises by virtue of the execution alone.[32] But one case holds that executions are liens, both before and after the property is seized and taken into custody of the law by its officer.[33] In some states, the lien commences from the issuance and deliverance;[34]

the titles SHERIFFS', CONSTABLES' AND MARSHALS' SALES; UNITED STATES MARSHALS.

24. Endorsement of return.—Remington *v.* Linthicum, 14 Pet. 84, 92, 10 L. Ed. 364. See post, "Conclusiveness," IX, C.

25. Construction.—Buckhannan *v.* Tinnin, 2 How. 258, 262, 11 L. Ed. 259.

26. Conclusiveness.—The return must be received as stating the truth. Buckhannan *v.* Tinnin, 2 How. 258, 262, 11 L. Ed. 259.

The return shows whether or not the remedy by execution has proved effectual, and from the embarrassments which would attend any other rule, the return is held conclusive. Jones *v.* Green, 1 Wall. 330, 332, 17 L. Ed. 553.

The court will not entertain inquiries as to the diligence of the officer in endeavoring to find property upon which to levy. Jones *v.* Green, 1 Wall. 330, 332, 17 L. Ed. 553.

27. In making the return, the officer acts under a heavy official responsibility. "If false, he is liable to plaintiff and to defendant for any damages resulting from it. He must, therefore, be at liberty to make his own return, subject to that responsibility. Nor do we think his return can be questioned by the sureties. It is declared by the laws to be the appropriate evidence of the right to proceed against them. It is an official act. If they had desired him to exercise it otherwise than he did, they might, by showing him property, have possibly rendered him liable for a false return, and, by paying the debt, avail themselves of this liability. But we do not think that either the spirit of the statute or justice of the case permits an inquiry into the truth of the officer's return in the subsequent proceeding against the sureties. It is analogous to the return of nulla bona as the foundation of creditor's bill in chancery, which cannot be questioned." Smith *v.* Gaines, 93 U. S. 341, 343, 23 L. Ed. 901.

28. Watson *v.* Bondurant, 21 Wall. 123, 22 L. Ed. 509.

29. Remedy for false return.—Jones *v.* Green, 1 Wall. 330, 332, 17 L. Ed. 553.

30. Control of officer by court.—See the titles COURTS, vol. 4, p. 861; INJUNCTIONS; SHERIFFS', CONSTABLES' AND MARSHALS' SALES; UNITED STATES MARSHALS.

31. Lien—Arises from state law.—"The lien may be considered as a rule of property, and a rule of decision under the thirty-fourth section of the judiciary act of 1789. But the preparatory steps, by which the judgment is obtained and the lien established, depend upon the practice of the court; and that practice is settled by the federal courts, and not by the courts of the state." Clements *v.* Berry, 11 How. 398, 411, 13 L. Ed. 745.

32. Commencement and duration.—Freedman's Saving, etc., Co. *v.* Earle, 110 U. S. 710, 716, 28 L. Ed. 301.

33. Peck *v.* Jenness, 7 How. 612, 620, 12 L. Ed. 841.

34. But an execution returned is no lien on any property not levied on; and no new lien can be acquired, until a new execution is put into the hands of the sheriff. Any delay, then, by the assignee, enables the debtor to alien his property, in the interval, between judgment and the execution reaching the sheriff, as well as between the return of one and the lien acquired by a new execution. Bank *v.* Tyler, 4 Pet. 366, 7 L. Ed. 888.

"According to the settled rule in Alabama where an execution comes to the

in others, from the levy, of the execution.[35] By a fiction of law, the lien may commence prior to the actual rendition of judgment, in states where the judgment and the execution lien relate back to the first day of the term.[36] Upon equitable interests subject to execution, the lien dates from the filing of the bill.[37]

B. Priorities—1. BETWEEN EXECUTIONS—a. *In General.*—It is the execution first begun to be executed, unless otherwise regulated by statute, which is entitled to priority.[38] The filing of the bill, in cases of equitable execution, is the beginning of executing it.[39]

b. *Issuing from Federal and State Courts.*—No provision is made by the statutes of the state or United States for the determination of the priorities between the creditors of the respective courts, state and federal. They merely provide for the settlement of the priorities between creditors prosecuting their claims in the same jurisdiction.[40] In such a case the rule is, that whichever officer, the sheriff or the marshal, acquires possession of the property first by the levy of the execution, obtains a prior right, and a purchaser at a judicial sale will take the property free from all liens of the same description.[41]

2. BETWEEN EXECUTIONS AND OTHER LIENS.—A landlord having a lien for rent upon property brought on the premises, has priority over execution creditors, levying on such property thereafter, so long as the goods remain on the premises.[42] A mortgagee of a mortgage, given prior to the levy of an execu-

hands of the sheriff, the lien attaches and continues from term to term provided alias and plures writs are duly issued and delivered; and, while it is so kept alive, the lien is, upon levy and sale, paramount to any intermediate conveyance of the debtor." Beebe *v.* United States, 161 U. S. 104, 111, 40 L. Ed. 632; Pulliam *v.* Osborne, 17 How. 471, 15 L. Ed. 154.

In Kentucky, the creditor obtains a lien upon the property of his debtor by the delivery of a fi. fa. to the sheriff; and this lien is as absolute before the levy as it is afterwards. Therefore, a creditor is not deprived of this lien by an act of bankruptcy on the part of the debtor committed before the levy is made, but after the execution is in the hands of the sheriff. Savage *v.* Best, 3 How. 111, 120, 11 L. Ed. 518; Peck *v.* Jenness, 7 How. 612, 620, 12 L. Ed. 841.

In Mississippi.—Massingill *v.* Downs, 7 How. 760, 765, 12 L. Ed. 903.

35. Ward *v.* Chamberlain, 2 Black 430, 437, 17 L. Ed. 319.

36. It is said to be a legal absurdity to suppose that the lien of the execution can attach prior to the judgment. But the judgments entered on the last day of the term, by the law of Tennessee, have relation to the first day of the term, so as to place all the judgments entered at the term on an equality in regard to liens. This it is said is proper to do equal justice to creditors, whose judgments were necessarily entered on different days of the term, from the arrangement of the causes on the docket. But it is said, that a bona fide purchaser for a valuable consideration would limit the lien of the judgment and execution to the time the judgment was rendered. Clements *v.* Berry, 11 How. 398, 410, 13 L. Ed. 745.

37. "The filing of a bill by an execution creditor to subject the equity of the debtor in his lifetime, created a lien and gave him a legal preference." Freedman's Savings, etc., Co. *v.* Earle, 110 U. S. 710, 719, 28 L. Ed. 301.

38. **Priorities—Between executions.**—Rockhill *v.* Hanna, 15 How. 189, 195, 14 L. Ed. 656; Day *v.* Washburn, 24 How. 352, 16 L. Ed. 712; Freedman's Savings, etc., Co. *v.* Earle, 110 U. S. 710, 716, 28 L. Ed. 301; Metcalf *v.* Barker, 187 U. S. 165, 173, 47 L. Ed. 122.

If the first of three judgment creditors had levied a fi. fa. on the goods and chattels of the defendant, the second taken his body on a ca. sa., and the third laid his elegit on his land, having elected different remedies, each would be entitled to a precedence in that which he has elected. Rockhill *v.* Hanna, 15 How. 189, 195, 14 L. Ed. 656.

39. Freedman's Savings, etc., Co. *v.* Earle, 110 U. S. 710, 716, 28 L. Ed. 301; Metcalf *v.* Barker, 187 U. S. 165, 173, 47 L. Ed. 122.

40. **Issuing from state and federal courts.**—Pulliam *v.* Osborne, 17 How. 471, 475, 15 L. Ed. 154.

41. Pulliam *v.* Osborne, 17 How. 471, 15 L. Ed. 154; Taylor *v.* Carryl, 20 How. 583, 596, 15 L. Ed. 1028; Conner *v.* Long, 104 U. S. 228, 26 L. Ed. 723; Brown *v.* Clarke, 4 How. 4, 11 L. Ed. 850; Hagan *v.* Lucas, 10 Pet. 400, 9 L. Ed. 470.

Although, by the state law, a lien upon property accrues from the delivery of the execution to the sheriff or marshal, and the rights of creditors claiming under the same jurisdiction are adjudged accordingly, yet the same rule does not apply where a controversy arises between executions issued by a court of the United States and a state court. Pulliam *v.* Osborne, 17 How. 471, 15 L. Ed. 154.

42. **Between execution and lien for rent.**—Webb *v.* Sharp, 13 Wall. 14, 16, 20 L. Ed. 478.

tion, has priority over the execution creditor;[43] but not where the mortgage was not recorded, in states where recordation is required by statute.[44]

Loss of Priority.—The priority of another creditor over an execution creditor may be lost by laches.[45]

XII. Satisfaction and Discharge of Lien.

A. In General.—An execution is never completed until the money is made and paid over to the plaintiff, if it be practicable to make it.[46]

B. Sale on Credit.—An execution is not satisfied by a sale of land on credit.[47]

C. Payment—1. In Gold and Silver.—A marshal is not authorized by law to receive anything, in discharge of an execution, but gold and silver.[48] A plaintiff has no right to direct an officer to receive a certain description of money in satisfaction of an execution.[49]

2. In Depreciated Currency—Bank Notes—a. *In General.*—To permit either the debtor or the officer to impose upon the creditor the receipt of depreciated paper in payment, would be to permit not merely a repeal of the judgment, but a violation, a virtual abrogation indeed, of the contract on which it was founded.[50]

b. *Authorization or Acceptance by Plaintiff.*—If the plaintiff authorizes the marshal to take bank notes, of any description, in payment of the execution, a payment by the defendant to the marshal in such bank notes is a satisfaction of

43. Between execution and mortgage.—Hammock *v.* Loan, etc., Co., 105 U. S. 77, 91, 26 L. Ed. 1111.

44. Where judgment creditors have caused an execution to be levied upon lands upon which there is an unrecorded mortgage, of which they have no notice at the date of the levy, their lien is superior to that of an unrecorded mortgagee under the laws of Texas, and the purchaser at a sale under the execution acquires the rights of his creditors free from the mortgage, although the mortgage was recorded before such sale. Stevenson *v.* Texas R. Co., 105 U. S. 703, 26 L. Ed. 1215.

45. If the obligee of a bottomry bond suffer the ship to make several voyages, without asserting his lien, and executions are levied upon the ship, by other creditors, the obligee loses his lien on the ship. The Charles Carter, 4 Cranch 328, 2 L. Ed. 636. See ante, "Conflicting and Concurrent," V, C, 2. And see ante, "Property or Interest Conveyed or Assigned," III, J.

46. Satisfaction of lien.—McFarland *v.* Gwin, 3 How. 717, 720, 11 L. Ed. 799.

Presumption of satisfaction.—See ante, "Election of Writs." V, B.

47. Sale on credit.—Evans *v.* Pike, 118 U. S. 241, 246, 30 L. Ed. 234. See Wayman *v.* Southard, 10 Wheat. 1, 44, 6 L. Ed. 253, for practice, under Virginia statute. See ante, "Property or Interest Conveyed or Assigned," III, J.

48. Payment—In gold and silver.—McFarland *v.* Gwin, 3 How. 717, 720, 11 L. Ed. 799; Buckhannan *v.* Tinnin, 2 How. 258, 11 L. Ed. 259; Gwinn *v.* Buchanan, 4 How. 1, 11 L. Ed. 849; Griffin *v.* Thompson, 2 How. 244, 11 L. Ed. 253; Gwin *v.* Breedlove, 2 How. 29, 11 L. Ed. 167.

"By the writ of execution the marshal was commanded to collect so many dollars; this meant gold and silver of course." Gwin *v.* Breedlove, 2 How. 29, 39, 11 L. Ed. 167; Griffin *v.* Thompson, 2 How. 244, 11 L. Ed. 253.

Where specie contracted for.—An express contract, payable in gold or silver dollars, can only be satisfied by the payment of coined dollars, and cannot be discharged by notes of the United States declared to be a legal tender in payment of debts. Trebilcock *v.* Wilson, 12 Wall. 687, 695, 20 L. Ed. 460. See, also, Lane County *v.* Oregon, 7 Wall. 71, 19 L. Ed. 101; Butler *v.* Horwitz, 7 Wall. 258, 19 L. Ed. 149.

49. Gwinn *v.* Buchanan, 4 How. 1, 11 L. Ed. 849.

50. Depreciated currency—Bank notes.—"None can fail to perceive the thousand devices for profit or favor which the toleration of such a practice would naturally call into action to defeat the rights of creditors. The courts of justice might thus be made to subserve only the purposes of dishonesty, and be transformed into engines of monstrous wrong." Griffin *v.* Thompson, 2 How. 244, 256, 11 L. Ed. 253.

The statutes of Kentucky concerning executions, which require the plaintiff to indorse on the execution, that bank notes of the Bank of Kentucky, or notes of the Bank of the Commonwealth of Kentucky, will be received in payment, and, on his refusal, authorize the defendant to give a replevin bond for the debt, payable in two years, are not applicable to executions issuing on judgments rendered by the courts of the United States. Wayman *v.* Southard, 10 Wheat. 1, 6 L. Ed. 253.

the execution;[51] for the creditor may receive either bank notes or blank paper in satisfaction of his debt, for the reason that his power over that debt is supreme, and he may release it without payment of any kind, if he think proper.[52]

c. *In Action against Officer.*—A marshal who receives bank notes in satisfaction of an execution, when the return has not been set aside at the instance of the plaintiff, or amended by the marshal himself, must account to the plaintiff in gold or silver; the constitution of the United States recognizing only gold and silver as a legal tender.[53]

D. Discharge.—An attorney has the power to accept payment and discharge an execution.[54]

XIII. Supplementary Proceedings.

A. Effect of State Law in Federal Courts.—A plaintiff who recovers a judgment in a common law cause in the United States court sitting in the state of New York is entitled to the remedy provided in that state as a proceeding supplementary to execution.[55]

B. Statutory Provision.—The New York act of June 1, 1872, ch. 255, was held to apply to proceedings supplementary to execution, to examine the judgment debtor in regard to his property, under a judgment rendered in a common law cause.[56]

C. Proceedings at Law.—The right of an execution creditor to proceed by action at law, against any person who interferes with the goods of his debtor so as to prevent a levy or sale thereon, is well recognized at common law.[57] The proceedings in garnishment in aid of execution, in the different states, have been adopted by act of congress as remedies for judgment creditors in the federal courts.[58]

D. Proceedings in Equity—1. Nature of Proceedings.—The ground

51. Acceptance authorized.—McFarland *v.* Gwin, 3 How. 717, 720, 11 L. Ed. 799; Griffin *v.* Thompson, 2 How. 244, 11 L. Ed. 253; Buckhannan *v.* Tinnin, 2 How. 258, 11 L. Ed. 259; Gwinn *v.* Buchanan, 4 How. 1, 11 L. Ed. 849.

52. Griffin *v.* Thompson, 2 How. 244, 256, 11 L. Ed. 253; Gwinn *v.* Buchanan, 4 How. 1, 3, 11 L. Ed. 849.

The plaintiff's sanction may be either express or implied. Buckhannan *v.* Tinnin, 2 How. 258, 11 L. Ed. 259.

An interval of more than two years was permitted to elapse between the return and the motion to quash it. This fact alone, unassociated with and unexplained by any other, will of itself imply, at least on the part of the plaintiff, laches and negligence in the prosecution of his interests, if not an assent by him to the acts of the officer. Buckhannan *v.* Tinnin, 2 How. 258, 261, 11 L. Ed. 259.

There are two points of difference between this and the case of Thompson *v.* Griffin, et al. These two points arise, first, upon the time intervening between the return of the marshal and the plaintiff's motion, as tending to show an acquiescence by the plaintiff; and, secondly, upon the additional evidence in this case amounting to proof of approbation or sanction by the plaintiff, express or implied, of the conduct of the marshal. Buckhannan *v.* Tinnin, 2 How. 258, 261, 11 L. Ed. 259. See ante, "Satisfaction of Execution," VII, B, 3, c.

53. In action against officer.—Gwin *v.* Breedlove, 2 How. 29, 11 L. Ed. 167; Turner *v.* Fendall, 1 Cranch 117, 134, 2 L. Ed. 53; Gwinn *v.* Buchanan, 4 How. 1, 11 L. Ed. 849; Griffin *v.* Thompson, 2 How. 244, 257, 11 L. Ed. 253.

"**No right would exist to pursue the specific pieces** received by the officer, although they should even have an ear-mark; and an action of debt, not of detinue, may be brought against him, if he fails to pay over the sum received, or converts it to his own use." Turner *v.* Fendall, 1 Cranch 117, 134, 2 L. Ed. 53.

54. Discharge.—Erwin *v.* Blake, 8 Pet. 18, 26, 8 L. Ed. 852; Union Bank *v.* Geary, 5 Pet. 99, 8 L. Ed. 60.

55. Supplemental proceedings.—Ex parte Boyd, 105 U. S. 647, 26 L. Ed. 1200.

56. Statutory provision.—Canal, etc., St. R. Co. *v.* Hart, 114 U. S. 654, 661, 29 L. Ed. 226. See Fed. Stat., § 916.

"The proceeding in aid of execution, in its present form in New York, as well as that in which it was administered under the Revised Statutes by the court of chancery, was a statutory process, and did not form any part of that jurisdiction in equity which, vested in the courts of the United States by the constitution, is assumed to be inalienable." Ex parte Boyd, 105 U. S. 647, 656, 26 L. Ed. 1200.

57. Proceeding at law.—Finlay *v.* McAllister, 113 U. S. 104, 111, 28 L. Ed. 930.

58. Canal, etc., St. R. Co. *v.* Hart, 114 U. S. 654, 662, 29 L. Ed. 226.

of the jurisdiction in equity is merely to aid the legal right by removing obstacles in the way of its enforcement at law.[59]

2. Want of Legal Remedy.—Courts of equity will entertain suits in aid of executions at law only in cases where there is no remedy in the law courts.[60]

3. Appointment of Receiver.—Where there is a judgment at law, under which property was sold in execution, a court of equity has power to cause possession to be taken thereof, to appoint a receiver to collect the profits and pay them into court, to the end of discharging the judgment at law.[61]

XIV. Sale.

This subject is to be treated elsewhere.[62]

XV. Claims of Third Persons.

The equitable rights of persons, whose names do not appear in the execution, ought to be preserved;[63] and, if the statutes of the different states contain provisions regulating trials of the right of property in such cases, it is convenient to make them a part of the practice of the court as contemplated by §§ 914, 915, 916, of the Revised Statutes.[64]

XVI. Appeal and Error.

For treatment of this subject, see elsewhere.[65]

59. Proceeding in equity.—Jones *v.* Green, 1 Wall. 330, 17 L. Ed. 553; Freedman's Savings, etc., Co. *v.* Earle, 110 U. S. 710, 715, 28 L. Ed. 301. See ante, "Patents and Copyrights," III, D, 3; "Corporate Stocks," III, D, 5; "Equitable Estates and Interests," III, F; "Property Mortgaged or Conveyed by Deed of Trust," III, G.

60. Want of legal remedy.—Knox *v.* Smith, 4 How. 298, 11 L. Ed. 983.

"It follows, then, that although at one time courts of equity would entertain bills of discovery, in aid of executions at law, because courts of law were not armed with adequate powers to execute their own process, yet the moment those powers were sufficiently enlarged, by competent authority, to accomplish the same beneficial result, the jurisdiction in equity, if it did not cease as unwarranted, would, at least, become inoperative and obsolete." Ex parte Boyd, 105 U. S. 647, 657, 26 L. Ed. 1200.

Execution must issue and be returned before proceeding in equity. Moore *v.* Page, 111 U. S. 117, 28 L. Ed. 373. See the titles CREDITORS' SUIT, vol. 5, p. 22; EQUITY, vol. 5, p. 803.

61. Appointment of receiver.—Covington Drawbridge Co. *v.* Shepherd, 21 How. 112, 16 L. Ed. 38. See the titles CREDITORS' SUITS, vol. 5, p. 22; EQUITY, vol. 5, p. 803.

Nature of proceeding.—"The proceeding for the appointment of a receiver was not a new and independent suit. It was not in the strictest sense of the term a creditor's bill. It did not purport to be for the benefit of all creditors, but simply a proceeding to enable the plaintiff in the judgment to obtain satisfaction thereof, satisfaction by execution at law having been shown to be impossible by the return of nulla bona. It is what is known as a supplementary proceeding, one known to the jurisprudence of many states, and one whose validity in those states has been recognized by this court." Mutual Reserve, etc., Ass'n *v.* Phelps, 190 U. S. 147, 159, 47 L. Ed. 987; Williams *v.* Hill, 19 How. 246, 15 L. Ed. 570; Atlantic, etc., R. Co. *v.* Hopkins, 94 U. S. 11, 24 L. Ed. 48; Ex parte Boyd, 105 U. S. 647, 26 L. Ed. 1200; Canal, etc., St. R. Co. *v.* Hart, 114 U. S. 654, 29 L. Ed. 226.

62. Sale.—See the title SHERIFFS,' CONSTABLES' AND MARSHALS' SALES.

63. Claims of third persons.—Turner *v.* Fendall, 1 Cranch 117, 136, 2 L. Ed. 53.

"A third person, a stranger to the suit and claiming as owner, may prosecute his right to restitution in either case, in the same methods as pointed out in Krippendorf *v.* Hyde, 110 U. S. 276, 25 L. Ed. 145, or he may pursue his remedy for damages against the officer, either personally for the trespass, as in Buck *v.* Colbath, 3 Wall. 334, 18 L. Ed. 257, or for the breach of his official duty, upon his bond and against his sureties, as in the case of Lammon *v.* Feusier, 111 U. S. 17, 28 L. Ed. 337." Covell *v.* Heyman, 111 U. S. 176, 181, 28 L. Ed. 390.

64. Clarke *v.* Matthewson, 12 Pet. 164, 172, 9 L. Ed. 1041; Gumbel *v.* Pitkin, 124 U. S. 131, 144, 31 L. Ed. 374. See the titles INTERPLEADER; INTERVENTION.

65. Granting or refusing stay.—See the title APPEAL AND ERROR, vol. 1, p. 997.

Quashing or refusing to quash.—See the title APPEAL AND ERROR, vol. 1, p. 976.

EXECUTION SALES.—See the title SHERIFFS', CONSTABLES' AND MARSHALS' SALES.

EXECUTIVE.—See, also, the titles GOVERNOR; PRESIDENT OF UNITED STATES; UNITED STATES. The executive executes the law.[1]

EXECUTIVE DEPARTMENT.—See the titles GOVERNOR; PRESIDENT OF UNITED STATES; UNITED STATES. See, also, the title CONSTITUTIONAL LAW, vol. 4, pp. 219; 274-279; 324.

EXECUTIVE OFFICERS.—See references under EXECUTIVE DEPARTMENT, ante, p. 118. See, also, the titles SHERIFFS AND CONSTABLES; UNITED STATES MARSHALS. See, generally, the titles PUBLIC OFFICERS; STATES.

EXECUTOR DE SON TORT.—See the title EXECUTORS AND ADMINISTRATORS.

1. Wayman *v.* Southard, 10 Wheat. 1, 46, 6 L. Ed. 253; Patton *v.* Brady, 184 U. S. 608, 620, 46 L. Ed. 713.

Executive duties.—"Stress is laid upon the words executive duties, as though the approval of the evidence of settlement and improvement (by the register and receiver under the pre-emption laws) was not an executive duty but a purely judicial act. This is a mistake. True, it involves the weighing of testimony and the exercise of judgment, but equally so do many administrative acts. * * * Any determination of a ministerial officer may by statute be declared final and conclusive, but such finality does not change its character and transform it from an executive to a judicial act. The approval of the evidence offered in respect to settlement and improvement is only quasijudicial. It is as much an administrative as a judicial act. * * * It is only one step in the procedure by which, through an executive department, the title to public land is obtained by an individual." Orchard *v.* Alexander, 157 U. S. 372, 379, 39 L. Ed. 737.

EXECUTORS AND ADMINISTRATORS.

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CROSS REFERENCES.

See the titles ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 12; INTEREST; MARRIAGE CONTRACTS AND SETTLEMENTS; REMOVAL OF CAUSES; SCIRE FACIAS.

As to the rights relative to abandoned and captured property, see the title ABANDONED AND CAPTURED PROPERTY, vol. 1, p. 7. As to the necessity of making the personal representative of one of several parties to appellate proceedings a party to the appeal, see the title APPEAL AND ERROR, vol. 2, p. 78. As to matters peculiar to the estates of army and navy officers, see the title ARMY AND NAVY, vol. 2, p. 494. As to the right of assignees under assignments of chose in action by personal representative, see the title ASSIGNMENTS, vol. 2, p. 591. As to the effect of a co-obligor in a bond making the obligee his executor, see the title BONDS, vol. 3, p. 428. As to the rule that state laws

and decisions govern the federal courts in passing upon questions relative to the administration of the decedent's estate, see the title COURTS, vol. 4, p. 1060. As to actions by personal representatives for death by wrongful act, see the title DEATH BY WRONGFUL ACT, vol. 5, p. 200. As to the powers and duties of representatives in regard to settlement of public lands, see the title PUBLIC LANDS. As to conclusiveness of judgments obtained against an executor in one state upon an executor in another state, see the title RES ADJUDICATA. As to the binding effect of a judgment against executors as against heirs, see the title RES ADJUDICATA. As to suit for specific performance of decedent's contracts, see the title SPECIFIC PERFORMANCE. As to rights by representative to collect claims for which testator was surety, which had been paid out of the estate, see the title SUBROGATION.

I. Definition and Status of Personal Representatives.

An executor is one appointed by a testator to carry out the directions and requests in his will, and to dispose of the property according to his testamentary provision after his decease. An administrator, in the most usual sense of the word, is a person to whom letters of administration, that is, an authority to administer the estate of a deceased person, having been granted by the proper court. He resembles an executor, but, being appointed by the court, and not by the deceased, he has to give security for the due administration of the estate, by entering into a bond with sureties, called the administrator's bond.[1] The primary and ordinary meaning of the words "representatives," or "legal representatives," or "personal representatives," when there is nothing in the context to control their meaning, is "executors or administrators," they being the representatives constituted by the proper court.[2] An administrator appointed by a state court is an officer of that court.[3] An executor or administrator is in equity a trustee for heirs, legatees and creditors.[4] The executor is no more than the testator's representative in all things lawful in the will.[5] In the theory of the law the executor continues the persona of the testator, and therefore is a different person from the natural man who fills the office.[6]

II. Jurisdiction over Administration Generally.

In this country, there are special courts established in some of the states, having jurisdiction over estates of deceased persons, called probate courts, orphans' courts, or surrogate courts, possessing, with respect to personal assets, nearly all the powers formerly exercised by the court of chancery and the ecclesiastical courts in England. They are authorized to collect the assets of the deceased, to allow claims, to direct their payment and the distribution of the property to legatees or other parties entitled, and generally to do everything essential to the final settlement of the affairs of the deceased, and the claims of creditors against his estate.[7] The several states of the Union necessarily

1. **Definition of personal representatives.**—Black's Law Dictionary, "Executors," "Administrators."

2. Briggs *v.* Walker, 171 U. S. 466, 471, 43 L. Ed. 243.

3. **Status of representatives.**—Byers *v.* McAuley, 149 U. S. 608, 615, 37 L. Ed. 867.

4. Michoud *v.* Girod, 4 How. 503, 554, 11 L. Ed. 1076; Lewis *v.* McFarland, 9 Cranch 151, 152, 3 L. Ed. 687.

Where there is contingent limitation to persons not in being, an executor of the estate must be considered as the legal representative of the rights of persons not yet in esse. McArthur *v.* Scott, 113 U. S. 340, 402, 28 L. Ed. 1015.

5. Bank *v.* Beverly, 1 How. 134, 149, 11 L. Ed. 75.

6. United States *v.* California, etc., Land Co., 192 U. S. 355, 358, 48 L. Ed. 476.

7. **Jurisdiction over administration.**—Board of Public Works *v.* Columbia College, 17 Wall. 521, 531, 21 L. Ed. 687. See, generally, the titles COURTS, vol. 4, p. 861; JURISDICTION.

As to jurisdiction to grant administration, see post, "Jurisdiction to Grant Administration," IV, A, 1. As to jurisdiction in matters of sales, see post, "Order or License from Court," VI, T, 4.

The orphans' court, by the testamentary laws of Maryland, has a general power to administer justice in all matters relative to the affairs of deceased persons, according to law. Nicholls *v.* Hodges, 1 Pet. 562, 565, 7 L. Ed. 263.

have full control over the estates of deceased persons within their respective limits.[8] The federal courts have no original jurisdiction in respect to the administration of an estate of a deceased person, and they cannot by entertaining jurisdiction of a suit against the administrator draw to themselves the full possession of the estate, or the power of determining all claims against or to it.[9]

III. Necessity for Administration.

It is not within the power of the testator to defeat the provisions and the policy of the testamentary law of the state, by bequeathing personal property to a trustee, without the intervention of an executor.[10] The general rule is that any act done by an executor by way of disposing of the property are invalid, unless he takes out letters testamentary, or is appointed executor by an order of the court of probate, equivalent to the issue of such letters.[11] And it is within the power of creditors to compel an administration to be taken upon an estate, by application to a court of probate.[12] The laws of some states have provided that the heirs of a decedent become seized and possessed of his whole estate, both real and personal, immediately upon his death, subject only to their right to renounce said succession, or to the right of creditors to require an administration thereof in case of nonaction by the heirs. Such renunciation is not presumed, but must be made by formal act before a notary, but such acceptance may be evidenced by any act of the heirs indicating their intention to exercise ownership over the ancestor's property, and is always presumed unless the contrary appear. After an acceptance by the heirs or any of them of the succession of their ancestor, no administrator can lawfully be appointed to administer thereon.[13]

IV. Appointment and Tenure of Office.

A. Appointment—1. JURISDICTION TO GRANT ADMINISTRATION—a. *General Consideration.*—In this country the general rule is that administration may be granted in any state or territory where unadministered personal property of a deceased person is found,[14] or real property subject to the claim of any creditor of the deceased;[15] that the proper place for the principal administration is the domicile of such deceased.[16] To give jurisdiction, a case, in which, by law, letters of administration may issue, must appear.[17]

8. Yonley *v.* Lavender, 21 Wall. 276, 279, 22 L. Ed. 536; Security Trust Co. *v.* Black River Nat. Bank, 187 U. S. 211, 228, 47 L. Ed. 147. And see the title COURTS, vol. 4, p. 895.

9. Byers *v.* McAuley, 149 U. S. 608, 619, 37 L. Ed. 867.

10. Necessity for administration.—Wall *v.* Bissell, 125 U. S. 382, 390, 31 L. Ed. 772, in which case it was said: "A trustee, therefore, who is but a legatee, can take only through the executors. If a testator were to appoint no executor, or direct that the estate should go immediately into the hands of legatees or of one or more trustees for particular purposes, such direction would be nugatory and void."

11. Wall *v.* Bissell, 125 U. S. 382, 389, 31 L. Ed. 772. See, also, Pray *v.* Belt, 1 Pet. 670, 680, 7 L. Ed. 309.

12. Ricard *v.* Williams, 7 Wheat. 59, 116, 5 L. Ed. 398.

13. Simmons *v.* Saul, 138 U. S. 439, 441, 34 L. Ed. 1054.

14. Jurisdiction of administration.—Thormann *v.* Frame, 176 U. S. 350, 355, 44 L. Ed. 500; Wilkins *v.* Ellett, 108 U. S. 256, 258, 27 L. Ed. 718; Rubber Co. *v.* Goodyear, 9 Wall. 788, 791, 19 L. Ed. 566.

15. Thormann *v.* Frame, 176 U. S. 350, 355, 44 L. Ed. 500.

16. Wilkins *v.* Ellett, 108 U. S. 256, 258, 27 L. Ed. 718.

17. In Griffith *v.* Frazier, 8 Cranch 9, 23, 3 L. Ed. 471, the court said: "To give the ordinary jurisdiction, a case, in which, by law, letters of administration may issue, must be brought before him. In the common case of intestacy, it is clear that letters of administration must be granted to some person by the ordinary; and though they should be granted to one not entitled by law, still the act is binding, until annulled by the competent authority; because he had power to grant letters of administration in the case. But suppose administration to be granted on the estate of a person not really dead. The act, all will admit, is totally void. Yet, the ordinary must always inquire and decide whether the person whose estate is to be committed to the care of others, be dead or in life. It is a branch of every cause in which letters of administration issue. Yet the decision of the ordinary that the

b. *Death as a Jurisdictional Prerequisite.*—The absolute nullity of administration granted upon the estate of a living person has been directly adjudged or distinctly recognized in many courts.[18]

c. *Administration on Estates of Absentees.*—The right to regulate concerning the estate or property of absentees is an attribute, which, in its very essence, must belong to all governments, to the end that they may be able to perform the purposes for which government exists.[19] But if a state law, in providing for the administration of the estate of an absentee, contains no adequate safeguards concerning property, and amounts therefore simply to authorizing the

person on whose estate he acts is dead, if the fact be otherwise, does not invest the person he may appoint with the character or powers of an administrator. The case, in truth, was not one within his jurisdiction; it was not one in which he had a right to deliberate; it was not committed to him by the law. And although one of the points occurs, in all cases proper for his tribunal, yet that point cannot bring the subject within his jurisdiction. The case of letters of administration granted on the estate of a person in full life, is not the only one which may serve for illustration; suppose, administration to be granted on the estate of a deceased person, whose executor is present, in the constant performance of his executorial duties. Is such an appointment void, or is it only voidable? In the opinion of the court, it would be an absolute nullity." Quoted in Scott *v.* McNeal, 154 U. S. 34, 40, 38 L. Ed. 896, which cited Mutual Benefit Life Ins. Co. *v.* Tisdale, 91 U. S. 238, 243, 23 L. Ed. 314. See post, "Death as Jurisdictional Prerequisite," IV, A, 1, b; "Validity of Letters as Affected by Existence of Executor," IV, A, 1, d.

18. Death as a jurisdictional prerequisite.—Scott *v.* McNeal, 154 U. S. 34, 43, 38 L. Ed. 896; Hamilton *v.* Brown, 161 U. S. 256, 267, 40 L. Ed. 691; Griffith *v.* Frazier, 8 Cranch 9, 23, 3 L. Ed. 471; Andrews *v.* Andrews, 188 U. S. 14, 47 L. Ed. 366; Grignon *v.* Astor, 2 How. 319, 339, 11 L. Ed. 283. Dissenting opinion of Brewer and Peckham, JJ., in United States *v.* Ju Toy, 198 U. S. 253, 276, 49 L. Ed. 1040. See post, "Administration on Estates of Absentees," IV, A, 1, c.

"The estate of a person supposed to be dead is not seized or taken into the custody of the court of probate upon the filing of a petition for administration; but only after and under the order granting that petition; and the adjudication of that court is not upon the question whether he is living or dead, but only upon the question whether and to whom letters of administration shall issue." Scott *v.* McNeal, 154 U. S. 34, 47, 38 L. Ed. 896, citing Mutual Benefit Life Ins. Co. *v.* Tisdale, 91 U. S. 238, 243, 23 L. Ed. 314.

19. Right to regulate concerning estates of absentees.—Cunnius *v.* Reading School District, 198 U. S. 458, 469, 49 L. Ed. 1125.

There is a distinction between the want of power in a state to administer the property of a person who is alive, under its general authority to provide for the settlement of the estates of deceased persons, and the power of the state to provide for the administration of the estates of persons who are absent for an unreasonable time, and to enact reasonable regulations on that subject. Cunnius *v.* Reading School District, 198 U. S. 458, 475, 49 L. Ed. 1125.

In the case of Scott *v.* McNeal, 154 U. S. 34, 38 L. Ed. 896, a probate court in the state of Washington had issued letters of administration upon the estate of a person who had disappeared, and proceeded to administer his estate as that of a dead person upon the presumption of death, which the court assumed had arisen from his absence. There was no statute of the state of Washington providing for an administration of the estate of an absentee as such, and creating rights and safeguards applicable to that situation, as distinct from the general law of the state, conferring upon courts of probate power to administer the estates of deceased persons. Referring to the presumption under the law of England of death arising from absence, it was held that such presumption was not conclusive, and was absolutely rebutted by proof that the person who was presumed from the fact of absence to be dead, was in fact, alive. Having established this proposition, it was then held, as death was essential to confer jurisdiction on a probate court to administer an estate as such, the fact of life at the time the administration was initiated conclusively rebutted the presumption and caused the court to be wholly without jurisdiction to administer the estate of a person who was alive. Cunnius *v.* Reading School District, 198 U. S. 458, 472, 49 L. Ed. 1125. See, also, dissenting opinion in United States *v.* Ju Toy, 198 U. S. 253, 276, 49 L. Ed. 1040.

"The opinion, however, in Scott *v.* McNeal, was not intended to and did not imply that the states were wholly devoid of power to endow their courts with jurisdiction under proper conditions to administer upon the estates of absentees, even though they might be alive, by special and appropriate proceedings applicable to that condition as distinct from the general power to administer the es-

transfer of the property of the absentee to others, such a law would be repugnant to the fourteenth amendment.[20]

d. *Validity of Letters as Affected by Existence of Executor.*—Where there is an executor, not disqualified by law, or who has not been excluded from acting, in conformity to law, a grant of administration is void.[21] But, in the case of an absent executor who has not yet made probate of the will and qualified, those letters testamentary which are indispensable to his character as executor, and which, during their existence, leave the ordinary without any further power over the subject, are not yet granted. The executor has as yet no evidence that he is executor; he is not yet able to act as one. He may never be able to act; for he may never take out letters testamentary; he may renounce the executorship. The ordinary, then, is not yet deprived of that power which he possesses to appoint a person to represent a dead man who has no representative. His jurisdiction over the subject remains, until he parts with it, by issuing letters testamentary.[22]

e. *Where Administrator First Appointed Refuses to Act.*—The question as to the appointment of a second administrator upon the resignation of the one first appointed, will be found treated elsewhere under this title.[23]

tates of deceased persons." Cunnius *v.* Reading School District, 198 U. S. 458, 473, 49 L. Ed. 1125.

20. Requisites of laws relative to estates of absentees.—Cunnius *v.* Reading School District, 198 U. S. 458, 477, 49 L. Ed. 1125.

Thus, a state law which did not provide adequate notice as prerequisite to the proceedings for the administration of the estate of an absentee, would also be repugnant to the fourteenth amendment. Cunnius *v.* Reading School District, 198 U. S. 458, 477, 49 L. Ed. 1125.

Likewise the creation by a state law of an arbitrary and unreasonable presumption of death resulting from absence for a brief period, would be a want of due process of law, and therefore repugnant to the fourteenth amendment. Cunnius *v.* Reading School District, 198 U. S. 458, 476, 49 L. Ed. 1125.

In substance the Pennsylvania statute of 1885, Public Laws, 155, is a special proceeding for the administration of the estates of absentees distinct from the general law of that state providing for the settlement of the estates of deceased persons, and as by the express terms of the statute jurisdiction was conferred upon the proper court to grant the administration, and the period of absence provided by the statute cannot be said to be unreasonable, and the notices which it directs to be issued were reasonable, it follows that it does not deprive absentees of due process of law within the intendment of the fourteenth amendment even though it should prove that the absentee in a particular case is alive and not dead. Cunnius *v.* Reading School District, 198 U. S. 458, 476, 49 L. Ed. 1125.

21. Validity as affected by existence of executor.—Kane *v.* Paul, 14 Pet. 33, 40, 10 L. Ed. 341; Griffith *v.* Frazier, 8 Cranch 9, 3 L. Ed. 471.

In Kane *v.* Paul, 14 Pet. 33, 39, 10 L. Ed. 341, the court said: "In Com. Dig. Adm. B. 1, it is said, if there be an executor, and administration be granted before probate and refusal, it shall be void, on the will being afterwards proved; although the will were suppressed, or its existence were unknown, or it were dubious who was executor, or he were concealed or abroad, at the time of granting the administration. So, in Com. Dig. B. 2, B. 10, if there be two executors, one of whom proves the will and the other refuses, and he who proves the will dies, and administration is granted, before the refusal of the survivor, subsequently to the death of his coexecutor, or if granted before the refusal of the executor, although he afterwards refuse, such administration shall be void. In all these cases, the administration is a mere nullity."

"The cases in which administration has been granted, notwithstanding the existence of a will, appear to be cases in which it is not apparent that there is any person possessing right in the chattels of the testator, or cases in which that person is legally disqualified from acting. Where administration is granted, pending a dispute respecting a will, it is not certain that there is an executor, or that there is a will. If it be granted during the minority of an executor, it is because the executor is legally disqualified from acting, and indeed, has not taken upon himself, and could not take upon himself, the trust reposed in him. He may, when of age, reject all the rights and powers conferred by the will; and consequently, the interest is not yet a vested interest. The rights and powers of the ordinary remain, until those of the executor commence." Griffith *v.* Frazier, 8 Cranch 9, 25, 3 L. Ed. 471.

22. Griffith *v.* Frazier, 8 Cranch 9, 25, 3 L. Ed. 471.

23. Where administrator first appointed refuses to act.—See post, "Administrators

f. *Limited Administration.*—As to limited or special administration, see post, "Limited and Special Executors or Administrators," X.

g. *Situs of Assets.*—The general rule of law is well settled, that for the purpose of founding administration all simple contract debts are assets at the domicile of the debtor;[24] and that the locality of such a debt for this purpose is not affected by a bill of exchange or promissory note having been given for it, because the bill or note does not alter the nature of the debt, but is merely evidence of it, and therefore the debt is assets where the debtor lives without regard to the place where the instrument is found or payable.[25] But the debts due from the government of the United States have no locality at the seat of government. The United States, in their sovereign capacity, have no particular place of domicile, but possess, in contemplation of law, an ubiquity throughout the Union; and the debts due by them are not to be treated like the debts of a private debtor, which constitute local assets in his own domicile. On the contrary, the administrator of a creditor of the government, duly appointed in the state where he was domiciled at the time of his death, has full authority to receive payment and give a full discharge of the debt due to his intestate, in any place where the government may choose to pay it, whether it be at the seat of government or at any other place where the public funds are deposited; and the moneys so received constitute assets under that administration, for which he was accountable to the proper tribunals of the state where he was appointed.[26] However, debts cannot be assets at the domicile of the debtor if their locality is fixed at the domicile of the creditor.[28]

2. Notice of Proceedings to Obtain Letters.—Certain notices may be, and usually are, required to be given of the proceedings to obtain letters.[28]

3. Time of Granting Administration.—Where there is no statutory limitation of the period within which an original administration may be granted, a grant of administration, although made after the lapse of a number of years, must be considered as valid.[29] Under a statute which permits the appointment of an administrator to be made only after an inventory of the estate is ordered, the statute is complied with where the court directs an inventory and appoints an administrator in the same order, though the inventory be filed on the following day.[30]

De Bonis Non or with the Will Annexed," XII.

24. Situs for purpose of administration.—Wyman *v.* Halstead, 109 U. S. 654, 27 L. Ed. 1068; Chicago, etc., R. Co. *v.* Sturm, 174 U. S. 710, 43 L. Ed. 1144; New England Mut. Life Ins. Co. *v.* Woodworth, 111 U. S. 138, 28 L. Ed. 379; Equitable Life Assur. Society *v.* Brown, 187 U. S. 308, 312, 47 L. Ed. 190; Vaughan *v.* Northrup, 15 Pet. 1, 10 L. Ed. 639; United States *v.* Borcherling, 185 U. S. 223, 46 L. Ed. 884.

The general rule is that simple contract debts, such as a policy of insurance not under seal, are, for the purpose of founding administration, assets where the debtor resides, without regard to the place where the policy is found. New England Mut. Life Ins. Co *v.* Woodworth, 111 U. S. 138, 145, 28 L. Ed. 379, citing Wyman *v.* Halstead, 109 U. S. 654, 27 L. Ed. 1068.

Where a foreign insurance company was doing business in another state, and had an attorney there for service of process, it was held that the corporation had a domicile in that state, in the sense of the rule that a debt on a policy was assets at its domicile, so as to uphold the grant of letters of administration. New England Mut. Life Ins. Co. *v.* Woodworth, 111 U. S. 138, 145, 28 L. Ed. 379.

25. Wyman *v.* Halstead, 109 U. S. 654, 656, 27 L. Ed. 1068.

26. Vaughan *v.* Northrup, 15 Pet. 1, 6, 10 L. Ed. 639; Mackey *v.* Coxe, 18 How. 100, 105, 15 L. Ed. 299; Wyman *v.* Halstead, 109 U. S. 654, 656, 27 L. Ed. 1068; United States *v.* Borcherling, 185 U. S. 223, 233, 46 L. Ed. 884.

27. Where debts are fixed at domicile of creditor.—Chicago, etc., R. Co. *v.* Sturm, 174 U. S. 710, 714, 43 L. Ed. 1144, in which case the court said: "If the policy of the state of the debtor can protect home creditors through administration proceedings, the same policy can protect home creditors through attachment proceedings."

28. Notice of proceedings to obtain letters.—Mutual Benefit Life Ins. Co. *v.* Tisdale, 91 U. S. 238, 243, 23 L. Ed. 314.

29. Time of granting administration.—Ricard *v.* Williams, 7 Wheat. 59, 115, 5 L. Ed. 398.

30. Simmons *v.* Saul, 138 U. S. 439, 451, 34 L. Ed. 1054.

4. Who May Be Executor or Administrator.—Different states have different provisions as to who may be executor or administrator, excluding some persons and preferring others, in the order and manner in their statutes specified. Thus persons convicted of infamous crime are excluded from this office, and persons of notoriously evil lives may be passed by in the discretion of the probate court. Sons or daughters or widows are entitled to take in preference to others; unmarried women are entitled in preference to married women.[31] If the next of kin decline the office, it is competent for the court to appoint any other suitable person.[32] Statutes provide that the husband has a right to administration on the property of his wife, if she had property in the state.[33] Some states do not permit nonresidents to take out letters of administration of the effect of deceased person within the state.[34] In some jurisdictions a public administrator is provided for and to him the administration of the estates of nonresident intestates must be granted.[35]

5. Effect of Appointment.—The letters issued to an executor or an administrator by a probate court are, as a general rule, evidence only of their own existence. They prove, that is to say, that the authority incident to that office or duty has been devolved upon the person therein named, that he has been appointed, and that he is executor or administrator of the party therein assumed to have departed this life, and the letters are the evidence that the proceedings have been regularly taken, and that the person or persons therein named are those by law entitled to the office. Upon these points the court has adjudicated. No proof to the contrary can be admitted, in an action brought by the executor as such. Parties wishing to contest that point must do it before the probate court at the time application is made for the letters, or upon subsequent application, as the case may require.[36] The bare appointment of an executor or ad-

31. Who may be executor or administrator.—Mutual Benefit Life Ins. Co. *v.* Tisdale, 91 U. S. 238, 243, 23 L. Ed. 314.

32. Ricard *v.* Williams, 7 Wheat. 59, 116, 5 L. Ed. 398.

33. New England Mut. Life Ins. Co. *v.* Woodworth, 111 U. S. 138, 144, 28 L. Ed. 379.

34. The laws of Rhode Island do not permit a person residing out of the state to take out administration of the effects of a deceased person within the state; and make such administration indispensable to the prosecution and defense of any suit in the state, in right of the estate of the deceased. Clarke *v.* Mathewson, 12 Pet. 164, 9 L. Ed. 1041.

35. Simmons *v.* Saul, 138 U. S. 439, 452, 34 L. Ed. 1054 (Louisiana), citing Comstock *v.* Crawford, 3 Wall. 396, 403, 18 L. Ed. 34 (Wisconsin); McNitt *v.* Turner, 16 Wall. 352, 363, 21 L. Ed. 341 (Illinois).

36. Effect of appointment.—Mutual Benefit Life Ins. Co. *v.* Tisdale, 91 U. S. 238, 243, 23 L. Ed. 314.

An order granting letters of administration is a judicial determination of the facts necessary to give the court jurisdiction. Simmons *v.* Saul, 138 U. S. 439, 451, 34 L. Ed. 1054.

A decision as to the proper persons to whom letters of administration should be granted, however irregular, cannot be impeached collaterally. Simmons *v.* Saul, 138 U. S. 439, 452, 34 L. Ed. 1054, citing Comstock *v.* Crawford, 3 Wall. 396, 403, 18 L. Ed. 34; McNitt *v.* Turner, 16 Wall. 352, 363, 21 L. Ed. 341.

An order of a court of probate, appointing an executor, may not be subject to be impeached collaterally, by showing that he did not in fact qualify. Wall *v.* Bissell, 125 U. S. 382, 390, 31 L. Ed. 772.

A grant of letters of administration by a court having sole and exclusive power of granting them, and which by statute is obliged to grant them "to the relatives of the deceased, who would be entitled to succeed to his personal estate," is conclusive in other courts on a question of legitimacy; the grant having been made on an issue raised on the question of legitimacy alone, and there having been no question of minority, bad habits, alienage, or other disqualification simply personal. Held, accordingly, after a grant under such circumstances, that the legitimacy could not be gone into by the complainants on a bill for distribution by the persons who had opposed the grant of letters, against the person to whom they had been granted; but on the contrary, that the complainants were estopped on that subject. Caujolle *v.* Ferrie, 13 Wall. 465, 20 L. Ed. 507.

Where a statute of Illinois enacted that "in all cases where an intestate shall have been a nonresident or without a widow, etc., but having property in the state, administration should be granted to the public administrator of the proper county, and to no one else;" held, that where a person to whom letters of administration

ministrator cannot be held on principle or authority, to foreclose inquiry into the fact of the domicile of the decedent in the courts of another sovereignty.[37] An appointment as executor of a will does not cancel a debt due from the testator.[38] Though an appointment as executor does not cancel a debt due from the testator, the executor is precluded from bringing an action at law for the same, as he would be plaintiff in his own right and defendant as executor of the will.[39] Where one gave a receipt before an administrator had been appointed and was afterwards himself appointed administrator, it was held that such receipt would not preclude him from recovering as administrator.[40] If the creditor appoints the debtor his executor, in some cases, it operates as a release; this, however, is not the case, as against creditors, the release is good against devisees, when the debt due has not been specifically bequeathed.[41]

B. Termination of Office—1. Appearance of Executor.—The appearance of an executor, with proof of the will and letters testamentary, subsequently to the grant of letters of administration, in a case where it was supposed there was no will, is of itself a revocation of the latter.[42]

2. By Arrival of Infant Executor at Majority.—Where an administrator holds during the minority of an executor, the powers of such administrator are determined when the executor has attained his full age.[43]

3. By Appointment of Military Governor.—Where the president, at the close of hostilities, appointed a military governor of one of the states, the people whereof had been at war against the United States, it was held, that such appointment did not change the general laws of the state then in force for the settlement of the estates of deceased persons, nor remove from office those who were at the time charged by law with public duties in that behalf.[44]

4. Resignation.—Where an administrator had been appointed, and after giving the required bonds informed the court that he was unable to act, and resigned the appointment, not having taken possession of the property of the intestate, or attempted to exercise any control over it, it was competent for the court to accept the resignation, and to appoint a new administrator. The power to accept the resignation and to make the second appointment, under these circumstances, were incidents of the power to make the first.[45]

5. Jurisdiction to Recall or Annul Letters.—Letters testamentary, when once granted, are not revocable by the ordinary. He cannot annul them, or transfer the legal interest of the executor to any other person. His rights and his duties are beyond the reach of the ordinary.[46] Nor will a court of equity entertain jurisdiction to set aside the granting of letters of administration, on the ground of fraud, mistake or forgery.[47] But it is held that courts of probate may for cause recall or annull testamentary letters.[48]

on the estate of a nonresident applied, under the statute to have a sale of his property, and the court, having jurisdiction of the subject, ordered the sale, it would not be presumed that he was not the public administrator. McNitt *v.* Turner, 16 Wall. 352, 21 L. Ed. 341.

37. Overby *v.* Gordon, 177 U. S. 214, 227, 44 L. Ed. 741; Thorman *v.* Frame, 176 U. S. 350, 355, 44 L. Ed. 500.

38. Glover *v.* Patten, 165 U. S. 394, 41 L. Ed. 760.

39. Glover *v.* Patten, 165 U. S. 394, 41 L. Ed. 760.

40. Cammack *v.* Lewis, 15 Wall. 643, 649, 21 L. Ed. 244.

41. Page *v.* Patton, 5 Pet. 304, 8 L. Ed. 134.

42. **Appearance of executor as constituting revocation of letters of administration.**—Kane *v.* Paul, 14 Pet. 33, 40, 10 L. Ed. 341. See ante, "Validity of Letters as Affected by Existence of Executor," IV, A, 1, d.

43. **Arrival of infant executor at majority.**—Yeaton *v.* Lynn, 5 Pet. 224, 8 L. Ed. 105.

44. **Appointment of military governor.**—Ketchum *v.* Buckley, 99 U. S. 188, 25 L. Ed. 473.

45. **Resignation.**—Comstock *v.* Crawford, 3 Wall. 396, 18 L. Ed. 34.

46. **Power of ordinary to revoke.**—Griffith *v.* Frazier, 8 Cranch 9, 25, 3 L. Ed. 471.

47. **Jurisdiction of court of equity to set aside letters.**—Simmons *v.* Saul, 138 U. S. 439, 460, 34 L. Ed. 1054.

48. **Power of probate court to revoke.**—Gaines *v.* Hennen, 24 How. 553, 567, 16 L. Ed. 770; Simmons *v.* Saul, 138 U. S. 439, 460, 34 L. Ed. 1064.

6. Parties to Procedure for Removal.—Where an executor has employed counsel to oppose the application for his removal and the counsel appears for him, such executor is a party to the proceedings for removal.[49]

7. Effect of Removal.—By removal from office the executor is completely separated from the business of the estate.[50]

V. Assets.

A. General Rule as to What Constitutes.—Whatever property or money is lawfully received by an executor or administrator, after the death of his testator or intestate, in virtue of his representative character, he holds as assets of the estate.[51]

B. Character of Assets—1. Legal or Equitable.—In some jurisdictions moneys arising from the sale of personal property are designated as legal assets, in the hands of the executor or administrator; and such as arise from the sale of real property are denominated equitable assets.[52] And the funds realized from a sale, in equity, partake of the same character and are subject to the same rule as the property which they represent.[53]

2. Where Property Is to Be Converted.—See the title Conversion and Reconversion, vol. 4, p. 599.

C. Power of Appointment.—Where a person has a general power of appointment, either by deed or by will, and executes this power, the property appointed is deemed, in equity, part of his assets, and subject to the demands of his creditors in preference to the claims of his voluntary appointees or legatees.[54]

D. Effect of Mingling Assets of Estate with Funds of Representative.—When assets have been turned into money by an executor or administrator and the money mingled with his own, the assets have ceased to exist as assets or estate of the decedent.[55]

E. Rights under Contracts.—The rights under a contract made by a deceased with a railroad company for construction work along the line of the railroad become assets of the estate,[56] and this is true where others have taken possession of the contract and made themselves in law trustees of the profits they have realized by its performance. As such trustees they must account to the personal representative of the estate and not to the heirs.[57]

F. Interest in Insurance Policy.—As to the interest in insurance policies as constituting assets, see the title Insurance.

G. Partnership Assets.—For a discussion of the rights of the surviving partner as to the partnership assets as against the personal representative of a deceased partner, see the title Partnership.

H. Securities Held Jointly.—Where two joint obligees held joint securities

49. Parties to procedure for removal.—Boyd *v.* Wyly, 124 U. S. 98, 105, 31 L. Ed. 369.

50. Effect of removal.—Taylor *v.* Savage, 1 How. 282, 286, 11 L. Ed. 132; Taylor *v.* Savage, 2 How. 395, 11 L. Ed. 313.

51. What constitutes assets.—De Valengin *v.* Duffy, 14 Pet. 282, 10 L. Ed. 457.

52. Legal and equitable assets.—Backhouse *v.* Patton, 5 Pet. 160, 167, 8 L. Ed. 82.

53. McLearn *v.* Wallace, 10 Pet. 625, 641, 9 L. Ed. 559.

54. Power of appointment.—Brandies *v.* Cochrane, 112 U. S. 344, 352, 28 L. Ed. 760, wherein it is said: "This rule is stated by Mr. Justice Gray in Clapp *v.* Ingraham, 126 Mass. 200, to have had its origin, perhaps, in a decree of Lord Somers, affirmed by the House of Lords, in a case in which the person executing the power had, in effect, reserved the power to himself in granting away the estate. Thompson *v.* Towne, Prec. Ch. 52; S. C., 2 Vern. 319. But it was frequently afterwards applied to cases of the execution of a general power of appointment by will, of property of which the donee had never any ownership or control during his life. In re Harvey's Estate, L. R. 13 Ch. Div. 216. See the title POWERS.

55. Funds mingled with those of representative.—United States *v.* Walker, 109 U. S. 258, 263, 27 L. Ed. 927.

56. Rights under contracts.—Crane *v.* Kansas Pac. R. Co., 131 U. S., appx. clxviii, 25 L. Ed. 782.

57. Crane *v.* Kansas Pac. R. Co., 131 U. S., appx. clxviii, 25 L. Ed. 782.

and one of the obligees died, it was held that, at law, the surviving obligee was entitled to the joint securities, and for the interposition of a court of equity a ground must be laid.[58]

I. Rights in Funds Arising from Treaties.—Where a treaty has been made recognizing a right to compensation to certain aggrieved parties, if a party injured has died before or after the treaty was made; and compensation has been subsequently decreed, it would be assets, and distributable as such, in the hands of his executors and administrators.[59]

J. Donation by Government for Services of Deceased.—A gift or donation by the government to the heirs as a reward for voluntary services rendered by the deceased, will not constitute assets in their hands for the payment of creditors.[60]

K. Payment by Government for Property Seized.—But where the manifest purpose of the government is not to confer a bounty or gratuity upon any one; but to provide for the ascertainment and payment of a debt due from it to a loyal citizen for property of his, taken by the government and to enable his executor to recover, as part of his estate, proceeds received by the government from the sale of that property; the fund recoverable does constitute assets of the estate.[61]

L. Reversions.—All the authorities, ancient and modern, agree that reversion after an estate for life is assets, or, as some of the books express it, quasi assets, in the hands of the heir, in regard to the bond of the ancestor, binding heirs.[62]

M. Goods of Principal Sold in Name of Factor.—In the case of a factor who sells the goods of his principal in his own name, upon a credit, and dies before the money is received, if it is afterwards paid to the administrator, in his representative character, the creditor would be entitled to consider it as assets in his hands; and to charge him in the same character in which he received it.[63]

N. Money Recovered on Administration Bonds.—As to money recovered on an administration bond as constituting assets of the estate, see post, "Payment into Court of Money Recovered on Bond," VII, J.

O. Situs of Assets.—The discussion of the situs of assets will be found elsewhere in this article.[64]

P. General Rule as to Real Property Interests.—The general rule is that the real estate of intestates stands chargeable with the payment of their debts, upon a deficiency of assets.[65]

58. Securities held jointly.—Penn *v.* Butler, 4 Dall. 354, 357, 1 L. Ed. 864.

59. Rights in funds arising from treaties.—Comegys *v.* Vasse, 1 Pet. 193, 217, 7 L. Ed. 108.

60. Donation of government for services of deceased.—In Emerson *v.* Hall, 13 Pet. 408, 409, 10 L. Ed. 223, money paid by the United States to the heirs at law, as "the legal representatives of William Emerson," under the act of March 3, 1831, c. 102, 6 Stat. 464, was held not to be assets in their hands for the payment of his creditors, the act, in its title, was expressed to be "for the relief of the heirs of William Emerson, deceased;" and it granted the money as a reward for services, meritorious indeed, but voluntarily rendered by Emerson, not under any law or contract, and imposing no obligation, legal or equitable, upon the government to compensate him therefor; and the money was therefore held to have been received by his heirs as a gift or pure donation. Briggs *v.* Walker, 171 U. S. 466, 472, 43 L. Ed. 243. See, also, Price *v.* Forrest, 173 U. S. 410, 429, 43 L. Ed. 749.

61. Payment by government for property seized.—Briggs *v.* Walker, 171 U. S. 466, 473, 43 L. Ed. 243; Price *v.* Forrest, 173 U. S. 410, 429, 43 L. Ed. 749.

62. Reversions.—Burton *v.* Smith, 13 Pet. 464, 10 L. Ed. 248. See the title REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS.

63. Goods of principal sold in name of factor.—De Valengin *v.* Duffy, 14 Pet. 282, 10 L. Ed. 457. See, generally, the title FACTORS AND COMMISSION MERCHANTS.

64. Situs of assets.—As to the situs of assets as a jurisdictional prerequisite to the founding of administration, see ante, "Situs of Assets," IV, A, 1, g.

65. General rule as to real property.—Wilkinson *v.* Leland, 2 Pet. 627, 658, 7 L. Ed. 542; Bank *v.* Dudley, 2 Pet. 492,

Q. Rents.—Rents which have become virtually the money of a decedent may be properly deemed assets in the hands of his administrator.[66]

R. Realty Made Assets by Terms of Will.—As to the treatment of the question where realty is made assets by the terms of the will, see the titles MARSHALING ASSETS AND SECURITIES; WILLS.

S. Property under Contract for Sale.—Where the executor only gives bonds for a deed, title not to be given until the purchase money is all paid, and that is not done and no title conveyed, the land yet remains subject to be applied to the payment of debts.[67]

T. Term of Years.—See post, "Terms of Years," VI, C, 4.

U. Property Mortgaged.—Where property is encumbered by a mortgage, upon the death of the mortgagee, the debts secured by the mortgage will be assets in the hands of his executor, and although the technical legal estate may descend to his heir, it must be used only for the purpose of obtaining satisfaction of the debt, the heir being merely a trustee for the executor.[67a]

VI. Rights, Duties and Liabilities.

A. Derivation of Powers.—An administrator derives his power over the estate of his intestate from the grant of the administration;[68] while the executor derives his power from the will of his testator.[69]

523, 7 L. Ed. 496; Watkins *v.* Holman, 16 Pet. 25, 10 L. Ed. 873; Meeks *v.* Olpherts, 100 U. S. 564, 566, 25 L. Ed. 735; Florentine *v.* Barton, 2 Wall. 210, 215, 17 L. Ed. 783; Ricard *v.* Williams, 7 Wheat. 59, 113, 5 L. Ed. 398; Tate *v.* Norton, 94 U. S. 746, 24 L. Ed. 222; Morris *v.* McConnaughy, 2 Dall. 189, 190, 1 L. Ed. 343; Morehouse *v.* Phelps, 21 How. 294, 304, 16 L. Ed. 140; Hannum *v.* Spear, 2 Dall. 291, 292, 1 L. Ed. 386; Telfair *v.* Stead, 2 Cranch 407, 415, 2 L. Ed. 320. See the titles MARSHALING ASSETS AND SECURITIES; WILLS.

66. Rents.—Boyce *v.* Grundy, 9 Pet. 275, 288. 9 L. Ed. 127.

On the hearing of the case of Boyce *v.* Grundy, at January term, 1830, on appeal from the decree of the circuit court of West Tennessee, 3 Pet. 210, 7 L. Ed. 655, the decree of the circuit court was affirmed; by which, after decreeing a rescission of a contract made between Felix Grundy and James Boyce, the intestate, for the purchase, by the former from the latter, of a tract of land lying in the state of Mississippi, the court also decreed, that Robert Boyce, the administrator of James Boyce, of the goods, etc., of James Boyce, deceased, do pay the sum of $2,065.21, to be levied on the goods of the said James Boyce, in his hands to be administered; and execution issue therefor as at law; in this decree, nothing was said as to any allowance of damages or interest. A mandate was issued in the usual form, to the circuit court, to carry the same into effect; on filing the mandate in the circuit court, in 1830, the cause was referred to the clerk, as master, to take an account of the assets of James Boyce, in the hands of the administrator; who reported, that no assets appeared in the hands of the administrator, but that Robert Boyce had, under an agreement with the appellee, received for rents of the land in Mississippi, before the 1st of January, 1824, $2,100, which, with interest thereon, $1,120, to the 1st of September, 1830, would amount to $3,220; and that the land in Mississippi was devised by James Boyce, to his son, Robert Boyce. The report was confirmed, except as to the $1,120 interest; the circuit court decreed that the plaintiff recover of Robert Boyce $2,100, with interest from the decree; to be levied on his proper goods and chattels; and for the balance due the plaintiff, $496.46, with interest, in case the same was not paid by him; the plaintiff had for the whole amount of the decree, a lien on the lands in the state of Mississippi; and that the same should be sold to satisfy the same, by the clerk of the court, acting as a commissioner. Held, that the sum of $2,100, the rents of the lands in Mississippi, came into the hands of Robert Boyce, as assets of the estate of James Boyce. Boyce *v.* Grundy, 9 Pet. 275, 9 L. Ed. 127.

67. Property under contract for sale.—Peter *v.* Beverly, 10 Pet. 532, 563, 9 L. Ed. 522; Bank *v.* Beverly, 1 How. 134, 147, 11 L. Ed. 75. See, generally, the titles MARSHALING ASSETS AND SECURITIES; WILLS.

67a. Property mortgaged.—Sheldon *v.* Sill, 8 How. 441, 450, 12 L. Ed. 1147. And see, generally, the title MORTGAGES AND DEEDS OF TRUST.

68. Administrator's powers derived from grant.—Dixon *v.* Ramsay, 3 Cranch 319, 323, 2 L. Ed. 453; Stacy *v.* Thrasher, 6 How. 44, 58, 12 L. Ed. 337; Johnson *v.* Powers, 139 U. S. 156, 160, 35 L. Ed. 112. See post, "Administrators De Bonis Non or with the Will Annexed," XII.

69. Executor's powers derived from will.—Brush *v.* Ware, 15 Pet. 93, 111, 10 L. Ed. 672; Dixon *v.* Ramsay, 3 Cranch 319, 323, 2 L. Ed. 453.

B. Extent of Authority Generally.[70]—The responsibilities of personal representatives as to the manner of settling the estate which they represent, depend upon the law of the state.[71] The administrator coming into such possession by succession to the intestate, and encumbered with the duty to pay his debts, is considered in law as in privacy with him.[72] Yet his representation of his intestate is a qualified one, and extends not beyond the assets of which the court granting the administration has jurisdiction.[73] The executor can do no valid act beyond his authority as conferred by the terms of the will.[74] But courts, in carrying out the wishes of testators, are much inclined, especially in equity, to vest all the power or interest in executors which are necessary to effectuate those wishes, if the language can fairly admit it.[75] They are inclined, also, when considering it a trust, or a power coupled with an interest, to have its duration and quantity commensurate with the object to be accomplished.[76] Where the will contains express directions what the executors are to do, an executor who proves the will must do all which he is directed to do as executor, and he cannot say that though executor he is not clothed with any of those trusts. Proving the will is an acceptance of the trust. Where a trust is created by a will and no trustee appointed, the executor is bound to act as such trustee.[77]

C. Title and Possession—1. General Rules as to Extent of Interest.—The interest of an executor in the testator's estate is what the testator gives him; that of an administrator, only that which the law of his appointment enjoins.[78] The general rule is that the appointment of an executor vests the whole personal estate in the person so appointed. He holds as trustee for the purposes of the will, but he holds the legal title in all the chattels of the testator. He is, for the purpose of administering them, as much the legal proprietor of those chattels as was the testator himself while alive.[79] He has not, ordinarily, any power over

70. Generally as to powers conferred by will, see the titles POWERS; WILLS.

71. What law governs.—Hill *v.* Tucker, 13 How. 458, 466, 14 L. Ed. 223; Goodall *v.* Tucker, 13 How. 469, 14 L. Ed. 227.

72. Administrator considered as in privity with intestate.—Stacy *v.* Thrasher, 6 How. 44, 58, 12 L. Ed. 337; Johnson *v.* Powers, 139 U. S. 156, 160, 35 L. Ed. 112.

As to a discussion of the question whether the administrator is bound or estopped by a judgment against the intestate, see the title RES ADJUDICATA.

73. Administrator's representation a qualified one.—Stacy *v.* Thrasher, 6 How. 44, 58, 12 L. Ed. 337; Johnson *v.* Powers, 139 U. S. 156, 160, 35 L. Ed. 112. See post, "Extraterritorial Powers Generally," XI, B.

74. Powers of executor confined to terms of will.—Brush *v.* Ware, 15 Pet. 93, 111, 10 L. Ed. 672; Bank of Beverly, 1 How. 134, 149, 11 L. Ed. 75.

Thus where a will disposed of personal estate only and the executor assigned a military certificate for lands, it was held that the executor had no power to assign the certificates. Brush *v.* Ware, 15 Pet. 93, 111. 10 L. Ed. 672.

"The will is the executor's law, and he is no more than the testator's representative in all things lawful in the will. A specific legacy of all the personal property is a law to him. The manumission of all the slaves of his testator, if he leaves no other personal property to pay debts, and if it be made in a way to charge real estate with the payment of all debts, is equally his law." Fenwick *v.* Chapman, 9 Pet. 461, 475, 9 L. Ed. 193.

75. Executors vested with powers necessary to effectuate wishes of testator.—Taylor *v.* Benham, 5 How. 233, 268, 12 L. Ed. 130; Peter *v.* Beverly, 10 Pet. 532, 9 L. Ed. 522.

76. Taylor *v.* Benham, 5 How. 233, 268, 12 L. Ed. 130.

77. Executor must fully comply with terms of will.—McBurney *v.* Carson, 99 U. S. 567, 572, 25 L. Ed. 378.

78. General rule as to extent of interest.—Carpenter *v.* Strange, 141 U. S. 87, 104, 35 L. Ed. 640; Hill *v.* Tucker, 13 How. 458, 14 L. Ed. 223; Goodall *v.* Tucker, 13 How. 469, 14 L. Ed. 227.

A testator may make the trust absolute or qualified in respect to his estate. It may be qualified as to the subject matter, the place where the trust shall be discharged, and the time when the executor shall begin and continue to act as such, or he may be executor of one of several purposes. Hill *v.* Tucker, 13 How. 458, 466, 14 L. Ed. 223; Goodall *v.* Tucker, 13 How. 469, 14 L. Ed. 227. See post, "Limited and Special Executors or Administrators," X.

The administrator's possession of the decedent's property is a possession taken in obedience to the orders of the court appointing him. Byers *v.* McAuley, 149 U. S. 608, 615, 37 L. Ed. 867.

79. Title of executor.—Griffith *v.* Frazier, 8 Cranch 9, 24, 3 L. Ed. 471; Kane *v.*

the real estate.[80] An original administrator with letters taken out at the place of the domicile, is invested with title to all personal property of the deceased for the purpose of collecting the effects of the estate, paying the debts, and making distribution of the residue according to the law of the place, or directions of the will, as the case may be.[81] As a general rule the administrator has no estate in the land, but a power to sell.[82] But by statute in some jurisdictions the administrator is given control over the real estate as well as the personal property.[83] The title of coexecutors, coadministrators, administrators de bonis non and foreign executors and administrators will be found treated elsewhere in this article.[84] The interest of a personal representative in the estate is that of a trustee,[85] unaffected by any disposition which a single creditor may make of

Paul, 14 Pet. 33, 10 L. Ed. 341. See, also, McNutt *v.* Bland, 2 How. 9, 15, 11 L. Ed. 159; Hess *v.* Reynolds, 113 U. S. 73, 76, 28 L. Ed. 927; Gormley *v.* Bunyan, 138 U. S. 623, 635, 34 L. Ed. 1086.

Where personal property of an estate under administration has been sold, or a debt collected, the proceeds are the property of the executor or administrator. United States *v.* Walker, 109 U. S. 258, 265, 27 L. Ed. 927.

As said by Mr. Chief Justice Shaw, delivering the opinion of the supreme judicial court of Massachusetts: "It is an established rule of law, that all the personal property of the testator vests in the executors for some purposes, before probate of the will; but to all intents and purposes, upon its probate. This they take not merely as donees, by force of the gift, as inter vivos, but by operation of the rules of law controlling, regulating and giving effect to wills." Wall *v.* Bissell, 125 U. S. 382, 390, 31 L. Ed. 772.

It was provided in the Louisiana civil code that a testator may give the seisin of the whole or of a part of his estate to his executor, accordingly as he may express himself. The seisin usually continues for a year and a day, but may be prolonged by an act of the court, and may be terminated whenever the heirs shall deliver to the executor a sum sufficient to pay the movable legacies. The seisin of the executor is distinct from and paramount to the seisin which the law vested in the heir immediately on the death of his ancestor, and the heir can only deprive the executor of it by providing security for the performance of his obligations. The executor represented the reception, in so far as respects creditors and legatee. Flowers *v.* Foreman, 23 How. 132, 148, 16 L. Ed. 405.

80. Ingle *v.* Jones, 9 Wall. 486, 494, 19 L. Ed. 621; Brush *v.* Ware, 15 Pet. 93, 10 L. Ed. 672.

81. Title of administrator.—Wilkins *v.* Ellett, 9 Wall. 740, 742, 19 L. Ed. 586; Harrison *v.* Perea, 168 U. S. 311, 321, 42 L. Ed. 478; Dixon *v.* Ramsay, 3 Cranch 319, 323, 2 L. Ed. 453; McArthur *v.* Scott, 113 U. S. 340, 397, 28 L. Ed. 1015; McNutt *v.* Bland, 2 How. 9, 15, 11 L. Ed. 159. See, also, Hess *v.* Reynolds, 113 U. S. 73, 76, 28 L. Ed. 927.

"When a debt due the deceased is collected or a chattel of his estate is sold, the money received becomes the property of the administrator, and he is accountable therefor to those beneficially interested in the estate." United States *v.* Walker, 109 U. S. 258, 263, 27 L. Ed. 927.

"The administrator, by virtue of his appointment and authority as such, obtains the title in promissory notes or other written evidences of debt, held by the intestate at the time of his death, and coming to the possession of the administrator; and may sell, transfer and indorse the same; and the purchaser or indorsees may maintain actions in their own names against the debtors in another state, if the debts are negotiable promissory notes, or if the law of the state in which the action is brought permits the assignee of a chose in action to sue in his own name. And on a note made to the intestate, payable to bearer, an administrator appointed in one state may sue in his own name in another state." Wilkins *v.* Ellett, 108 U. S. 256, 259, 27 L. Ed. 718, citing Harper *v.* Butler, 2 Pet. 239, 7 L. Ed. 410.

82. Administrator's title to land.—Bank *v.* Dudley, 2 Pet. 492, 523, 7 L. Ed. 496; Ingle *v.* Jones, 9 Wall. 486, 495, 19 L. Ed. 621.

83. "By virtue of the statutes of California the real estate of a person dying intestate comes to the possession and control of his administrator as personal property does, and that while the administrator can only sell real estate upon an order of the probate court, the possession and control, the perception of the rents and profits, and the right to sue to recover possession of it when held adversely, belongs solely to the administrator." Meeks *v.* Olpherts, 100 U. S. 564, 566, 25 L. Ed. 735.

84. See post, "Rights and Duties of Coexecutors and Coadministrators," VI, P; "Foreign Executors or Administrators," XI; "Administrators De Bonis Non or with the Will Annexed," XII.

85. Personal representative holds as trustee.—Jeffries *v.* Mutual Life Ins. Co., 110 U. S. 305, 309, 28 L. Ed. 156; Griffith *v.* Frazier, 8 Cranch 9, 24, 3 L. Ed. 471.

There attaches by operation of law to any executor, a trust to pay the debts of the estate and then to deliver over the re-

his debt against the estate, or the sale or other disposition which an individual devisee may make of his individual interest in the estate.[86]

2. Time of Vesting.—The title of an executor in the personal property of his testator, being derived from the will, doubtless vests in him from the moment of the testator's death. At common law, he might, before proving the will in the probate court, not only take possession of the property, but sell or dispose of it, pay debts of the estate, receive or release debts owing to it, bring actions for property which was in the testator's actual possession, and do almost any other acts incident to his office, except that he could not maintain any other actions without producing a copy of the probate and letters testamentary at the trial.[87] And it has been said that the title of an administrator, though it does not exist until the grant of administration, relates back to the time of the death of the intestate; and that he may recover against a wrongdoer who has seized or converted the goods of the intestate after his death, in an action of trespass or trover.[88]

3. Effect of Marriage of Executor to Devisee.—Where a testator devises certain property to his infant daughter, to be delivered over to her when she should arrive at a stated age, and the daughter, before attaining that age marries the executor who has the principal management of the estate, and possession of the property devised, he must be considered as holding it as executor, and not as husband.[89]

4. Terms of Years.—Terms of years belonging to a testator or intestate vest in his executor or administrator without an entry, for the reason that in contemplation of law such interests are chattels.[90]

5. Devise in Trust.—A devise in trust for a term vests the legal title in the executors until a division is made in one form or another.[91]

mainder of the lands for partition among the devisees or heirs. Allen *v.* Gillette, 127 U. S. 589, 595, 32 L. Ed. 271.

"The executor, though holding the title to the personal assets, is not absolute owner of them. They are not liable for his debts, nor can he dispose of them by will. He holds them in trust to pay the debts of the deceased, and then to discharge his legacies." Smith *v.* Ayer, 101 U. S. 320, 326, 25 L. Ed. 955.

The administrator is a trustee for the creditors, as well as for the heirs and distributees. Tate *v.* Norton, 94 U. S. 746, 752, 24 L. Ed. 222.

86. Effect of disposition of interests by individuals.—Allen *v.* Gillette, 127 U. S. 589, 595, 32 L. Ed. 271, wherein the court said: "Respecting these creditors or devisees in their separate and individual capacity, he is not the representative or guardian of their person or property, and can exercise no legal control over either. The disposition which a single creditor may make of his debt against the estate, or the sale or other disposition which an individual devisee may make of his individual interest in said estate, cannot interfere with the executor's control of the estate for the payment of the debts of the creditors, on the one hand, or for its ultimate partition among the devisees, on the other; and both are, therefore, matters entirely outside of his trust and his office."

87. When interest vests in executor.—Wall *v.* Bissell, 125 U. S. 382, 387, 31 L. Ed. 772; Dixon *v.* Ramsay, 3 Cranch 319, 323, 2 L. Ed. 453; Hill *v.* Tucker, 13 How. 458, 466, 14 L. Ed. 223.

The executors interest in the testator's estate vests from the latter's death, whatever may be the form that the will requires to be observed before an executor enters on the discharge of his functions. Hill *v.* Tucker, 13 How. 458, 466, 14 L. Ed. 223; Goodall *v.* Tucker, 13 How. 469, 14 L. Ed. 227.

Relation back of powers.—Letters testamentary issued to an executor, upon his qualifying according to law, may relate back and legalize his previous tortious acts. Wall *v.* Bissell, 125 U. S. 382, 31 L. Ed. 772.

88. Relation of title.—Dissenting opinion of White, J., Fuller, C. J., Harlan, J., in United States *v.* Loughrey, 172 U. S. 206, 227, 43 L. Ed. 420.

89. Effect of marriage of executor to devisee.—Price *v.* Sessions, 3 How. 624, 11 L. Ed. 755, citing in Paige *v.* Sessions, 4 How. 122, 11 L. Ed. 903.

90. Terms of years.—Insurance Co. *v.* Haven, 95 U. S. 242, 251, 24 L. Ed. 473.

91. Devise in trust.—Potter *v.* Couch, 141 U. S. 296, 311, 35 L. Ed. 721.

Where a testator devised and bequeathed all his real and personal estate to executors for twenty years in trust for certain uses and purposes, authorizing the executors to lease his real estate, and out of surplus funds to improve same and to buy other real estate to be held under same trusts, but not to lease beyond twenty years or improve or build after sixteen years, authorizing them to

6. Divesting of Title.—The executor's title cannot be divested or impaired by the unauthorized acts of the executor,[92] or by decree of any other court.[93] The legal title in the real estate, which has once vested in the executors cannot be divested without a conveyance, or a decree of a court of chancery, or an appointment by the court of probate of new executors and trustees in accordance with the will.[94] The administrator's possession being the possession of the court, it is a possession which cannot be disturbed by any other court.[95]

D. Degree of Care Required.—The personal representative is chargeable with the utmost good faith in dealing with the estate entrusted to him.[96] As a general rule the personal representative, in the management of the estate must do, what, under the circumstances and situation, prudent men, managing their own estates, would do.[97] A public administrator by the mere acceptance of his office does not place himself in any fiduciary relation to the holders of notes which were prescribed by lapse of time sixteen months before he was appointed, and where the record shows an erased mortgage, he is under no official duty to inquire whether the erasure is a proper one or not.[98]

E. Discretionary Powers.—The executor who takes charge of the affairs of a man in trade must, necessarily, on the winding up of his affairs be allowed a reasonable latitude of discretion; and in general, where there is manifest fidelity, diligence and ordinary judgment displayed, the courts will always, with some reluctance, enforce the rigid rules which courts have been obliged, for the protection of estates, to impose upon the conduct of executors.[99]

F. Delegation of Powers.—Letters of administration are a trust. They are granted by the probate court or ordinary because of confidence reposed in the grantee. They require him to take exclusive charge of the personal property of his intestate and to bring to its administration his own personal attention and judgment. He has no right to allow others to control it or to share in its administration. If he does, he exposes it to unnecessary hazards and subjects it to the disposition of persons in whom the officer of the law has reposed no confidence.[1]

mortgage in order to rebuild in case of destruction, and at the end of the twenty years the property be divided or sold in order to make a division between devisees as other parts of the will prescribe; held, that the executors had legal title and until the division was made in one form or other, by the executor and trustees, the legal title remained in them. Potter *v.* Couch, 141 U. S. 296, 311, 35 L. Ed. 721.

A testator by will devised lands to his executors and their successors, and their heirs, in trust; and directed that the income, until his youngest grandchild, who might live to be twenty-one years of age, should arrive at that age, should be equally divided among the testator's children, or the issue of any child dying, and the grandchildren also as they successively came of age, and as soon as the youngest grandchild arrived at the age of twenty-one, after the death of all of the testator's children, the land should be equally divided among the grandchildren, and the executors in the final division and distribution, should convey and pay to the persons entitled under the will. Held, that the executors took the legal title in fee, to hold until final division; and that the trusts were imposed upon them as executors. McArthur *v.* Scott, 133 U. S. 340, 377, 28 L. Ed. 1015. See, generally, the title TRUST AND TRUSTEES.

92. Divesting of title.—Brush *v.* Ware, 15 Pet. 93, 10 L. Ed. 672.

93. Byers *v.* McAuley, 149 U. S. 608, 615, 37 L. Ed. 867; Yonley *v.* Lavender, 21 Wall. 276, 22 L. Ed. 536. See the titles EXECUTIONS, ante, p. 84; JUDGMENTS AND DECREES.

94. McArthur *v.* Scott, 113 U. S. 340, 397, 28 L. Ed. 1015.

95. Byers *v.* McAuley, 149 U. S. 608, 615, 37 L. Ed. 867; Williams *v.* Benedict, 8 How. 107, 112, 12 L. Ed. 1007; Yonley *v.* Lavender, 21 Wall. 276, 22 L. Ed. 536. See the titles EXECUTIONS, ante, p. 84; JUDGMENTS AND DECREES.

96. Degree of care required.—Glasgow *v.* Lipse, 117 U. S. 327, 333, 29 L. Ed. 901. See post, "Personal Liability of Executors or Administrators," VI, X.

97. Glasgow *v.* Lipse, 117 U. S. 327, 333, 29 L. Ed. 901.

98. Pickett *v.* Foster, 149 U. S. 505, 531, 37 L. Ed. 829.

99. Discretionary powers.—Hunter *v.* Bryant, 2 Wheat. 32, 42, 4 L. Ed. 177. See post, "Personal Liability of Executor or Administrator," VI, X.

1. Delegation of powers.—Forsyth *v.* Woods, 11 Wall. 484, 487, 20 L. Ed. 207.

"To permit a mercantile or a banking firm, of which the administrator is a partner, to take the assets of the decedent's estate into its possession and to share in

G. Inventory.—The filing of an inventory is not imperative where such inventory would settle nothing by reason of the fact that the property in which all the parties are equally interested is constantly changing.[2]

H. Protection of Estate.—It is the duty of the personal representative to protect the interests of the estate,[3] in doing which he is the representative of the rights of the heirs and of the creditors of the estate.[4]

I. Collection of Assets—1. AUTHORITY TO COLLECT.—The personal representative is the proper person to represent the estate in collecting the assets thereof.[5] The fact that a note may not have been inventoried as a part of the estate will not preclude the executor from collecting the proceeds therefrom.[6]

the disposition of them, is to invite what the plea shows happened in this case, misappropriation and loss. It is a gross breach of trust, a violation of legal duty. It must be, therefore, that any contract which has for its object such a faithless abandonment of the duties of an administrator cannot be enforced in a court of law." Forsyth *v.* Woods, 11 Wall. 484, 487, 20 L. Ed. 207.

"The executor alone can appoint his agents." Griffith *v.* Frazier, 8 Cranch 9, 28, 3 L. Ed. 471.

2. Inventory.—Hoyt *v.* Sprague, 103 U. S. 613, 627, 26 L. Ed. 585.

3. Duty to protect interests of estate.—Glover *v.* Patten, 165 U. S. 394, 402, 41 L. Ed. 760; Gaines *v.* De La Croix, 6 Wall. 719, 721, 18 L. Ed. 967; McArthur *v.* Scott, 113 U. S. 340, 396, 28 L. Ed. 1015; Hess *v.* Reynolds, 113 U. S. 73, 76, 28 L. Ed. 927. See post, "Actions by and against Executors or Administrators," IX.

Executors represent the residuary legatees and guard their interests. Glover *v.* Patten, 165 U. S. 394, 402, 41 L. Ed. 760; Dandridge *v.* Washington, 2 Pet. 370, 377, 7 L. Ed. 454.

An executor represents the person of the testator, and is charged with the duty of resisting unfounded claims against the fund in his hands. Briggs *v.* Walker, 171 U. S. 466, 471, 43 L. Ed. 243, citing McArthur *v.* Scott, 113 U. S. 340, 396, 28 L. Ed. 1015. And see Telfair *v.* Stead, 2 Cranch 407, 417, 2 L. Ed. 320.

As the representative of the rights of the heirs and of the creditors of the estate, an executor has the same power to sue for and recover the property of the estate as if he had been the intestate himself. Not only is it his right, but it is his exclusive right and his duty. For any failure to perform this duty, he lays himself liable to the heirs, or any one else injured by that failure. Meeks *v.* Olpherts, 100 U. S. 564, 566, 25 L. Ed. 735.

4. Meeks *v.* Olpherts, 100 U. S. 564, 566, 25 L. Ed. 735; McArthur *v.* Scott, 113 U. S. 340, 396, 28 L. Ed. 1015.

5. Authority to collect assets.—Briggs *v.* Walker, 171 U. S. 466, 473, 43 L. Ed. 243; Price *v.* Forrest, 173 U. S. 410, 429, 43 L. Ed. 749; Seymour *v.* Freer, 8 Wall. 202, 19 L. Ed. 306. See, also, Gormley *v.* Bunyan, 138 U. S. 623, 635, 34 L. Ed. 1086.

Where notes belonging to decedent had never been inventoried as part of the decedent's estate, but it was shown that they were the property of the decedent at the time of his death, and by operation of law, in pursuance of his will, they passed by his executors, it was held, that the executors could sue on the notes. Gormley *v.* Bunyan, 138 U. S. 623, 635, 34 L. Ed. 1086.

An agreement was entered into between P. and S. which provided, on the part of P., that he should devote his time and best judgment to the selection and purchase of land, to an amount not exceeding five thousand dollars, in certain designated states and territories, or in such of them as he might find most advantageous to the interest of S.; that the purchases should be made during the then existing year, and that the contracts of purchase should be made, and the conveyance taken in the name of S.; and on the part of S., that he should furnish the five thousand dollars; that the lands purchased should be sold within five years afterwards, and that of the profits made by such purchase and sale, one-half should be paid to P., and be in full for his services and expenses. Under this agreement, lands having been purchased by P. and the title taken in the name of S., held, that the principle of equitable conversion being applied to the case, and that land which was to be converted into money, being regarded and treated in equity as money, the personal representative of P. was the proper person to maintain a suit for recovery of P.'s portion of the profits and it was not necessary that his heirs at law should be parties. Seymour *v.* Freer, 8 Wall. 202, 19 L. Ed. 306.

Where the heirs at law of a deceased person sued to enforce a trust on personal property, it was held that they were not the proper parties to bring the suit, but the suit should have been brought by the personal representative. Ware *v.* Galveston City Co., 111 U. S. 170, 175, 28 L. Ed. 393.

The power to sue for debts due to the estate of an intestate is implied in the authority given to administrators ad colligendum, issued under the authority of the statute law of Mississippi. Ventress *v.* Smith, 10 Pet. 161, 9 L. Ed. 382.

6. Gormley *v.* Bunyan, 138 U. S. 623, 635, 34 L. Ed. 1086.

Where a bill to foreclose a mortgage was filed by the executors of the mortgagee, it was held that they were the proper parties to file the bill.[7]

2. Situs of Assets.—A treatment of the question as to the situs of assets will be found elsewhere in this article.[8]

3. Accepting Depreciated Currency.—For debts payable in lawful money, the depreciated currency of the country where they were contracted and the executor resides can be used at its face value in payment of legacies, and, therefore, may be accepted by the executor in payment of claims of the estate, without a breach of trust.[9]

4. Receipts.—A receipt given by a person as attorney for money paid by himself as administrator to himself as attorney is good.[10]

J. Compromise and Composition.—An administrator has general power to compound a debt, if it is for the benefit of the trust estate. And, even when statutes exist providing for compromises with debtors with the approval of a probate court, it is held that the right to compromise which before existed is not taken away, but may be exercised subject to the burden of showing that the compromise was beneficial to the estate.[11] The authority given to an administrator by statute, to commence and prosecute actions, fairly includes the power to make such reasonable contracts in regard to compensation and the compro-

7. Anderson *v.* Watt, 138 U. S. 694, 703, 34 L. Ed. 1078.

8. **Situs of assets.**—See ante, "Situs of Assets," IV, A, 1, g.

9. **Accepting depreciated currency in payment.**—In Washington *v.* Opie, 145 U. S. 214, 221, 36 L. Ed. 580, the court said: "The present case in some of its features is not unlike that of Glasgow *v.* Lipse, 117 U. S. 327, 334, 29 L. Ed. 901. The facts in that case were these: Lipse's executors having authority to dispose of the real property of the testator, who died in Virginia, sold certain lands in that state to Spears in 1860. One of the payments fell due in October, 1861, another in October, 1862. The bonds were paid in a check on a Virginia bank, which was deposited in that bank by the resident executor who received it. Against that deposit the executor drew his checks, which were paid in Confederate notes. The principal question in the case was whether the debtor was discharged from liability to pay his bonds in lawful money of the United States. This court, after referring to the doctrine declared by the court of appeals of Virginia (Patteson *v.* Bondurant, 30 Gratt. 94), that a debtor who pays to an executor in depreciated currency a debt payable in gold or its equivalent, knowing at the time that the currency is not needed for the payment of debts or legacies, or other uses of the estate, and that the safety of the debt does not require its collection, may also be charged as a participant in the devastavit, said: 'The present case does not come under the doctrine. It falls within the class where, for debts payable in lawful money, the depreciated currency of the country where they were contracted and the executor resides can be used at its face value in payment of legacies, and, therefore, may be accepted by him without a breach of trust. The notes received had in October, 1862, to a great extent, superseded the use of coin, and became the principal currency of the confederate states. All business transactions there were had with reference to them. They were a standard of value, according to which contracts were made and discharged. Having, therefore, an exchangeable value, they were sought for by residents within the confederacy.' In reference to the issue as to whether the legatees were estopped to question the action of the executor, the court said: 'The resident executor there, however, hesitated to accept them (Confederate notes) in payment of the last bond of Spears, which, being made in October, 1860, must be considered as payable in lawful money, and he consulted the wishes of legatees in Virginia, among whom the greater part of the money was to be distributed. They desired him to take the notes, and received them in discharge of their distributive shares. So far as those legatees are concerned their approval of his action was shown by their expressed wishes, and their acceptance of the notes. They, at least, are estopped from questioning the propriety of his conduct.'" See post, "Personal Liability of Executor or Administrator," VI, X. And see, generally, the title PAYMENT.

10. Mackey *v.* Coxe, 18 How. 100, 15 L. Ed. 299.

11. **Compromise and composition.**—Jeffries *v.* Mutual Life Ins. Co., 110 U. S. 305, 310, 28 L. Ed. 156.

The fact of the enactment in Missouri of a statute, which went into effect November 1st, 1879, Rev. Stat. of Missouri, of 1879, vol. 1, p. 37, § 242, giving power to an administrator to compound with a debtor, with the approbation of the judge of probate, does not imply that the power did not exist before without such approbation. Jeffries *v.* Mutual Life Ins. Co., 110 U. S. 305, 310, 28 L. Ed. 156.

mising of actions on doubtful claims as the circumstances of particular cases may justify.[12]

K. Continuing Business.—A treatment of the question as to the rights, duties and liabilities of personal representatives in allowing the surviving partner of their testator or intestate to continue in control of the partnership business, will be found in title PARTNERSHIP.

L. Pledge or Mortgage.—Unless restrained by statute an executor can dispose of the personal assets of his testator by pledge for all purposes connected with the discharge of his duties under the will.[13] Parties who deal with an executor, exercising his power of disposition of the personal assets of the estate in his hands, to raise money, not for the estate or the settlement of its affairs, but for the business of a commercial firm, are bound to look into his authority, and are held to a knowledge of all the limitations which the will, as well as the law, puts thereon.[14] Where the pledge is made for other purposes than those connected with the discharge of his executor's duties under the will, of which the pledgee has no knowledge or notice, but takes the property in good faith, the transaction will be sustained; for the pledgee is not bound to see to the disposition of the proceeds received.[15] But the case is otherwise where the pledgee has knowledge of the perversion of the property to other purposes of the estate, or the intended perversion of the proceeds, and the funds can be followed and recovered.[16]

M. Releases.—An executor may release the maker of a note from his liability to the estate of the testator arising from endorsements made by the testator, if the transaction is bona fide and for sufficient consideration, and there is no evidence to disprove either.[17] A release made in good faith by a surviving creditor who is also executor is valid and binding, notwithstanding the fact that letters testamentary have not been issued at the time of making such release.[18]

12. Jeffries *v.* Mutual Life Ins. Co., 110 U. S. 305, 310, 28 L. Ed. 156.

13. Pledge or mortgage.—Smith *v.* Ayer, 101 U. S. 320, 326, 25 L. Ed. 955. See the titles MORTGAGES AND DEEDS OF TRUST; PLEDGE AND COLLATERAL SECURITY.

14. Smith *v.* Ayer, 101 U. S. 320, 25 L. Ed. 955.

15. Smith *v.* Ayer, 101 U. S. 320, 326, 25 L. Ed. 955.

16. Smith *v.* Ayer, 101 U. S. 320, 326, 25 L. Ed. 955.

At the time of his death A. held in his name an interest in a commercial firm which he had acquired by funds belonging one-third to himself, one-third to the children of a deceased brother, and one-third to a sister. In his will, of which B., his brother, was appointed executor, A. made a request that the whole of such interest should be retained in the firm, under the control of B., so long as the latter should deem it profitable. His own interest he bequeathed to B., in trust for the latter and certain nephews and nieces, in equal proportions, to be held and controlled by B. so long as he should deem it advisable. One of the members of the firm having withdrawn therefrom, B. purchased his interest, whereupon the firm name was changed. Subsequently, to raise funds wherewith to pay loans made to the firm, B. pledged to C. certain notes which had come into his possession as executor. Held, that his use of the notes to raise funds for the firm being a misappropriation of them, and that C., having knowledge of the directions of the testator, could hold them against the claim of his representatives. Smith *v.* Ayer, 101 U. S. 320, 25 L. Ed. 955.

17. Power to make releases.—Columbia Ins. Co. *v.* Lawrence, 10 Pet. 507, 512, 9 L. Ed. 512. See, generally, the title RELEASE.

18. Wall *v.* Bissell, 125 U. S. 382, 396, 31 L. Ed. 772, in which case the court said: "As the survivor of two joint creditors, he had the same power (independently of any authority as executor) to release the debt and the mortgage, as if he had been the sole creditor. The release, therefore, notwithstanding the superfluous description of the releasor as executor, was, by reason of his being surviving creditor, binding upon the interests of the representatives of the deceased creditor, as well as upon his own; and upon this ground the decree is affirmed."

The two characters of executor and of surviving creditor being united in one person, if such person had executed the release in his own name merely, without describing himself as acting in either capacity, the court would presume that he acted in the character which would make the release valid and effectual. Wall *v.* Bissell, 125 U. S. 382, 393, 31 L. Ed. 772, citing Yeaton *v.* Lynn, 5 Pet. 224, 229, 8 L. Ed. 105.

N. Where Representative Absents Himself from State.—An executor who, after taking out letters testamentary, absents himself from the state, is still capable of performing, and he is still bound to perform, all the duties of an executor.[19]

O. Where Grant of Administration Is Void.—If a court purporting to grant administration has no jurisdiction in the case, then the grant of administration is void ab initio, and all the acts of the grantee are void.[20]

P. Rights and Duties of Coexecutors and Coadministrators.—Coadministrators have the same legal title to the assets; and on the death of either the sole surviving administrator is vested with the exclusive title and the right to the immediate possession of the assets of the estate.[21] And each administrator is severally liable to pay the debts of the deceased out of the assets committed to him, and therein they resemble joint and several co-obligors in a bond.[22] Where there are two executors in a will, it is clear that each has a right to receive the debts due to the estate, and all other assets which shall come into his hands; and he is answerable for the assets he receives; this responsibility results from the right to receive, and the nature of the trust. A payment of the sums received by him to his coexecutor will not discharge him from his liability to the estate; he is bound to account for all assets which come into his hands, and to appropriate them according to the directions of the will.[23] It is a well-settled rule that one executor is not responsible for the devastavit of his coexecutor any further than he is shown to have been knowing and assenting at the time to such devastavit or misapplication of the assets; merely permitting his co-executor to possess the assets, without going further, and concurring in the application of them, does not render him answerable for the receipts of his coexecutor. Each executor is liable only for his own acts, and what he receives and applies, unless he join in the direction and misapplication of the assets.[24] However many executors the testator may appoint, all of them have the same privity with each other and to the testator.[25] Executors are not liable to each other; but each is liable to the cestui que trust and devisees, to the full extent of the funds

19. **Where representative absents himself from state.**—Griffith *v.* Frazier, 8 Cranch 9, 22, 3 L. Ed. 471; Edmonds *v.* Crenshaw, 14 Pet. 166, 169, 10 L. Ed. 402.

The removal of an executor from a state in which the will was proved, and in which letters testamentary were granted, does not discharge him from his liability as executor; much less does it release him from his liability for assets received by him and paid over to his coexecutor. Edmonds *v.* Crenshaw, 14 Pet. 166, 10 L. Ed. 402.

20. **Where grant of administration is void.**—Griffith *v.* Frazier, 8 Cranch 9, 28, 3 L. Ed. 471; Kane *v.* Paul, 14 Pet. 33, 10 L. Ed. 341.

"The appointment by the probate court of an administrator of the estate of a living person, without notice to him, being without jurisdiction, and wholly void as against him, all acts of the administrator, whether approved by that court or not, are equally void; the receipt of money by the administrator is no discharge of a debt; and a conveyance of property by the administrator passes no title." Scott *v.* McNeal, 154 U. S. 34, 49, 38 L. Ed. 896.

21. **Rights and duties of coexecutors and coadministrators.**—Harrison *v.* Perea, 168 U. S. 311, 321, 42 L. Ed. 478.

22. Stacy *v.* Thrasher, 6 How. 44, 60, 12 L. Ed. 337.

23. Edmonds *v.* Crenshaw, 14 Pet. 166, 10 L. Ed. 402.

However many executors the testator may appoint, all of them have the same responsibility to creditors. Hill *v.* Tucker, 13 How. 458, 14 L. Ed. 223; Goodall *v.* Tucker, 13 How. 469, 14 L. Ed. 227.

An executor having full authority to collect assets, it is not necessary that his coexecutor shall join in the receipts. Glascow *v.* Lipse, 117 U. S. 327, 335, 29 L. Ed. 901, citing Edmonds *v.* Crenshaw, 14 Pet. 166, 10 L. Ed. 402.

24. Peter *v.* Beverly, 10 Pet. 532, 9 L. Ed. 522, approved in Bank *v.* Beverly, 1 How. 134, 147, 11 L. Ed. 75.

Where there were two executors of an estate and one collected money belonging to the estate and turned it over to his coexecutor, who afterwards became insolvent, the court held, that although the executor would be chargeable, if there were creditors, and a deficiency of assets to satisfy them, yet he was not answerable to the legatees. Appeal of Brown, 1 Dall. 311, 312, 1 L. Ed. 152.

25. Hill *v.* Tucker, 13 How. 458, 14 L. Ed. 223; Goodall *v.* Tucker, 13 How. 469, 14 L. Ed. 227.

received by him.[26] And where the several executors prove the will and take out letters testamentary in different states, such an arrangement, however convenient, cannot affect the duty of either of the executors or the court to see that the trust is carried out according to the testator's intention.[27] Where certain powers are given to the several executors, and a provision is made that the testator's wife shall have a voice as executrix, her participation in the decisions are indispensable to their validity.[28] When within the same political jurisdiction, however many executors the testator may appoint, all of them may be sued as one executor for the debts of the testator, and they may unite in a suit to recover debts due to their testator, or to recover property out of possession. All of them, then, having the same privity with each other and to the testator, and the same responsibility to creditors, though they may have been qualified as executors in different sovereignties, an action for a debt due by the testator, against any one of them in that sovereignty where he undertook to act as executor, places all of them in one relation concerning it, and as to the remedies for its recovery; what one may plead to bar a recovery against any of them, applies to all of them.[29] Where three executors were named in a will but only one of them proved the will and received the letters, the others took no step in that direction. It was held that the executor who qualified could maintain suit without joining the others where there was a provision in case some of the executors did not act.[30] As to survivorship of power of sale in executors, see post, "Who May Execute Power," VI, T, 3.

Q. Powers over Manumitted Slaves.—As to the powers of a representative over manumitted slaves, see the title SLAVERY AND INVOLUNTARY SERVITUDE.

R. Powers in Regard to Patent Rights.—As to the powers of the personal representative over the patent rights owned by the estate, see the title PATENTS.

S. Liability for Assets Received.—Whatever property or money is lawfully recovered by an executor or administrator, after the death of his testator or intestate, in virtue of his representative character, he holds as assets of the estate; and he is liable therefor, in such representative character, to the party who has a good title thereto.[31] The want of knowledge, or the possession of knowledge, on the part of the administrator, as to the rights and claims of other persons, upon the money thus received, cannot alter the rights of the party to whom it ultimately belongs.[32]

T. Sales—1. POWERS GENERALLY.—An administrator has general power to dispose of the personal effects of his intestate.[33] And unless restrained by statute an executor can dispose of the personal assets of his testator by sale for all purposes connected with the discharge of his duties under the will.[34] It is well settled, that executors have power to sell the real estate, where such power is given to them, or necessarily to be implied from the produce having to pass

26. Edmonds *v.* Crenshaw, 14 Pet. 166, 10 L. Ed. 402.

27. Hayes *v.* Pratt, 147 U. S. 557, 567, 37 L. Ed. 279.

28. Pray *v.* Belt, 1 Pet. 670, 680, 7 L. Ed. 309.

29. Hill *v.* Tucker, 13 How. 458, 466, 14 L. Ed. 223; Goodall *v.* Tucker, 13 How. 469, 14 L. Ed. 227.

30. Rubber Co. *v.* Goodyear, 9 Wall. 788, 791, 19 L. Ed. 566.

31. Liability for assets received.—De Valengin *v.* Duffy, 14 Pet. 282, 10 L. Ed. 457; Edmonds *v.* Crenshaw, 14 Pet. 166, 169, 10 L. Ed. 402; United States *v.* Walker, 109 U. S. 258, 263, 27 L. Ed. 927; Williams *v.* Gibbes, 20 How. 535, 537, 15 L. Ed. 1013.

As to the representative's personal liability, see post, "Personal Liability of Executor or Administrator," VI, X.

As long as personal property is held by executors as part of the estate of the testator, for the payment of debts or legacies, or as a residuum to be distributed, they hold it by virtue of their office and are accountable for it as executors; that liability only ceases when it has been taken out of the estate of the testator and appropriated to and made the property of the cestui que trust. Colt *v.* Colt, 111 U. S. 566, 581, 28 L. Ed. 520.

32. De Valengin *v.* Duffy, 14 Pet. 282, 10 L. Ed. 457.

33. Power to sell personalty.—Jeffries *v.* Mutual Life Ins. Co., 110 U. S. 305, 310, 28 L. Ed. 156.

34. Smith *v.* Ayer, 101 U. S. 320, 326, 25 L. Ed. 955. As to a treatment of the question where the sale is made for pur-

through their hands in the execution of their office;[35] but they have no authority to sell real estate, unless the power to sell, and the purpose of the sale, are expressed in the will.[36] Therefore, the court cannot infer, from a power expressly granted to sell the estate for one purpose, a power to sell it for another purpose not granted.[37] The administrator, in virtue of his general authority, has no right to meddle with the real estate.[38] He has no estate in the land, but a power to sell, under the authority of the court. This is not an independent power, to be exercised at discretion, when the exigency, in his opinion, may require it; but is conferred by the court, in a state of things prescribed by the law.[39]

2. POWER MUST BE STRICTLY PURSUED.—Authority given to executors and administrators to sell is a personal trust, and must be strictly pursued; and if they transcend their authority, in any essential particular, their act is void.[40]

3. WHO MAY EXECUTE POWER.—A naked power to sell may be exercised or not by the executors, and is discretionary; while an imperative direction to sell and dispose of the proceeds in a certain way, as in this case, is a power coupled with a trust;[41] and though the executors may not be expressly named as the persons who are to sell the land, yet, the power may be vested in them by necessary implication.[42] A power to sell, coupled either with an interest or trust,

poses other than those connected with the discharge of the executor's duties under the will, see post, "Rights, Duties and Liabilities of Purchasers," VI, T, 12.

35. Power to sell realty.—Fenwick *v.* Chapman, 9 Pet. 461, 477, 9 L. Ed. 193.

36. Lane *v.* Vick, 3 How. 464, 480, 11 L. Ed. 681.

37. Lane *v.* Vick, 3 How. 464, 480, 11 L. Ed. 681.

In Lane *v.* Vick, 3 How. 464, 480, 11 L. Ed. 681, it was held that the only authority given by the will to sell the town lots, was for the payment of debts; and there the power of the executors to sell any portion of the estate terminated. When they had sold as many of the lots as were necessary to pay the debts, the remainder fell into the general devise of all the lands of the testator to his sons; and the purposes of the testator, in relation to his real estate, were accomplished, according to his plain intention, when all the provisions of the will were taken together.

38. Power of administrator to sell realty.—Ricard *v.* Williams, 7 Wheat. 59, 113, 5 L. Ed. 398.

39. Bank *v.* Dudley, 2 Pet. 492, 523, 7 L. Ed. 496; Watkins *v.* Holman, 16 Pet. 25, 57, 10 L. Ed. 873; Ricard *v.* Williams, 7 Wheat. 59, 113, 5 L. Ed. 398. See post, "Order or License from Court," VI, T, 4.

40. Ventress *v.* Smith, 10 Pet. 161, 9 L. Ed. 382; Patterson *v.* Gaines, 6 How. 550, 601, 12 L. Ed. 553; Daly *v.* James, 8 Wheat. 495, 535, 5 L. Ed. 670.

Thus, a sale by executors, under a power to sell for the payment of legacies, is not valid against creditors. Hannum *v.* Spear, 2 Dall. 291, 292, 1 L. Ed. 386.

41. Who may execute power.—Taylor *v.* Benham, 5 How. 233, 267, 12 L. Ed. 130.

42. Taylor *v.* Benham, 5 How. 233, 268, 12 L. Ed. 130; Peter *v.* Beverly, 10 Pet. 532, 565, 9 L. Ed. 522, affirmed in Bank *v.* Beverly, 1 How. 134, 11 L. Ed. 75.

In Peter *v.* Beverly, 10 Pet. 532, 565, 9 L. Ed. 522, affirmed in Bank *v.* Beverly, 1 How. 134, 147, 11 L. Ed. 75, the court said: "Although the clause in the will now under consideration does not name the executors as the persons who are to sell the land, yet it is a power vested in them, by necessary implication. The land is to be sold for the purpose of paying the debts, which is a duty devolving upon the executors; and it follows, as a matter of course, that the testator intended his executors should make the sale, to enable them to discharge the duty and trust of paying the debts. Mr. Sugden, in his Treatise on Powers, page 167, on the authority of a case cited from the Year Books, lays it down as a general rule, that when a testator directs his land to be sold, for certain purposes, without declaring by whom the sale shall be made, if the fund is to be distributed by the executors, they shall have, by implication, the power to sell. And this is the doctrine of Chancellor Kent, in the case of Davoue *v.* Fanning, 2 Johns. Ch. 254. The will, in that case, as in this, directed the real estate to be sold, for certain purposes therein specified, but did not direct expressly by whom the sale should be made; and he held, as Lord Hardwick did, in a case somewhat similar (1 Atk. 420), that it was a reasonable construction, that the power was given to the executors; that it was almost impossible to mistake the testator's meaning on that point. So, in the present case, it is impossible to draw any other conclusion, than that it was the testator's intention, that the sale should be made by his executors. McDonald *v.* Hewitt, 15 Johns. 349, is a case very much in point, on both questions; that the power in this case, is coupled with an interest, and survives, and that by implication, it is to be

survives to the surviving executor. So, also, if all the trustees or executors in such a case decline to act, except one.[43]

4. Order or License from Court—a. *Necessity for Order.*—The general

executed by the executor. The testator, say the court, in that case, directed, that in case of a deficiency of his personal estate to pay his debts, some of his real estate should be sold, without naming by whom; and one of the executors only undertook the execution of the will, and sold the land; and the court held, that this was a power coupled with an interest, and might be executed by one of the executors, it being a power to sell for the payment of debts."

Though the distinctions between these different powers are not always well preserved, no doubt exists that a power coupled with an interest may be inferred by obvious implication from the whole will, as the fee not being at once vested elsewhere, and it being necessary to have it in the executors to effect the general design as well as from the usual course, which is by an express devise to the executors. Nor is it of any consequence how small the interest be. It is enough if only to distribute the proceeds, or to take the rents or use for the benefit of others. The interest, too, may be equitable or legal. And it is an interest not required to yield a profit or gain, but any title in the estate itself, the thing to be sold. Being given by the will, when it is a power coupled with an interest, and the conveyance under it being by and through the will, it is of course for the use of the person designated in the will, as if it was a devise over to him. And if the whole scope and design of the will could not otherwise be accomplished, therefore be unjustifiable in a court of equity. Taylor *v.* Benham, 5 How. 233, 268, 12 L. Ed. 130.

43. **Survivorship of power.**—Taylor *v.* Benham, 5 How. 233, 12 L. Ed. 130.

If the executors have another duty to perform after the sale under the will, with the proceeds, it is a power coupled with a trust or an interest, and survives. Taylor *v.* Benham, 5 How. 233, 268, 12 L. Ed. 130; Peter *v.* Beverly, 10 Pet. 532, 567, 9 L. Ed. 522, affirmed in Bank *v.* Beverly, 1 How. 134, 11 L. Ed. 75.

In Peter *v.* Beverly, 10 Pet. 532, 564, 9 L. Ed. 522, affirmed in Bank *v.* Beverly, 1 How. 134, 147, 11 L. Ed. 75, the court said: "The general principle of the common law, as laid down by Lord Coke (Co. Litt. 112b), and sanctioned by many judicial decisions, is, that when the power given to several persons, is a mere naked power to sell, not coupled with an interest, it must be executed by all, and does not survive; but when the power is coupled with an interest, it may be executed by the survivor. 14 Johns. 553; 2 Johns. Ch. 19. But the difficulty arises in the application of the rule to particular cases. It may, perhaps, be considered as the better conclusion to be drawn from the English cases on this question, that a mere direction, in a will, to the executors, to sell land, without any words vesting in them an interest in the land, or creating a trust, will be only a naked power, which does not survive. In such case, there is no one who has a right to enforce an execution of the power. But when anything is directed to be done, in which third persons are interested, and who have a right to call on the executors to execute the power, such power survives. This becomes necessary for the purpose of effecting the object of the power. It is not a power coupled with an interest, in executors, because they may derive a personal benefit from the devise; for a trust will survive, though no way beneficial to the trustee. It is the possession of the legal estate, or a right in the subject over which the power is to be exercised, that makes the interest in question. And when an executor, guardian or other trustee is invested with the rents and profits of land, for the sale or use of another, it is still an authority coupled with an interest, and survives. 1 Caines Cas. 16; 2 P. Wms. 102. In the American cases, there seems to be less confusion and nicety on this point; and the courts have generally applied to the construction of such powers, the great and leading principle which applies to the construction of other parts of the will—to ascertain and carry into execution the intention of the testator. When the power is given to executors, to be executed in their official capacity of executors, and there are no words in the will, warranting the conclusion, that the testator intended, for safety or some other object, a joint execution of the power; as the office survives, the power ought also to be construed as surviving. And courts of equity will lend their aid to uphold the power, for the purpose of carrying into execution the intention of the testator, and preventing, the consequences that might result from an extinction of the power; and where there is a trust, charged upon the executors, in the direction given to them in the disposition of the proceeds, it is the settled doctrine of courts of chancery, that the trust does not become extinct by the death of one of the trustees. It will be continued in the survivors, and not be permitted, in any event, to fail, for want of a trustee. This is the doctrine of Chancellor Kent, in the case of Franklin *v.* Osgood, 2 Johns. Ch. 19, and cases there cited; and is in accordance with numerous decisions in the English courts. 3 Atk. 714; 2 P. Wms. 102. And is

rule is that order of the court is a prerequisite, indispensable to the very existence of the power of the representative to sell the real estate,[44] and in some jurisdictions such an order is necessary for the sale of either species of property.[45]

b. *Power to Sell*—(1) *Jurisdictional Prerequisites.*—On a sale of land for the payment of debts of an intestate, the requisites to the jurisdiction of the court are the death of the intestate,[46] the insufficiency of his personal estate to pay his debts,[47] and a representation thereof to the court making these facts appear.[48]

(2) *Jurisdiction to Sell Not Necessarily Included in General Jurisdiction.*—"Jurisdiction of all probate and testamentary matters" given by a statute may be completely exercised, without possessing the power to order the sale of the lands of an intestate. Such jurisdiction does not appear to be identical with that power, or to comprehend it.[49]

(3) *Extraterritorial Operation of Decree.*—A sale of real estate in one state by a representative under a decree or license granted by a court of another state is void; and a deed executed by him is proprio vigore, inoperative to pass any title of the estate to any lands described therein.[50]

(4) *Effect of Repeal of Law Granting Power.*—If the law which authorized the court to make the order be repealed, the power to sell can never come into

adopted and sanctioned by the court of errors in New York, on appeal, in the case of Franklin *v.* Osgood. And Mr. Justice Platt, in that case, refers to a class of cases in the English courts, where it is held, that although, from the terms made use of in creating the power, detached from other parts of the will, it might be considered a mere naked power to sell; yet, if, from its connection with other provisions in the will, it clearly appears to have been the intention of the testator, that the land should be sold to execute the trusts in the will, and such sale is necessary for the purpose of executing such trusts, it will be construed as creating a power coupled with an interest, and will survive. This doctrine is fully recognized by the supreme court of Pennsylvania, in the case of the Lessee of Zebach *v.* Smith, 3 Binn. 69. The court there considered it as a settled point, that if the authority to sell is given to executors, virtute officii, a surviving executor may sell; and that the authority given by the will, in that case, to the executors, to sell, was to them in their character of executors, and for the purpose of paying debts, an object which is highly favored in the law."

Where executors had a power under a will to sell property, which was a power coupled with a trust, and one of the executors sold the land, it was held not to be such an informal or illegal sale as not to make the executor liable to the cestui que trusts for the purchase price. Taylor *v.* Benham, 5 How. 233, 272, 12 L. Ed. 130.

There was a devise that after the death of the testator's wife, certain lands should be sold, and the money divided among the children, but the will did not declare by whom the sale should be made. The land was sold by the survivor of two executors. The court held it to be a valid sale. Lloyd *v.* Taylor, 2 Dall. 223, 1 L. Ed. 357.

44. Necessity for order of court.—Bank *v.* Dudley, 2 Pet. 492, 323, 7 L. Ed. 496.

45. Tate *v.* Norton, 94 U. S. 746, 24 L Ed. 222; Ventress *v.* Smith, 10 Pet. 161, 9 L. Ed. 382.

46. Jurisdictional prerequisites.—Grignon *v.* Astor, 2 How. 319, 339, 11 L. Ed. 283.

As to the death of a person as a prerequisite to granting administration on his estate, see ante, "Death as a Jurisdictional Prerequisite," IV, A, 1, b.

47. Grignon *v.* Astor, 2 How. 319, 339, 11 L. Ed. 283; Ricard *v.* Williams, 7 Wheat. 59, 113, 5 L. Ed. 398; Florentine *v.* Barton, 2 Wall. 210, 216, 17 L. Ed. 783; Ingle *v.* Jones, 9 Wall. 486, 500, 19 L. Ed. 621. See the title MARSHALING ASSETS AND SECURITIES.

48. Grignon *v.* Astor, 2 How. 319, 339, 11 L. Ed. 283; Ricard *v.* Williams, 7 Wheat. 59, 113, 5 L. Ed. 398; United States Bank *v.* Ritchie, 8 Pet. 128, 144, 8 L. Ed. 890; Comstock *v.* Crawford, 3 Wall. 396, 18 L. Ed. 34.

A petition of the administrator, setting forth that the personal property of the deceased is insufficient to pay the debts, and praying the court for an order of sale, brings the case fully within the jurisdiction of the court. It becomes a case of judicial cognizance. The court has power over the subject matter and the parties. Florentine *v.* Barton, 2 Wall. 210, 216, 17 L. Ed. 783.

49. Jurisdiction to sell not identical with general jurisdiction.—Bank *v.* Dudley, 2 Pet. 492, 524, 7 L. Ed. 496.

50. Extraterritorial operation of decree.—Wilkinson *v.* Leland, 2 Pet. 627, 655, 7 L. Ed. 542; Watkins *v.* Holman, 16 Pet. 25, 57, 10 L. Ed. 873.

existence. The repeal of such a law divests no vested estate, but is the exercise of a legislative power which every legislature possesses, for the mode of subjecting the property of a debtor to the demands of a creditor, must always depend on the wisdom of the legislature.[51]

(5) *Effect of Statute Granting Additional Power to Chancellor.*—A statute giving the chancellor full power and authority to sell lands of a decedent descending to minors and lunatics and pay his debts, if personalty be insufficient, upon application of any creditor of decedent, does not confer a personal power on the chancellor, but an extension of the jurisdiction of the court.[52]

(6) *As Granted by Private Act of Legislature.*—A state legislature may, constitutionally, pass a private act authorizing a court to decree, on the petition of an administrator, private sale of the real estate of an intestate to pay his debts, even though the act should not require notice to heirs or to any one, and although the same general subject is regulated by general statute much more full and provident in its nature. In making the order of sale under such private act, the court is presumed to have adjudged every question necessary to justify such order or decree, viz: The death of the owners; that the petitioners were his administrators; that the personal estate was insufficient to pay the debts of deceased; that the private acts of assembly, as to the manner of sale, were within the constitutional power of the legislature, and that all the provisions of the law as to notices which are directory to the administrators have been complied with. Nor need it enter upon the record the evidence on which any fact is decided. Especially does all this apply after long lapse of time.[53]

(7) *Jurisdiction as Affected by Errors and Irregularities.*—Informalities as to notices, advertisements, etc., in the subsequent proceedings of the court cannot oust jurisdiction which has already attached.[54]

c. *Nature of Proceeding to Sell.*—The proceeding for the sale of the real property of an intestate, though had in the general course of administration, is a distinct and independent proceeding authorized by statute only in certain specially designated cases;[55] it is a judicial proceeding.[56] In a proceeding to sell the real estate of an indebted intestate, there are no adversary parties; the proceeding is in rem.[57] The administrator represents the land; the only question of jurisdiction is the power of the court over the subject matter before them, without regard to the persons who may have an interest in it; all the world are parties. In all courts who have power to sell the estates of intestates, their action operates on the estate, not on the heirs of the intestate.[58]

d. *Preliminaries*—(1) *The Petition.*—The petition by an administrator, for the sale of realty, need not follow exactly the language of the statute. If the substance of what was necessary to be stated, is contained in the petition, it will be sufficient.[59] Where the description of land contained in a petition was so defective that its terms were equally applicable to another tract in the same county, it was held that a correct description in the schedule attached to the

51. Effect of repeal of law granting power.—Bank *v.* Dudley, 2 Pet. 492, 523, 7 L. Ed. 496.

52. Effect of statute granting additional powers to chancellor.—United States Bank *v.* Ritchie, 8 Pet. 128, 143, 8 L. Ed. 890.

53. Private act of legislature.—Florentine *v.* Barton, 2 Wall. 210, 17 L. Ed. 783.

54. Simmons *v.* Saul, 138 U. S. 439, 453, 34 L. Ed. 1054.

55. Nature of proceeding to sell.—Comstock *v.* Crawford, 3 Wall. 396, 404, 18 L. Ed. 34.

56. Thompson *v.* Tolmie, 2 Pet. 157, 163, 7 L. Ed. 381.

57. Grignon *v.* Astor, 2 How. 319, 338, 11 L. Ed. 283; Davis *v.* Gaines, 104 U. S. 386, 392, 26 L. Ed. 757; Florentine *v.* Barton, 2 Wall. 210, 216, 17 L. Ed. 783.

58. Grignon *v.* Astor, 2 How. 319, 338, 11 L. Ed. 283.

59. McNitt *v.* Turner, 16 Wall. 352, 363, 21 L. Ed. 341.

Under the statute of Illinois authorizing the sale of the real estate of a decedent, and directing the executor or administrator to make out a petition to the county court "stating therein what real estate the said testator or intestate may have died seized of," a statement of the real estate which he died "leaving" is a sufficient compliance with the statute. McNitt *v.* Turner, 16 Wall. 352, 21 L. Ed. 341.

notice of application to the court was sufficient to cure the defective description.[60] Under the statute of Maryland, passed in 1785, the chancellor could decree a sale of land upon the application of only a part of the heirs interested.[61]

(2) *Audit of Estate.*—The necessity of an order for the sale of real property to pay debts being clear, the court may direct an ascertainment of the whole amount of the testator's liabilities when the sale is confirmed. It is not indispensable that such ascertainment have been made before the sale was ordered.[62] But under the Maryland statute providing for sale of decedent's lands in case of personalty insufficient to pay debts, a decree, which was entered for the sale of lands without having the estate audited, and which did not postpone the sale until the claims should be exhibited before the auditor, was held to be erroneous.[63]

(3) *Bond to Account for Proceeds of Sale.*—In some jurisdictions a sale is invalid as against the heir, if the administrator fails to give bond to account for the proceeds of the sale.[64]

(4) *Probate and Recording of Will.*—The due probate of the will of the testator, before the proper court, is an indispensable preliminary to any sale of the property in that state.[65] But when a sale is made under a will, the omission to record the will does not vitiate the sale, unless recording is made necessary by a local statute.[66]

(5) *Notice of Sale.*—Statutory provisions require, with certain exceptions where the estate is small,[67] that notice be given of a sale under order of court.[68] Where the word "recorded" was used in a notice for the sale of decedent's lands, it was held to be evidently a mistake for "situated," or it might be regarded as surplusage.[69]

e. *The Hearing*—(1) *Determination as to Necessity and Propriety of Sale.*—The necessity and propriety of the sale solicited, are matters to be considered at the hearing upon the order to show cause why the license should not be granted.[70]

(2) *Parties.*—In a proceeding to sell real estate of a decedent to pay his debts, there are no adversary parties, the proceeding being in the nature of a proceeding in rem, to which all claiming under the decedent are parties.[71]

60. McNitt *v.* Turner, 16 Wall. 352, 364, 21 L. Ed. 341.

Where under the statute of Illinois authorizing the sale of the real estate of a decedent, and directing the executor or administrator to make out a petition to the county court "stating therein what real estate the said testator or intestate may have died seized of," an administrator gave public notice that he meant to apply to have a power to sell the decedent's lands, stating that it belonged to him, and describing the several pieces in this way:

Parts of Sec.	Tp.	Range.
S. E. 4	1 S.	4 W.
S. W. 24	3 N.	8 W.

"All the above lands being recorded north or south of the base line, and east and west of the fourth principal meridian." And the petition prayed to sell the decedent's land, describing it as—

S. E. 4	1 S.	4 W.
S. W. 24	3 N.	8 W.

Held, that the notice was correct, and the description in the petition, aided by the notice, sufficient. McNitt *v.* Turner, 16 Wall. 352, 21 L. Ed. 341.

61. Shriver *v.* Lynn, 2 How. 43, 11 L. Ed. 172.

62. Ingle *v.* Jones, 9 Wall. 486, 19 L. Ed. 621.

63. United States Bank *v.* Ritchie, 8 Pet. 128, 145, 8 L. Ed. 890.

64. Bond to account for proceeds of sale.—Clay *v.* Field, 115 U. S. 260, 261, 29 L. Ed. 375.

65. Probate of will.—Owings *v.* Hull, 9 Pet. 607, 629, 9 L. Ed. 246.

66. Recording will.—Taylor *v.* Benham, 5 How. 233, 12 L. Ed. 130.

67. Notice of sale.—Simmons *v.* Saul, 138 U. S. 439, 453, 34 L. Ed. 1054.

68. Ventress *v.* Smith, 10 Pet. 161, 9 L. Ed. 382.

69. McNitt *v.* Turner, 16 Wall. 352, 365, 21 L. Ed. 341.

70. Comstock *v.* Crawford, 3 Wall. 396, 18 L. Ed. 34.

71. Parties to proceeding to sell.—Florentine *v.* Barton, 2 Wall. 210, 216, 17 L. Ed. 783; Davis *v.* Gaines, 104 U. S. 386, 392, 26 L. Ed. 757; Grignon *v.* Astor, 2 How. 319, 338, 11 L. Ed. 283.

Where a bill was filed in the circuit court of the United States for the county of Alexandria, by a legatee, against the executor and residuary devisee, praying for the sale of the real estate in order to pay legacies, the personal estate being

(3) *Decree Omitting Provision for Approval of Sale by Court.*—Under the Maryland statute of 1785 providing for the sale of land descending to minors, it was held to be a fatal error in a decree which directed a conveyance to be made on the payment of the purchase money, without directing that the sale first be notified to, and approved by the court.[72]

5. Duration of Power to Sell.—So long as an administration legally subsists, or may be legally granted, this power over the land may be exercised, if the land remain in possession of the heirs; and it is not defeated, simply by an alienation or disseisin of the heirs;[73] but when the right of entry to the land is gone, or the estate is gone, by an adverse possession from those who held as heirs or devisees, the whole interest in the land, the power of the administrator to make sale of the land for payment of debts, is gone also.[74] A power to sell the estate for payment of debts, being created by the law, ought not to be so construed as to work mischiefs against the intent of the law. It ought to be exercised within a reasonable time after the death of the intestate; and gross neglect or delay on the part of the creditors, for an unreasonable time, ought to be held to be a waiver or extinguishment of it.[75] And what is a reasonable time within which the power must be exercised, is to be fixed by analogy to the statute of limitations in force.[76] Where the power given by statute to executors to make sale of real estate terminates at the end of a year from their appointment, unless there be an order of court to sell, a sale made after the expiration of the year, in a case where no order of court is shown, and where the will itself gives no power of sale, is a nullity.[77] In case the statute vesting the courts with power to grant an order for the sale of an estate is repealed before the sale is made, the power of the administrators to sell terminates with the repeal of the law.[78]

6. Power to Sell Property Held in Trust.—Where a person who holds land as trustee directs by his will that the whole of the property that he may die seized and possessed of, or may be in any wise belonging to him, should be sold, the executors will have power to sell the land held in trust, as well as that belonging to the testator in his own right.[79]

7. Character of Sale.—A personal representative can sell only at public auction,[80] except where private sale is directed by the will of the testator.[81]

8. Quantity of Land to Be Sold.—It rests in the discretion of the court to order the sale of the whole or of a part of the lands.[82]

exhausted, it was not necessary to make a special devisee of land in Virginia who resided in Virginia, a party defendant. West *v.* Smith, 8 How. 402, 12 L. Ed. 1130.

72. United States Bank *v.* Ritchie, 8 Pet. 128, 145, 8 L. Ed. 890.

73. Duration of power to sell.—Ricard *v.* Williams, 7 Wheat. 59, 113, 114, 5 L. Ed. 398.

74. Power terminates with estate.—Ricard *v.* Williams, 7 Wheat. 59, 119, 5 L. Ed. 398, in which case the court said: "The convenience of mankind, the public policy of protecting innocent purchasers, and the repose of titles honestly acquired, require some limitation upon powers of this nature, and we know of none more just and equitable than this."

75. Power of sale must be exercised within a reasonable time.—Ricard *v.* Williams, 7 Wheat. 59, 116, 5 L. Ed. 398. See the title LACHES.

76. Ricard *v.* Williams, 7 Wheat. 59, 5 L. Ed. 398.

77. Termination of power by statutory provision.—Gaines *v.* New Orleans, 6 Wall. 642, 18 L. Ed. 950.

78. Power terminates with repeal of statute which gives the power.—Bank *v.* Dudley, 2 Pet. 492, 523, 7 L. Ed. 496.

Proceedings for the sale of the real estate of an intestate, for the payment of debts, were commenced, before the repeal of the act of the legislature of Ohio, entitled "a law for the settlement of intestates' estates;" and administrators, notwithstanding the repeal, went on to sell the land, and appropriate the proceeds to the discharge of the debts of the intestate. Held, that the sale was void. Bank *v.* Dudley, 2 Pet. 492, 7 L. Ed. 496.

79. Power to sell property held in trust.—Taylor *v.* Benham, 5 How. 233, 12 L. Ed. 130.

80. Gaines *v.* De La Croix, 6 Wall. 719, 18 L. Ed. 967; Davis *v.* Gaines, 104 U. S. 386, 393, 26 L. Ed. 757; Ventress *v.* Smith, 10 Pet. 161, 9 L. Ed. 382.

81. Ventress *v.* Smith, 10 Pet. 161, 9 L. Ed. 382.

82. Quantity of land to be sold.—Tate *v.* Norton, 94 U. S. 746, 752, 24 L. Ed. 222.

9. Medium of Payment of Purchase Money.—Where the executors sell property, taking security for the purchase money, the debt being payable only in lawful money of the United States, they have no right to take anything in payment but such money or its equivalent.[83]

10. Confirmation of Sale.—The power of a state legislature in relation to the confirmation of sales of a personal representative is greater than the strict judicial power.[84] A probate court cannot by subsequent order give validity to sales of real estate made by executors, which were void by the laws of the state where made.[85]

11. Injunction against Sale.—Creditors may, for cause, enjoin the executor from selling; or, upon his application to sell, in a case where the intervention of a court of equity is asked to permit or direct a sale, creditors may be allowed to make themselves parties.[86]

12. Rights, Duties and Liabilities of Purchasers—a. *Nature of Title Acquired.*—In all the courts which have power to sell the estates of decedents, their action operates on the estate, not on the heirs of the intestate. A purchaser claims not their title, but one paramount. The estate passes by operation of law.[87]

b. *Effect of Irregularities in Sale by Personal Representative.*—Executors and administrators, in making sales of property, must comply strictly with the requisites of all statutory provisions on the subject;[88] and unless every essential direction of the law is complied with, all whose interests are affected by the authority to sell are not concluded by the sale, unless, from a long acquiescence, a foundation is laid for a fair and reasonable presumption, that the requisites of the law had been complied with;[89] and no such presumption can

83. Medium of payment of purchase money.—McBurney *v.* Carson, 99 U. S. 567, 570, 25 L. Ed. 378.

84. Confirmation by legislature.—Cynthia Jenks, on a petition to the general assembly of Rhode Island, represented that she was the executrix of the last will and testament of Jonathan Jenks, late of Winchester, in the state of New Hamshire, deceased, and that the personal property being insufficient to pay the debts of the estate, she obtained authority from the judge of probate to make sale of so much of the real estate of the deceased as should be necessary to pay the debts; and that under this authority she sold and conveyed certain lands in the state of Rhode Island, as belonging to the estate, and received a part of the consideration money, and the balance was to be paid when the deed executed by the petitioners should be ratified by the general assembly; the residue of the purchase money was represented to be absolutely necessary to pay the debts of the estate, and a ratification of the deed, etc., was prayed. In the lower house, June 1792, "it was voted and resolved, that the said petition be received, and that the said deed and the same is hereby ratified and confirmed, so far as respects the conveyance of any right or interest in said estate, mentioned in said deed, which belonged to the said Jonathan Jenks, at the time of his decease;" and in the upper house, this resolve was read the same day, and concurred in. The purchasers, under the deed sanctioned, received all the interest in the premises which had been vested in Jonathan Jenks, and which, on his death, vested in his heirs or devisees; the act of the legislature and the deed are unconditional, and neither the heirs of Cynthia Jenks, nor any other persons can impeach the deed, by evidence of facts prior to the act of confirmation. The power of the legislature of Rhode Island in relation to the confirmation of such sales of real estate, is greater than the strict judicial power; they may sanction past transactions, where vested rights are not disturbed; while the court can only authorize a title to be made in future. Leland *v.* Wilkinson, 10 Pet. 294, 9 L. Ed. 430.

85. Confirmation of void sale.—Gaines *v.* New Orleans, 6 Wall. 642, 18 L. Ed. 950.

86. Injunction against sale.—Fenwick *v.* Chapman, 9 Pet. 461, 478, 9 L. Ed. 193. See the title INJUNCTIONS.

87. Nature of title acquired.—Beauregard *v.* New Orleans, 18 How. 497, 503, 15 L. Ed. 469, citing Grignon *v.* Astor, 2 How. 319, 11 L. Ed. 283. And see Ricard *v.* Williams, 7 Wheat. 59, 113, 114, 5 L. Ed. 398.

88. See ante, "Power Must Be Strictly Pursued," VI, T, 2.

89. Effect of irregularities.—Ventress *v.* Smith, 10 Pet. 161, 9 L. Ed. 382; Daly *v.* James, 8 Wheat. 495, 531, 5 L. Ed. 670; Gaines *v.* De La Croix, 6 Wall. 719, 720, 18 L. Ed. 967; Davis *v.* Gaines, 104 U. S. 386, 393, 26 L. Ed. 757.

It is necessary to show, in all cases of forced sales, meaning such as are done by judicial order—particularly of the property of a succession, or estate of a deceased person—that all the formalities of

arise in a sale by a person who has no right to sell.[90] But where a sale was made by an administrator under the authority and pursuant to an order of the probate court of the county where the land laid, and the proceedings were regular except that no guardian was appointed to represent the heirs, it was held that this defect was not sufficient to prevent the title from vesting in the purchaser.[91]

c. *Right to Rely upon Validity of Sale.*—The law appears to be settled in the states that courts will go far to sustain bona fide titles acquired under sales made by statutes regulating sales made by order of the courts. When there has been a fair sale the purchaser will not be bound to look beyond the decree, if the facts necessary to give the court jurisdiction appear on the face of the proceedings.[92] But if there be a total want of jurisdiction, the proceedings are

the law have been strictly complied with, or the sale will be annulled. Patterson *v.* Gaines, 6 How. 550, 601, 12 L. Ed. 553.

90. Ventress *v.* Smith, 10 Pet. 161, 9 L. Ed. 382.

Where one purchased from an executor in good faith what he supposed was a legal title, but the executor had no right to sell, it was held that the purchaser could acquire a good title only by prescription and therefore where prescription was not shown, the purchaser could not claim against the heir of the estate. Gaines *v.* New Orleans, 6 Wall. 642, 716, 18 L. Ed. 950.

91. Parker *v.* Kane, 22 How. 1, 16 L. Ed. 286.

92. Right to rely upon validity of sale.—Thompson *v.* Tolmie, 2 Pet. 157, 7 L. Ed. 381; Davis *v.* Gaines, 104 U. S. 386, 391, 26 L. Ed. 757; Florentine *v.* Barton, 2 Wall. 210, 216, 17 L. Ed. 783; Cornett *v.* Williams, 20 Wall. 226, 250, 22 L. Ed. 254; Shrivers *v.* Lynn, 2 How. 43, 11 L. Ed. 172; Comstock *v.* Crawford, 3 Wall. 396, 18 L. Ed. 34; Manson *v.* Duncanson, 166 U. S. 533, 545, 41 L. Ed. 1105; Noble *v.* Union River Logging Railroad, 147 U. S. 165, 173, 37 L. Ed. 123.

In Simmons *v.* Saul, 138 U. S. 439, 454, 34 L. Ed. 1054, it was said: "Grignon *v.* Astor, 2 How. 319, 337, 340, 341, 11 L. Ed. 283, was, like this, a case of a sale by an administrator. The court, in its opinion, said: 'The whole merits of the controversy depend on one single question: Had the county court of Brown County jurisdiction of the subject on which they acted? * * * Nor is it necessary that a full or perfect account should appear in the records of the contents of papers on file, or the judgment of the court on matters preliminary to a final order; it is enough that there be something of record which shows the subject matter before the court, and their action upon it, that their judicial power arose and was exercised by a definitive order, sentence or decree. * * * The granting the license to sell is an adjudication upon all the facts necessary to give jurisdiction, and whether they existed or not is wholly immaterial, if no appeal is taken; the rule is the same whether the law gives an appeal or not; if none is given from the final decree, it is conclusive on all whom it concerns. * * * The court having power to make the decree, it can be impeached only by fraud in the party who obtains it. 6 Pet. 729. A purchaser under it is not bound to look beyond the decree; if there is error in it, of the most palpable kind, if the court which rendered it have, in the exercise of jurisdiction, disregarded, misconstrued or disobeyed the plain provisions of the law which gave them the power to hear and determine the case before them, the title of a purchaser is as much protected as if the adjudication would stand the test of a writ of error.' The following authorities are strong in support of the general proposition under consideration: Thompson *v.* Tolmie, 2 Pet. 157, 7 L. Ed. 381; Mohr *v.* Manierre, 101 U. S. 417, 25 L. Ed. 1052; Comstock *v.* Crawford, 3 Wall. 396, 18 L. Ed. 34; Florentine *v.* Barton, 2 Wall. 210, 17 L. Ed. 783; Thaw *v.* Ritchie, 136 U. S. 519, 34 L. Ed. 531." And see Davis *v.* Gaines, 104 U. S. 386, 392, 26 L. Ed. 757; McNitt *v.* Turner, 16 Wall. 352, 366, 21 L. Ed. 341.

"A title under a license to the administrator to sell real estate, 'is good against the heirs of the intestate, although the license was granted upon the certificate of the judge of probate, not warranted by the circumstance of the case.'" Grignon *v.* Astor, 2 How. 319, 343, 11 L. Ed. 283.

A purchaser at judicial sale by an administrator, does not depend upon a return by the administrator making the sale, of what he has done. If the preliminary proceedings are correct, and he has the order of sale and the deed, this is sufficient for him. McNitt *v.* Turner, 16 Wall. 352, 21 L. Ed. 341.

Where a petition for the seizure and sale of the mortgaged property of a deceased person was filed, in the circuit court of the United States for Louisiana, against the executor of that deceased person, which petition alleged the plaintiff to be a citizen of Tennessee, and the defendant to be a citizen of Louisiana, and the proceedings went on to a sale without any objection to the jurisdiction of the court being made by the executor upon the ground of residence of parties, it is too

void and a mere nullity, and confer no right, and afford no justification, and may be rejected, when collaterally drawn in question.[93]

d. *Effect of Discovery of Later Will.*—A sale of land, duly made by order of the court having jurisdiction, and a conveyance thereof by the executor of a will duly admitted to probate while its functions are in full force, to a bona fide purchaser for value, vests the purchaser with a good title, which will not be affected by the discovery of a later will and its admission to probate and record.[94] But a purchaser of property from an executor of a will of one date, who has at the time strong reasons to believe, and had recently declared solemnly that he did believe that a later will with different executors and different dispositions of property had been made, is not protected from liability to the parties interested under such later will, if established and received to probate, by the fact that the executor of the first will made the sale under order of court having jurisdiction of such things. He purchases at the risk of the later will being found, or proved and established. If the later will is found, it relates back as against such a purchaser, and affects him with notice of its existence and contents as of the time when he purchased.[95] On suit brought by a real and paramount heir claiming under a will of one date to recover possession, it is no defense by a party in possession under sales made by the executors or alleged instituted heir under an earlier and annulled will, that the estate of the testator was insolvent.[96]

e. *Fraudulent Sales*—(1) *Purchase by Executor or Administrator.*—Executors and administrators are not permitted to derive a personal benefit from the manner in which they transact the business or manage the assets of the estates intrusted to them; but whatever advantage is derived by them from a purchase at an undervalue is for the common benefit of the estate.[97] And the receipts or acquittances given by the complainants to the executors do not affect the rights of the latter where they are obviously given without full knowledge of all the circumstances connected with the disposal and management of the es-

late for a curator, appointed in the place of the executor, to raise the objection in a state court against a purchaser at the sale, and attempt to prove that the circuit court had no jurisdiction over the case, because the executor was not a citizen of Louisiana. Evidence dehors the record cannot be introduced to disprove it. Erwin *v.* Lowry, 7 How. 172, 12 L. Ed. 655.

As to the presumption of jurisdiction, see generally, the title JURISDICTION.

As to the general rule that mere errors in the exercise of jurisdiction will not render a judgment liable to collateral attack, see the title JUDGMENTS AND DECREES.

The validity of an administrator's sale will not be affected by an irregularity in the appointment of an administrator. Simmons *v.* Saul, 138 U. S. 439, 452, 34 L. Ed. 1054, citing Comstock *v.* Crawford, 3 Wall. 396, 403, 18 L. Ed. 34; McNitt *v.* Turner, 16 Wall. 352, 363, 21 L. Ed. 341.

Where property was sold under an administrator's sale, the presumption is in favor of its correctness; and after a long possession under it, the burden of proof is upon the party who impeaches the sale. Moore *v.* Greene, 19 How. 69, 15 L. Ed. 533.

Where there were irregularities in a public sale made by a public officer by authority of the order of the probate court, and a deed was given by the executor, the statute of limitations of Louisiana would cure the defects of the sale. Davis *v.* Gaines, 104 U. S. 386, 402, 26 L. Ed. 757.

93. Thompson *v.* Tolmie, 2 Pet. 157, 163, 7 L. Ed. 381.

94. Effect of discovery of later will.—Davis *v.* Gaines, 104 U. S. 386, 397, 26 L. Ed. 757.

95. Gaines *v.* De La Croix, 6 Wall. 719, 18 L. Ed. 967.

96. Gaines *v.* New Orleans, 6 Wall. 642, 18 L. Ed. 950.

97. Purchase by executor or administrator.—Allen *v.* Gillette, 127 U. S. 589, 593, 32 L. Ed. 271; Gaines *v.* De La Croix, 6 Wall. 719, 723, 18 L. Ed. 967.

In Michoud *v.* Girod, 4 How. 503, 557, 11 L. Ed. 1076, the court said: "We are aware that cases may be found, in the reports of some of the chancery courts in the United States, in which it has been held that an executor may purchase, if it be without fraud, any property, of his testators, at open and public sale, for a fair price, and that such purchase is only voidable, and not void, as we hold it to be. But with all due respect for the learned judges who have so decided, we say that an executor or administrator is, in equity, a trustee for the next of kin, legatees, and creditors, and that we have been unable to find any one well-considered decision, with other cases, or any one case in the books, to sustain the right of an executor to become the purchaser of the property which he represents, or any

tate.[98] Where an administrator suffers land to be sold, through the agency of another, with the view of securing the title to himself, the proceeding is fraudulent and void.[99]

(2) *Second Sale as Evidence of Fraud.*—A second license to an administrator to sell property already sold by him, and a second purchase of it by the same party who had already bought it before, is not evidence of fraud in the first sale.[1]

(3) *Inadequacy of Price.*—Where the price is so grossly inadequate as to show a fraudulent sale, such sale is void.[2] But where witnesses testify as to the intrinsic value of property, to hold and to use in reference to the future, and not the actual market value of the property at the time to be sold for cash, and an executor sells at less than what it is worth if held, it is not a void sale on the ground of fraud.[3]

f. *Purchaser Must Be Bona Fide and without Notice.*—The purchaser to hold

portion of it, though he has done so for a fair price, without fraud, at a public sale. Why should the rule be relaxed in the case of persons most frequently exposed to the temptations of self-interest, who may yield to it more readily than any others, with a larger impunity, if the day of equitable retribution shall ever come for those who have been defrauded? Is it not better that the cause of the evil shall be prohibited, than that courts of equity shall be relied upon to apply the remedy in particular cases, by inquiring into all the circumstances of a case, whether there has or has not been fraud in fact? Is the rule to be relaxed, in the case of executions, in respect to all persons interested in the estate, or only to such of them as are sui juris? And if only to those who are sui juris, why in case of an executor as to such persons, when the rule has never been relaxed by any court of equity to permit purchases by any other trustee or agent of one who is sui juris? Shall it be relaxed in cases of those who are interested in the estate, and who are not sui juris or minors? Then other remedies must be devised to protect their interests than that which experience has shown to be alone efficacious. It is, that when a trustee for one not sui juris sees that it is absolutely necessary that the estate must be sold, and he is ready to give more for it than any one else, that a bill should be filed, and he should apply to the court by motion, to let him be a purchaser. This is the only way he can protect himself. There are cases in which the court will permit it." See, also, the title TRUSTS AND TRUSTEES.

98. Michoud *v.* Girod, 4 How. 503, 561, 11 L. Ed. 1076.

99. Assuming place of original purchaser.—Swayze *v.* Burke, 12 Pet. 11, 25, 9 L. Ed. 980; Michoud *v.* Girod, 4 How. 503, 553, 11 L. Ed. 1076.

An execution creditor purchased land, but did not have any intention of holding the property, which he told the administrator sometime before the sale took place, and he never paid any consideration. After four years the administrator paid off the judgment and received a deed from the execution creditor. It was held that the execution creditor was not such bone fide purchaser as would give the administrator a valid title against other coheirs. Swayze *v.* Burke, 12 Pet. 11, 25, 9 L. Ed. 980.

1. Second sale as evidence of fraud.—Comstock *v.* Crawford, 3 Wall. 396, 18 L. Ed. 34.

2. Inadequacy of price.—At the time of his decease, O. J. M. was the owner of a large estate in Louisiana, valued at nearly a million dollars, consisting mostly of lands, abundantly sufficient, if honestly applied, to pay all his debts; but a sale was made under an order of the probate court of the Parish of Carroll (where the lands were situated) on application of B., as guardian of his daughter, and of the executor, O. T. M. The petition was signed by the other defendants as attorneys, and untruly represented that the lands were unproductive, and that it was necessary to sell them all to pay the debts of the estate. A simultaneous order was made, on the application of O. T. M. as executor of the will of J. M. (adverse to and irreconcilable with his duties and trust as executor of O. J. M.), for the sale of three-fourths of the same land as belonging to the estate of J. M., a daughter of O. J. M., and the sale was made under both orders. Before the sale, the confederates procured a false and fraudulent appraisement of the lands to be made at $2.75 per acre, reducing the whole value thereof $43,205.25, instead of $947,155.80, at which they had been appraised in the inventory. At the sale, B. became the purchaser of 9,171 acres of the lands at $3 per acre; M'y of 5,040 acres, and G., of 1,500 acres, at the same price. Held, that the sale was a sheer fraud as against general purchasers of the estate. Johnson *v.* Waters, 111 U. S. 640, 28 L. Ed. 547, affirmed in Mellen *v.* Buckner, 139 U. S. 388, 35 L. Ed. 199.

3. Boyd *v.* Wyly, 124 U. S. 98, 105, 31 L. Ed. 369.

a good title must be bona fide and without notice of any defects or irregularities.[4] And property acquired from a personal representative by third parties with knowledge of his trust and his disregard of its obligations, can be followed and recovered. The law exacts the most perfect good faith from all parties dealing with a trustee respecting trust property. Whoever takes it for an object other than the general purposes of the trust, or such as may reasonably be supposed to be within its scope, must look to the authority of the trustee, or he will act at his peril.[5]

g. *Duty to See to Application of Proceeds.*—Where the sale is made for other purposes than those connected with the discharge of the executor's duties under the will, of which the purchaser has no knowledge or notice, but takes the property in good faith, the transaction will be sustained; for the purchaser is not bound to see to the disposition of the proceeds received.[6]

h. *Effect of Failure to Include Property in Inventory.*—A purchaser of land at a probate sale, under the order of a court of competent jurisdiction, directing the sale of all of the property of succession, is not affected by the failure of the executor to have such land placed on the inventory.[7]

i. *Effect of Excess of Proceeds over Amount of Debts.*—The title of a purchaser at an administrator's sale is not affected by the fact that the proceeds of the sale exceeded the amount of the alleged debts of the decedent, for the payment of which such sale was ordered.[8]

j. *Effect of Failure of Administrator to Account for Proceeds.*—Where an

4. Purchaser must be bona fide and without notice.—Smith *v.* Ayer, 101 U. S. 320, 326, 25 L. Ed. 955; Davis *v.* Gaines, 104 U. S. 386, 393, 26 L. Ed. 757 See ante, "Fraudulent Sales," VI, T, 12, e.

An administrator suffered an excess of land to be sold for the payment of a debt. It was bid in by the creditor who did not pay any purchase price, but simply held it as security. The administrator then paid the debt and took a deed for the land. It was held that the administrator could not be considered a bona fide purchaser. Swayze *v.* Burke, 12 Pet. 11, 25, 9 L. Ed. 980.

Where one buys land at an illegal sale by an executor, he cannot substitute himself for the creditors of the estate, and use them as a means to get protection. Gaines *v.* New Orleans, 6 Wall. 642, 713, 18 L. Ed. 950.

The executor of an officer in the Virginia line on the continental establishment, obtained a certificate from the executive council of Virginia, as executor, for 4,000 acres of land in the Virginia reserve, in the state of Ohio, and afterwards sold and assigned the same; entries were made, and warrants issued in favor of the assignees, and a survey was made under one of the warrants, in favor of one of the assignees, a bona fide purchaser, who obtained a patent from the United States for the land. It appeared that the executor had no right, under the will, to sell the land to which the testator was entitled. The patent was granted in 1818, and the patentee had been in possession of the land from 1808. The heirs of the officer entitled to the land for military services, in 1839, some of them being minors, filed a bill to compel the patentee to convey the land held by him to them. Held, that the patentee was a purchaser with notice of the prior title of the heirs, and that he was bound to make the conveyance asked from him. Brush *v.* Ware, 15 Pet. 93, 10 L. Ed. 672.

"A sale of slaves, authorized by an executrix to be made in Louisiana, must be presumed to be intended to be made in the manner required by the laws of that state to give it validity. And the purchaser, equally with the seller, is bound, under such circumstances, to know what these laws are, and to be governed thereby. The law will never presume that parties intend to violate its precepts." Owings *v.* Hull, 9 Pet. 607, 628, 9 L. Ed. 246.

5. Smith *v.* Ayer, 101 U. S. 320, 326, 25 L. Ed. 955.

6. Duty to see to application of proceeds.—Smith *v.* Ayer, 101 U. S. 320, 326, 25 L. Ed. 955; Long *v.* O'Fallon, 19 How. 116, 125, 15 L. Ed. 550.

A bona fide purchaser, who pays the purchase money to a person authorized to sell, is not bound to look to its application, whether in the case of lands charged in the hands of an heir or devisee with the payment of debts, or lands devised to a trustee for the payment of debts. But if the money be misapplied by the devisee or trustee, with the co-operation of the purchaser, he remains liable to the creditors for the sum so misapplied. Potter *v.* Gardner, 12 Wheat. 498, 6 L. Ed. 706.

7. Effect of failure to include property in inventory.—Davis *v.* Gaines, 104 U. S. 386, 398, 26 L. Ed. 757.

8. Effect of excess of proceeds over amount of debts.—Comstock *v.* Crawford, 3 Wall. 396, 18 L. Ed. 34.

administrator sells property which had been conveyed to him for the purpose of securing a debt due to his intestate's estate, his failure to account for the proceeds does not entitle the heirs to claim the property from a purchaser in good faith for a valuable consideration. Nor can the heirs, in such a case, claim land which has been taken up by the administrator as vacant land, and for which he obtained a patent from the United States, although such land was included in the conveyance to him.[9]

k. *Effect of Informalities in Deed.*—Where an executrix had sold lands but did not say in the conveyance that the consideration passed to her in her representative character, it was held that the deed would not be upset.[10]

l. *Effect of Failure to File and Record Report of Sale.*—The fact that the report of a sale by an administrator was not properly filed, approved or recorded was held immaterial to the title of a purchaser at such sale.[11]

m. *Effect of Additional Sale by Heirs.*—The land being in fact sold by the executor, claiming a right to do so under the will, and the purchase money being received by him, he is responsible to the cestui que trusts for the money thus received. The reception of an additional sum, as purchase money, by them, with the reservation of the right to sue the executor, is not an avoidance of the first sale by the executor.[12]

n. *Priorities between Rights of Purchaser and Judgment Lien.*—Where one bought land, at a sale by the orphans' court, upon which there was a lien of a judgment obtained against the intestate during his lifetime, it was held that such a purchaser held the lands discharged from such lien.[13]

o. *Setting Aside Sale*[14]—(1) *Setting Aside in Federal Courts.*—The jurisdiction of the federal courts to set aside sales of estates will be found treated elsewhere.[15]

(2) *Laches.*—Where there had been an unreasonable delay in seeking to set aside the sale, equity will not rescind the sale.[16]

(3) *Limitation of Actions.*—When fraud is alleged as a ground to set aside a title, the statute does not begin to run until the fraud is discovered, and in such a case, the bill must be specific in stating the facts and circumstances which constitute the fraud, and also as to the time it was discovered.[17] The statute of California which provides that no action for the recovery of real estate sold by order of a probate court "shall be maintained by any heir or other person claiming under the intestate," unless brought within three years after such sale, applies to the administrator who made the sale as well as to the heirs. When by lapse of time the action is barred against him, it is also barred against them, because the right of possession is, by the law of California, in him, and he represents their interests.[18] By the Code of Mississippi of 1871 it was provided that no action could be brought to recover property sold by an administrator, by order of the probate court, on the ground of invalidity of the sale, unless such action be brought within one year "if such sale shall have been made in good faith, and the purchase money paid." It was held, that this statute did not apply

9. Long *v.* O'Fallon, 19 How. 116, 15 L. Ed. 550.

10. Effect of informalities in deed.—Gratz *v.* Cohen, 11 How. 1, 20, 13 L. Ed. 579.

11. Effect of failure to file and record report of sale.—McNitt *v.* Turner, 16 Wall. 352, 365, 21 L. Ed. 341.

12. Effect of additional sale by heirs.—Taylor *v.* Benham, 5 How. 233, 12 L. Ed. 130.

13. Priorities between rights of purchaser and judgment lien.—Moliere *v.* Noe, 4 Dall. 450, 455, 1 L. Ed. 905.

14. As to the necessity for a judgment creditor to set aside the sale by an executor before he can levy his execution, see the title EXECUTIONS, ante, p. 84.

15. Setting aside in federal courts.—See the title COURTS, vol. 4, p. 895.

16. Laches.—Badger *v.* Badger, 2 Wall. 87, 93, 17 L. Ed. 836; Hanner *v.* Moulton, 138 U. S. 486, 495, 34 L. Ed. 1032. See, generally, the title LACHES.

17. Limitation of actions.—Moore *v.* Greene, 19 How. 69, 72, 15 L. Ed. 533. See, generally, the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION.

18. Meeks *v.* Olpherts, 100 U. S. 564, 25 L. Ed. 735.

where one bought in at an administrator's sale but, being a creditor of the estate, gave a receipt for that amount.[19]

(4) *Parties.*—The fact that the creditor of an estate may have been a party to a confirmation proceeding will not preclude him from suing in equity to set aside the sale for fraud, he being ignorant of such fraud.[20]

(5) *Repayment of Purchase Money.*—A bought real estate on credit, giving a mortgage on the land for the purchase price. A then died, and his land was sold by the probate court and the money obtained used to pay off the mortgage. It was then found that the sale was void, so the heirs claimed the property. It was held, that where no repayment or tender of payment of purchase price was made to the purchaser at the sale, there could be no recovery of the land by the heirs.[21]

(6) *Purchasers Considered as Holding in Trust.*—Where a deed was sought to be set aside by charging fraud against the executors and a notice of the fraud to the purchasers, they must be considered, though the sales had the forms of law, as holding the property in trust. The powers of a court of chancery are required to do complete justice between the parties.[22]

p. *Liability of Purchasers to Contribution.*—Where one died intestate, but did not have sufficient personal estate to pay his debts and the court ordered a sale of part of real estate to be applied to payment of debts, and there was a division of the remainder among the children, and the eldest son sold his share to a bona fide purchaser, and it was then discovered that all the debts had not been paid, it was held, that the bona fide purchaser from the eldest son was bound to contribute to the other heirs whose lands had not been sold.[23]

U. Payment of Debts—1. What Law Governs.—The effects of an intestate, in the hands of the administrator, are to be distributed among his creditors according to the laws of the situs of the property.[24]

2. Time of Payment.—The duty of the administrator arises to pay the debts when their existence is discovered.[25]

3. Presentment of Claim.—Unless some satisfactory excuse be given, the failure of the creditor to present his claim, in the mode and time prescribed by law, will cause the rejection of such claim.[26] Where one has a debt against an estate, he may claim the same in a state where there is ancillary administration of the estate, though he be not a resident there, or he may look to such assets as he can find in the state of primary administration whether originally found there or brought from the state of ancillary administration.[27]

19. Clay *v.* Field, 115 U. S. 260, 262, 29 L. Ed. 375.

20. Parties.—Johnson *v.* Waters, 111 U. S. 640, 667, 28 L. Ed. 547.

21. Repayment of purchase money.—Davis *v.* Gaines, 104 U. S. 386, 403, 404, 26 L. Ed. 757.

22. Purchasers considered as holding in trust.—Gaines *v.* Chew, 2 How. 619, 649, 11 L. Ed. 402.

23. Liability of purchaser to contribution.—Graff *v.* Smith, 1 Dall. 481, 484, 1 L. Ed. 232.

24. What law governs.—Smith *v.* Union Bank, 5 Pet. 518, 8 L. Ed. 212.

25. Time of payment.—Green *v.* Creighton, 23 How. 90, 108, 16 L. Ed. 419.

26. Necessity for presentment.—Board of Public Works *v.* Columbia College, 17 Wall. 521, 531, 21 L. Ed. 687; Rogers *v.* Law, 1 Black 253, 17 L. Ed. 58; McGill *v.* Armour, 11 How. 142, 152, 13 L. Ed. 638.

27. Place of presentment.—Borer *v.* Chapman, 119 U. S. 587, 599, 30 L. Ed. 532, in deciding which point the court said: "The administration of the estate of Gordon, in California, under the orders of the probate court of San Francisco, was merely ancillary; the primary administration was that of the testator's domicile, Minnesota. Chapman was not a citizen of California, nor resident there; he was no party to the administration proceedings; he was not bound to make himself such. If he had chosen he could have proved his claim there and obtained payment, but he had the right to await the result of the settlement of that administration, and look to such assets of Gordon as he could subsequently find in Minnesota, whether originally found there or brought there from California by the executors or legatees of Gordon's estate. The assets in California finally distributed there, and brought into Minnesota by the executor or by any legatee, remained assets in Minnesota for the payment of any unpaid creditors choosing that forum. Such assets were impressed with a trust

4. Effect of Allowance.—A claim admitted by the administrator, and allowed and classified by the probate court, has the dignity and effect of a judgment.[28]

5. What Constitute Debts of the Estate—a. *Claims Satisfied by Will.*—A debt of the decedent which has been satisfied by the terms of his will cannot be set up by the heirs to defeat the rights of the creditors.[29]

b. *Trust Funds Invested by Decedent.*—The estate will be held liable for the amount of trust funds held by the decedent and not accounted for, together with interest, less any amounts advanced to the legatees.[30]

c. *Profits Wrongfully Withheld by Testator.*—Mesne profits of an estate wrongfully held by the testator constitute a claim against the estate.[31]

d. *Claims Based upon Unperformed Covenants.*—Where there was no evidence that the condition precedent of a covenant made with a testator had been complied with, either in the lifetime of the testator or since his death, a claim based upon such covenant was properly rejected.[32] On a covenant to pay rent, reserved by a deed granting real estate, subject to the rent, the personal representatives of the covenantor are liable for the nonpayment of the rent, after an assignment, although there may also be a good remedy against the assignee.[33]

e. *Interest and Discounts on Negotiable Paper.*—Interest and discounts on notes made by the decedent constitute claims against the estate.[34]

which such creditor had a right to have administered for his benefit. Aspden *v.* Nixon, 4 How. 467, 11 L. Ed. 1059; Stacy *v.* Thrasher, 6 How. 44, 12 L. Ed. 337; Hill *v.* Tucker, 13 How. 458, 14 L. Ed. 223; Mackey *v.* Coxe, 18 How. 100, 15 L. Ed. 299. It is upon the ground of such a trust that the jurisdiction of courts of equity primarily rests in administration suits, and in creditors' bills brought against executors or administrators, or after distribution against legatees, for the purpose of charging them with a liability to apply the assets of the decedent to the payments of his debts."

28. Tate *v.* Norton, 94 U. S. 746, 24 L. Ed. 222.

29. O. J. M., who owned large estates in Louisiana, died in 1860, leaving the minor children of his deceased daughter J M., and a miror grandson of his deceased daughter A. M., as his heirs. His wife had died in 1844, and a large portion of the property was community property in which she was entitled to a half interest. Before the death of his daughter J. M. by an act of sale and donation, O. J. M. transferred or attempted to transfer to his said daughter J. M. three-fourths of all his property and to the minor grandson of his deceased daughter A. M. one-fourth of the property intended thus to be in lieu of their interests in the community property of his deceased wife and the portion that he desired them to have in his own estate. And later, seemingly under an apprehension that the previous donation might not be valid, he made a will which contained substantially the same provisions. The representatives and heirs of O. J. M. went into, or continued in, possession of his property in accordance with his will. In 1869, however, a sale was made by the executor of all the lands at the instance of a creditor, which on the application of other creditors was set aside as a fraudulent and sham sale in Johnson *v.* Waters, 111 U. S. 640, 28 L. Ed. 547, and remanded to the circuit court for further proceedings that all creditors of the estate might come in and prove their debts. In these proceedings the claims of the said heirs to the community property and for improvements were set up as debts against the estate. It was held that any debt which may have been due from O. J. M. to his heirs was more than satisfied by their receiving that portion of the property which was intended by him as a satisfaction and by the rents and revenues they received after his death; and that in place of said supposed claims the said heirs were entitled to have and retain a certain portion of said O. J. M.'s estate free from the claims of his creditors, which portion was designated, the remaining portion to the subject to the payment and satisfaction of the debts due the other creditors. Mellen *v.* Buckner, 139 U. S. 388, 35 L. Ed. 199.

30. Where A held property of a testator and turned over a certain amount to the guardian of the legatees under the will but the remainder was not accounted for, A having died, his estate was held liable for the amount which was not accounted for with interest, less the amount paid by A to B, one of the legatees. Darlington *v.* Turner, 202 U. S. 195, 341, 50 L. Ed. 992.

31. Profits wrongfully withheld.—Haldane *v.* Duche, 2 Dall. 176, 1 L. Ed. 338. See the title EJECTMENT, vol. 5, p. 695.

32. Rogers *v.* Law, 1 Black 253, 258, 17 L. Ed. 58.

33. Scott *v.* Lunt, 7 Pet. 596, 8 L. Ed. 797. See the title LANDLORD AND TENANT.

34. Peter *v.* Beverly, 10 Pet. 532, 570, 9 L. Ed. 522, approved in Bank *v.* Beverly, 1 How. 134, 147, 11 L. Ed. 75.

f. *Mortgages.*—A mortgage given by the decedent constitutes a debt of the estate.[35]

g. *Improvements.*—Where a bill was filed claiming specific performance of an alleged contract to convey a house and lot for the benefit of the wife of the complainant, the latter having expended a large sum of money in improving the property, in the expectation that it would be conveyed as required by the bill; the court not considering that sufficient evidence of an agreement to convey the property was given, ordered that it should be sold, and out of the proceeds, that the advances made by the complainant should be repaid; the property sold for a sum far less than the amount expended; it was held, that the balance unpaid, after the sale, was not a debt due by the estate of the father of the wife, and could not be claimed of his representatives.[36]

h. *Damages for Torts.*—As to whether causes of action founded upon torts constitute a claim against the estate, see the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 22.

i. *Taxes.*—Where a nonresident invests personal property in a state, the investment being secured by bonds and mortgages, the taxes are a claim that may be proven against decedent's estates subject to the statute of limitations in the state taxing.[37]

6. ORDER OF PAYMENT—a. *What Law Governs.*—In the administration of the estate of a deceased person, the assets are always distributed according to the dignity of the debt, as regulated by the law of the country where the representative of the deceased acts, and from which he derives his powers; not by the law of the country where the contract was made.[38]

b. *Power of Executor to Grant Preference.*—The executors have an unquestionable right, generally speaking, to give a preference to any creditor of the same degree.[39]

c. *Claims by Executor or Administrator.*—If the executor has a claim on the estate of the deceased, it stands on an equal footing with other claims of the same nature.[40] The executor or administrator cannot discharge his own debt, in preference to others of superior dignity; though he may give the preference to his own over others of equal degree. In some of the states, this rule would not apply, as there is no difference made in the payment of debts between a bond and simple contract.[41] By extinguishing his right of action, the receipt of assets by an executor extinguishes a debt due from the estate to him.[42] That an administrator or executor may retain the amount of his debt, out of the assets in his

35. Mortgages.—Ruston *v.* Ruston, 2 Dall. 243, 245, 1 L. Ed. 365. See the title MORTGAGES AND DEEDS OF TRUST.

Where a person had a claim to land under a Spanish grant, and subsequently congress confirmed the claim, the heirs of such person take the land subject to a mortgage that was given before the confirmation. Massey *v.* Papin, 24 How. 362, 364, 16 L. Ed. 734.

36. King *v.* Thompson, 13 Pet. 128, 10 L. Ed. 91.

37. Taxes.—Bristol *v.* Washington County, 177 U. S. 133, 139, 142, 147, 44 L. Ed. 701. See the title TAXATION.

38. What law governs order of payment.—Harrison *v.* Sterry, 5 Cranch 289, 298, 3 L. Ed. 104; Smith *v.* Union Bank, 5 Pet. 518, 8 L. Ed. 212; dissenting opinion in Harrison *v.* Nixon, 9 Pet. 483, 518, 9 L. Ed. 201.

39. Power of executor to grant preference.—Roberts *v.* Cay, 2 Dall. 260, 263, 1 L. Ed. 373.

40. Claims by executor or administrator.—Nicholls *v.* Hodges, 1 Pet. 562, 565, 7 L. Ed. 263.

41. Page *v.* Patton, 5 Pet. 304, 8 L. Ed. 134, in which case the court said: "Blackstone lays down the doctrine of retainer, as 'a remedy by mere operation of law, and grounded upon this reason, that the executor cannot, without an apparent absurdity, commence a suit against himself; but having the whole in his hands, so much as is sufficient to answer his demand is, by operation of law, applied to that particular purpose.' This doctrine is sanctioned in all the cases referred to, and is believed to be nowhere controverted. But this right of retainer must be exercised, under certain restrictions. The executor or administrator cannot discharge his own debt, in preference to others of superior dignity; though he may give the preference to his own over others of equal degree."

42. Page *v.* Patton, 5 Pet. 304, 313, 8 L. Ed. 134.

hands, is a principle which grew out of the necessity of the case. If such a right did not exist, the executor or administrator would be, in many cases, without remedy. The principle was intended for his benefit, and not to mislead or entrap him. It is a right which he may postpone, if, in doing so, he does no injury to the estate; and such a question can only be made by the devisees or their heirs. If he shall pay debts, not on interest, and permit his own to run on interest, it may become a question whether he be entitled to interest. But his right to pay himself, so long as assets shall remain in his hands, is clear.[43]

d. *Foreign Judgments.*—In the payment of the debts of a testator, or intestate, the judgment of another state, whatever may have been the subject matter of the suit, cannot be put upon the footing of judgments rendered in the state of the principal administration; it can only rank as a simple contract debt, in the appropriation of the assets of the estate of a deceased person to the payment of debts.[44]

e. *Priorities between Negotiable Instruments.*—Promissory notes are not entitled to the same priority as bills of exchange.[45]

f. *Claims of the United States.*—As to priorities of claims of the United States government, see the title UNITED STATES.

g. *Application of Payments.*—As to the application of payments, see the title PAYMENT.

7. PAYMENT BY REPRESENTATIVE WITH PERSONAL FUNDS.—If the personal representative has paid the debt of the estate from his own funds, he becomes a creditor of the estate and may resort to the trust fund to satisfy the debt.[46]

8. RENEWAL OF NOTES.—Where notes of the decedent are retired by the substitution of notes by the executor, such substitution is only by way of renewal and cannot be construed as an extinguishment of the debt, unless there be such clear and satisfactory evidence as to leave no reasonable doubt that such was the intention of the parties.[47]

9. BENEFIT OF INVENTORY.—In Louisiana the benefit of inventory is the privilege which the heir obtains of being liable for the charges and debts of the succession only to the value of the effects. The heir is bound only to the amount the estate was worth at his ancestor's death; of course he is bound to that extent.[48]

10. RIGHTS OF HEIR AB INTESTATO UNDER PORTO RICAN PRACTICE.—By the law of Porto Rico an heir of an intestate may claim against one designated heir ab intestato, any time within five years after designation, but where the heir designated, within five years after designation, collects money due the estate, the payment being made in good faith and without knowledge of other heirs and under order of the court, it will discharge the debtor, even though there be other heirs; but if the debtor have legal notice from the court of others not originally designated applying for recognition as heir ab intestato, then payment to the heir already designated would not discharge the debtor but he would be liable to the one applying for recognition if designated, for his proportionate share; and if the debtor made payment before the debt is due, to the heir originally designated, but after another has applied for recognition, it should be left for the jury to determine whether or not the debtor had notice of the others rights.[49]

43. Page *v.* Patton, 5 Pet. 304, 316, 8 L. Ed. 134.

44. Foreign judgments.—McElmoyle *v.* Cohen, 13 Pet. 312, 10 L. Ed. 177. See the title FOREIGN JUDGMENTS; RECORDS AND JUDICIAL PROCEEDINGS.

45. Priorities between negotiable instruments.—Roberts *v.* Cay, 2 Dall. 260, 264, 1 L. Ed. 373.

46. Payment by representative with personal funds.—Peter *v.* Beverly, 10 Pet. 532, 567, 9 L. Ed. 522, affirmed in Bank *v.* Beverly, 1 How. 134, 147, 11 L. Ed. 75. See the title SUBROGATION.

47. Renewal of notes.—Peter *v.* Beverly, 10 Pet. 532, 567, 9 L. Ed. 522, affirmed in Bank *v.* Beverly, 1 How. 134, 147, 11 L. Ed. 75. See, generally, the title PAYMENT.

48. Benefit of inventory.—Mellen *v.* Buckner, 139 U. S. 388, 412, 35 L. Ed. 199.

49. Heir ab intestato.—Sixto *v.* Sarria,

11. Submission to Arbitration.—As to submission to arbitration by personal representatives, see the title Arbitration and Award, vol. 2, pp. 469, 481.

12. Enforcement of Claims—a. *Conditional Rights.*—Where a husband agrees in his marriage settlement to give his wife a sum equal to that which she would obtain by devise from her father, this cannot be enforced against the husband's estate until the amount is ascertained, an appraisal or valuation not being sufficient.[50]

b. *Proceedings against Heirs, Devisees or Legatees.*—A proceeding will lie against devisees or legatees, if the executor has no assets.[51] If the personalty be insufficient to discharge the debts, and it be necessary to resort to the realty of the deceased for that purpose, a proceeding against the heir must be instituted In that event, whatever has been done by the administrator is without effect, as to the property sought to be charged. A judgment against the administrator is not evidence against the heir. The demand must be proved in all respects as if there had been no prior proceeding to effect its collection, and the statute of limitations may be pleaded with the same effect as if there had been no prior recovery against the personal representative.[52]

c. *Form of Judgment.*—Under the code of practice in Louisiana, a suit may be brought and distinct judgments rendered against a defendant, as administratrix of her deceased husband, as a widow in community, and as tutrix of his minor heirs.[53]

d. *Execution Sale.*—It has been held that the lands of a deceased debtor could be sold under a judgment against his executor.[54]

e. *Where Decedent Was Member of Partnership.*—As to the rights of creditors to proceed against the personal representative for partnership debts, see the title Partnership.

f. *Jurisdiction.*—As to jurisdiction of the federal courts in enforcing claims against estates, see the title Courts, vol. 4, pp. 895, 963.

g. *Suit in Equity.*—When a proper case is shown, equity will entertain a suit to compel the payment of claims against the estate.[55] But a court of equity will

196 U. S. 175, 186, 187, 191, 49 L. Ed. 436.

The mortgage law of Porto Rico, which provides that "property acquired through inheritance or legacy cannot be cleared until five years have elapsed from the date of their record in the registry," does not require that the collection of debts shall be delayed for five years or that they shall be paid to the legally declared heir or heirs, upon pain of being required to respond to others who may within the limitation permitted establish a right to the property; and the effect of the proceedings under §§ 1000, 1001, of the Porto Rico code to appoint the heirs ab intestato, is to permit the heirs appointed, to receive and collect the estate. Sixto *v.* Sarria, 196 U. S. 175, 186, 49 L. Ed. 436.

50. Conditional rights.—Rogers *v.* Law, 1 Black 253, 258, 17 L. Ed. 58.

51. Proceeding against devisee or legatee.—Milligan *v.* Milledge, 3 Cranch 220, 228, 2 L. Ed. 417.

52. Proceeding against heirs.—Ingle *v.* Jones, 9 Wall. 486, 495, 19 L. Ed. 621.

53. Form of judgment.—Kittredge *v.* Race, 92 U. S. 116, 23 L. Ed. 488.

54. Execution sale.—Landes *v.* Brant, 10 How. 348, 376, 13 L. Ed. 449. See the title EXECUTIONS, ante, p. 84.

55. Suit in equity.—"That a single creditor may maintain a bill against an administrator of a deceased debtor, for a discovery of assets and the payment of his debt, there can be no doubt. That, in some cases, he may join with the administrator a third person, who is in possession of property which is amenable to the payment of the debt, is also clear. The instances in which it has been actually held that such third person might be joined, are chiefly cases of collusion between the administrator and the third person possessed of assets, insolvency of the administrator, and where the third person was the surviving partner of the deceased. Utterson *v.* Mair, 2 Ves. 95; Alsager *v.* Rowley, 6 Ves. 748; Burroughs *v.* Elton, 11 Ves. 29; Gedge *v.* Traill, 1 Russ. & M. 281; Long *v.* Majectre, 1 Johns. (N. Y.) Ch. 306. But it will be found that the equitable right of the creditor to join a third person, and have a discovery and an appropriation of assets held by him, has never been limited to these particular cases." Hagan *v.* Walker, 14 How. 29, 33, 14 L. Ed. 312.

"The authorities are abundant and well settled that a creditor of a deceased person has a right to go into a court of equity for a discovery of assets and the payment of his debt. When there, he will not be turned back to a court of law to estab-

not exercise its jurisdiction to reach the property of a debtor applicable to the payment of his debts, unless the debt be clear and undisputed, and there exists some special circumstances requiring the interposition of the court to obtain possession of, and apply the property. This rule should be insisted upon with rigor whenever the property sought to be reached constitutes assets of a deceased debtor, which have already been subjected to administration and distribution; and some satisfactory excuse should be given for the failure of the creditor to pre-

lish the validity of his claim. The court being in rightful possession of the cause for a discovery and account, will proceed to a final decree upon all the merits." Kennedy *v.* Creswell, 101 U. S. 641, 645, 25 L. Ed. 1075.

"In the court of chancery, executors and administrators are considered as trustees, and that court exercises original jurisdiction over them, in favor of creditors, legatees, and heirs, in reference to the proper execution of their trust. A single creditor has been allowed to sue for his demand in equity, and obtain a decree for payment out of the personal estate without taking a general account of the testator's debts." Green *v.* Creighton, 23 How. 90, 106, 16 L. Ed. 419, citing Hagan *v.* Walker, 14 How. 29, 14 L. Ed. 312.

"A court of equity will sustain a bill against executors, because they are considered as trustees for the creditors and representatives of the deceased, and are liable to account; especially, where they are executors of several copartners; and because the court may compel an equitable distribution." Telfair *v.* Stead, 2 Cranch 407, 416, 2 L. Ed. 320.

"If an executor shall have distributed the estate of his testator, the creditor has an action at law against him, and he has his remedy against the legatees; the creditor has no action at law against the legatees. Yet it has never been understood, that the creditor is compelled to resort to his legal remedy. He may bring the executor and legatees both before a court of chancery, which court will decree immediate payment from those who are ultimately bound. If the executor and his sureties should be insolvent, so that a suit at law must be unproductive, the creditor would have no other remedy than in equity, and his right to the aid of that court could not be questioned. If doubts of his right to sue in chancery could be entertained, while the executor was solvent, none can exist, after he had become insolvent. Yet the creditor would have no legal claim on the legatees, and could maintain no action at law against them. The right of the executor, however, may, in a court of equity, be asserted by the creditor, and, as the legatees would be ultimately responsible for his debt, equity will make them immediately responsible." Riddle *v.* Mandeville, 5 Cranch 322, 330, 3 L. Ed. 114.

Children who are executors of their mother's will, may sue in equity for the amount held in trust for them by their mother as executrix of her husband's will. Glover *v.* Patten, 165 U. S. 394, 404, 41 L. Ed. 760.

No doubt when an executor or administrator colludes with a fraudulent claimant against a decedent's estate, and refuses to take steps to resist the claim, any person interested in the estate may maintain an action against such fraudulent claimant and the executor or administrator for the purpose of contesting the claim. Bank *v.* Cooper, 20 Wall. 171, 174, 22 L. Ed. 273.

The courts of the United States, as courts of equity, have jurisdiction over executors and administrators, where the parties to the suit are citizens of different states, and this jurisdiction is not barred by subsequent proceedings in insolvency in the probate court of a state. In such a case, the courts may interpose in favor of a foreign creditor, to arrest the distribution of any surplus of the estate of a decedent among the heirs. Green *v.* Creighton, 23 How. 90, 16 L. Ed. 419.

"Thus it will be seen that under the decisions of this court, a foreign creditor may establish his debt in the courts of the United States against the representatives of a decedent, notwithstanding the local laws relative to the administration and settlement of insolvent estates, and that the court will interpose to arrest the distribution of any surplus among the heirs." Green *v.* Creighton, 23 How. 90, 107, 16 L. Ed. 419, citing Suyram *v.* Broadnax, 14 Pet. 67, 10 L. Ed. 357; Williams *v.* Benedict, 8 How. 107, 12 L. Ed. 1007; Peale *v.* Phipps, 14 How. 368, 14 L. Ed. 459; Bank *v.* Horn, 17 How. 157, 15 L. Ed. 70.

Where there has been a fraudulent conveyance by an intestate, although the creditor has a remedy against the surety of the administrator by a suit at law upon the bond, yet he may also file a bill in chancery against all the parties who are concerned in the alleged fraud, and such other persons as are interested in the estate. McLaughlin *v.* Bank, 7 How. 220, 12 L. Ed. 675.

"By the decisions of the courts of Georgia, on the statute of 5 Geo. II, making lands liable to a fiere facias, it is not necessary that the heirs should be made parties. The lands are assets, until all the debts are paid. The executor of an administrator is not, as such, liable to a suit, on account of the original intestate; but is liable in equity for the property of the

sent his claim, in the mode prescribed by law, to the representative of the estate, before distribution.[56]

h. *Limitation of Actions*[57]—(1) *Distinctions.*—The distinction between ordinary statutes of limitation and statutes of administration of the estate of decedents limiting the time within which creditors must prove their claim, is pointed out in the respect that the latter are rules of property as well as statutes of limitation.[58]

(2) *When Statute Begins to Run.*—Where a nunc pro tunc order has been entered, the statute begins to run from the true date of entry.[59] By Arkansas statute it is provided that "all demands not exhibited to an executor or administrator before the end of two years from the granting of letters, shall be forever barred." This statute holds against claimants under disability of nonage, or otherwise, although the claim may have originated in consequence of a relation of trust.[60] If an act of limitations have a clause "saving to all persons non compos mentis, femes covert, infants imprisoned, or out of the commonwealth, three years after their several disabilities removed," a creditor, resident of another state, removes his disability by coming into the commonwealth, even for temporary purposes; provided, the debtor be at time within the commonwealth.[61] It has been held by the supreme court of Maryland that the act of 1715 does not apply to a claim by an executor against his estate, inasmuch as the executor cannot sue himself at law.[62]

(3) *Who May Plead.*—A mere administrator, not the donee of a power foreign to those which come within the scope of an executor's ordinary functions, cannot plead the statute of limitations to defeat a suit brought on a judgment, by a creditor seeking to charge the realty with his debt.[63]

(4) *Period of Limitation.*—An acknowledgment of the debt, by the personal representatives of the original debtor, deceased, will not take the case out of the statute of limitations.[64] Where the probate court is given the power to limit the time between certain periods within which claims against an executor or administrator must be made, his having once exercised that power by fixing a certain term, any extension of that term can only be had upon showing good

original intestate which has come into his hands." Telfair *v.* Stead, 2 Cranch 407, 415, 2 L. Ed. 320.

56. Board of Public Works *v.* Columbia College, 17 Wall. 521, 21 L. Ed. 687.

57. Statutes of limitation.—See, generally, the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION.

58. Distinctions.—Security Trust Co. *v.* Black River Nat. Bank, 187 U. S. 211, 229, 47 L. Ed. 147.

59. When statute begins to run.—C recovered a judgment against A, in the supreme court of New York. Three years afterwards A, a citizen of Minnesota, died testate, directing in his will that S and X be executors. The will was proved in probate court of Minnesota. Most of A's estate was in California and proof of will and authenticated copy of Minnesota court was sent to California, and the estate wound up there. C did not make himself a party to the proceedings of the California court, but brought suit upon the New York judgment in the circuit court of the United States for the District of Minnesota against S and X as executors of last will and testament of A. S never took actual part in the distribution of A's estate. He was served with process and appeared and defended the suit denying that he was or ever had been executor of A's estate. But judgment was entered against S personally, which judgment was reversed as being erroneous in form. Whereupon the lower court entered a judgment nun pro tunc against S as executrix upon its former decision and findings. A bill was filed, within one year after the nunc pro tunc order, in the lower court to marshal the assets of estate of A, and it was held, that the suit was not barred by the statute of limitations of Minnesota regarding the time within which suit against a decedent's estate should be filed, the time beginning from the last nunc pro tunc order. Borer *v.* Chapman, 119 U. S. 587, 603, 30 L. Ed. 532.

60. Effect of disabilities.—Morgan *v.* Hamlet, 113 U. S. 449, 452, 28 L. Ed. 1043; Security Trust Co. *v.* Black River Nat. Bank, 187 U. S. 211, 229, 47 L. Ed. 147.

61. Faw *v.* Roberdeau, 3 Cranch 174, 2 L. Ed. 402.

62. Where claim is by executor.—Glover *v.* Patten, 165 U. S. 394, 405, 41 L. Ed. 760.

63. Who may plead.—Ingle *v.* Jones, 9 Wall. 486, 19 L. Ed. 621.

64. Acknowledgment of debt.—Thomp-

cause before final settlement.[65] The statute of Georgia of March 16, 1869, requiring actions for the enforcement of rights of individuals under acts of incorporation or by operation of law, which accrued prior to June 1, 1865, to be brought before January 1, 1870, did not apply to claims against the estate of a deceased person, so as to exclude the time which a previous statute allowed to administrators to ascertain the condition of the estate, and to creditors to file their claims.[66] The 9th section of the act of assembly of North Carolina, passed in 1715, which directed that unless the creditors of deceased persons should make their claim within seven years after the death of the debtor, they should be barred, was repealed by the act of 1789, c. 23, notwithstanding the act of 1799, which declared the contrary.[67] Where an action was not brought until after the time limited by the order of the probate court for the filing, examination and allowance of claims against a decedent's estate, nor until after the examination and allowance of the administrator's final account, under the laws of Minnesota the official existence of the administrator as such had ceased and no action could be maintained against him.[68] It has been held that it would be attended with the most inconvenient and pernicious consequences, to determine, that a creditor could not compel a payment from his debtor's estate, nor even bring a suit against the executors, for a period of twelve months.[69]

(5) *Binding Effect of State Laws on Federal Courts.*—As to the binding effect of the state laws regulating limitations of actions against decedent's estates, as recognized in the federal courts, see the title COURTS, vol. 4, p. 895.

V. Distribution—1. WHAT LAW GOVERNS.—It has long been settled, and is a principle of universal jurisprudence, in all civilized nations, that the personal estate of the deceased is to be regarded, for the purposes of succession and distribution, wherever situated, as having no other locality than that of his domicile and, if he dies intestate, the succession is governed by the law of the place where he was domiciled at the time of his decease, and not by the conflicting laws of the various places where the property happened at the time to be situated.[70] Where the law of a state providing that a wife should retain certain property in her own right, notwithstanding her coverture, went into operation before a daughter arrived at the age of eighteen years, the distribution to her will be considered to have been made under that law.[71]

2. ASSENT OF PERSONAL REPRESENTATIVE.—The assent of an executor must be obtained before a legatee can take possession of a legacy. But this assent may be implied, and an assent to the interest of the tenant for life in a chattel enures to vest the interest of the remainder. Therefore, where a bill averred the possession of the subject of the legacy by the life tenant in pursuance of the bequest in the will, and this bill was demurred to, it is sufficient to raise a presumption that the possession was taken with the assent of the executor.[72]

son *v.* Peter, 12 Wheat. 565, 6 L. Ed. 730.

65. Extension of time.—Security Trust Co. *v.* Black River Nat. Bank, 187 U. S. 211, 236, 47 L. Ed. 147.

While the state probate court may, upon good cause shown by the administrator or executor, before final settlement, extend the time for the settlement of the estate, and where no application was made to the federal court to exercise such a power either before or after the limitation prescribed under the state statute had expired, the United States supreme court declined to say whether or not, upon a good cause shown, a federal court might extend the time in which a claim might be asserted against a decedent's estate beyond the term previously fixed by the probate court. Security Trust Co. *v.* Black River Nat. Bank, 187 U. S. 211, 226, 47 L. Ed. 147.

66. Mills *v.* Scott, 99 U. S. 25, 25 L. Ed. 294.

67. Ogden *v.* Blackledge, 2 Cranch 272, 2 L. Ed. 276.

68. Security Trust Co. *v.* Black River Nat. Bank, 187 U. S. 211, 224, 47 L. Ed. 147.

69. Time for action.—Roberts *v.* Cay, 2 Dall. 260, 263, 1 L. Ed. 373.

70. What law governs distribution.—Wilkins *v.* Ellett, 9 Wall. 740, 742, 19 L. Ed. 586; Mackey *v.* Coxe, 18 How. 100, 104, 15 L. Ed. 299.

71. Price *v.* Sessions, 3 How. 624, 11 L. Ed. 755, citing Paige *v.* Sessions, 4 How. 122, 11 L. Ed. 903.

72. Assent of personal representative.—

3. Fairness Required.—Personal representatives are under obligation to dispose of the property vested in their hands according to the express will of the testator, and they are not at liberty to act in the interests of one legatee as against those of another.[73]

4. Time of Distribution.—The executors have no power to distribute the property before the happening of contingencies mentioned in the will.[74]

5. Medium of Payment.—It has been held that the decree of a probate court directing the payment of distributive shares in Confederate bonds, was a nullity and afforded no protection to the executor in the courts of the United States.[75]

6. Transmutation by Declaration of Intention.—Transmutation will not be affected by the mere making of a written instrument setting aside a bond and mortgage to meet a particular legacy, in the absence of the consent of the legatees or an order of court.[76]

7. Indemnity.—Where an heir at law took an intestate's lands at a valuation, and the orphans' court only required him to give bonds to those entitled, under the act of assembly, to a distributive share, it was held that such practice was illegal and improper and that the court should, instead of bonds, which are a mere personal security, take recognizances, by which the lands themselves would be bound for the distributive shares.[77]

8. Partial Distribution.—Where partial distributions were charged against specific legacies and not against the legatee's interest in the residue, it was held that there was no ground for complaint.[78]

9. Liability of Legatee for Excess of His Share in Mortgage Assigned Him.—In the distribution of the estate of a deceased person, an assignment, to one of the distributees, of a mortgage which is for a greater sum than his distributive share, does not make him responsible to the executors for the difference between his share and the nominal amount of the mortgage, in case the mortgaged premises sell for less than the amount of his share, where the distributee has, with proper diligence, and in good faith, subjected the mortgaged property to sale, and has not bound himself absolutely for the nominal sum secured by the mortgage.[79]

10. Payment to Foreign Guardian.—A transfer of property of a testator in the District of Columbia to one, as administrator or representative of his minor children, residing in Louisiana, who by that law was empowered to hold, was held valid and binding when there were no creditors, even though the testator was domiciled in Virginia, and if the property had been administered in Virginia, regardless of the power of the father under the Louisiana law he would not be entitled to receive or remove the property from the jurisdiction without an order made by a Virginia court and upon the giving of satisfactory security.[80]

McClanahan *v.* Davis, 8 How. 170, 12 L. Ed. 1033.

73. Fairness required.—Adams *v.* Cowen, 177 U. S. 471, 483, 44 L. Ed. 851.

74. Time of distribution.—Price *v.* Sessions, 3 How. 624, 11 L. Ed. 755, citing Paige *v.* Sessions, 4 How. 122, 11 L. Ed. 903.

75. Medium of payment.—Horn *v.* Lockhart, 17 Wall. 570, 21 L. Ed. 657.

76. Transmutation by mere declaration.—Testator died leaving the interest on $4,000 to C. for life, and at C.'s death the $4,000 to be equally divided between X, Y, Z; P. was appointed executor in New York and G. and J. executors in Michigan. G. and J. during the lifetime of C. by a written instrument, set apart a bond and mortgage to be held by them as executors under the will, in trust, from which to collect the interest on the $4,000, which at the time of the execution of the paper had been overdue more than seventeen months. None of the legatees under the will consented to the setting apart of the bond and mortgage, nor was there any order from the court. Held, that the written instrument, even though put on record, amounted to no more than if they had retained the bond and mortgage, it was revocable at any time, and did not amount to the decisive and irrevocable act which must exist to have the effect to transmute property. Sherman *v.* Jerome, 120 U. S. 319, 326, 30 L. Ed. 680.

77. Indemnity.—Walton *v.* Willis, 1 Dall. 265, 1 L. Ed. 130.

78. Partial distribution.—McIntire *v.* McIntire, 192 U. S. 116, 123, 48 L. Ed. 369.

79. Liability of legatee for excess of his share in mortgage assigned him.—Hammond *v.* Washington, 1 How. 14, 11 L. Ed. 30.

80. Payment to foreign guardian.—Dar-

11. Receipt or Release by Distributee.—Where a legatee, laboring under undue influence, gives a receipt or release of his interest in the estate without any consideration, such release will be set aside in equity.[81]

12. Enforcement of Distribution.—A court of chancery, as an incident to its power to enforce trusts, and make those holding a fiduciary relation account, has jurisdiction to compel executors and administrators to account and distribute the assets in their hands.[82] Where a creditor seeks the aid of a court of equity for the distribution of an estate, the existence of an undisputed debt by the deceased must appear.[83] In suit brought against executors to obtain payment of legacies bequeathed in a will, it was held that the residuary legatees were not necessary parties.[84] Where there was a suit for the distribution of a fund, it was held that all who participated in the fund ought to be made parties to the suit.[85] Where one was suing an administrator for a legacy, and creditors and persons claiming as heirs at law had already filed bills against the administrator, it was held that the creditors and heirs at law should be joined as defendants with the administrator.[86] In a suit in the circuit court of the United States by a distributee of the estate of a decedent to recover a distributive share, the mere

lington *v.* Turner, 202 U. S. 195, 237, 50 L. Ed. 992.

81. Receipt or release by distributee.—Adams *v.* Cowen, 177 U. S. 471, 483, 44 L. Ed. 851, which was case in which a distributee released practically his entire interest in his father's estate, he being in very straitened circumstances, broken in spirit and wavering in purpose, at times impressed with the idea that the administrators had a moral if not a legal claim upon him, and that he should yield up his legacy to the estate, and this claim was pressed and insisted upon by the administrators. It was held that this amounted simply to a gift to the administrators for the benefit of the other legatees whose only claim rested on the bounty of the testator, the court in passing upon this point saying: "Courts of equity view such transactions with distrust, and if the circumstances indicate that the trustee has dealt with the beneficiaries unjustly, will not hesitate to set them aside. The absence of any adequate consideration in itself raises a presumption of unfairness which the trustee is bound to repell." See, also, the titles GIFTS; TRUSTS AND TRUSTEES; UNDUE INFLUENCE.

82. Enforcement of distribution.—Payne *v.* Hook, 7 Wall. 425, 431, 19 L. Ed. 260.

83. Proof of debt.—Board of Public Works *v.* Columbia College, 17 Wall. 521, 527, 21 L. Ed. 687.

84. Parties.—Dandridge *v.* Washington, 2 Pet. 370, 377, 7 L. Ed. 454.

In Glover *v.* Patten, 165 U. S. 394, 402, 41 L. Ed. 760, the court said: "The second assignment, that there is a nonjoinder of necessary parties defendant, is based upon the theory that there are three legatees interested in the estate to the amount of $45,000; that there is no averment that these legatees have been paid, or can be paid in full, out of the personal estate if the claims of the complainants and those of other creditors are satisfied. There is nothing in this objection. The complainants do not sue as executrices, but expressly aver that they bring the suit 'in their own right' as creditors of their mothers' estate, and for the purpose of establishing their debt. To such a suit other creditors are not necessary parties. The case of Dandridge *v.* Washington, 2 Pet. 370, 377, 7 L. Ed. 454, is directly in point. This was a suit brought by the plaintiff against the executors of the will of Mrs. Martha Washington to obtain payment of legacies bequeathed to him in her last will. In reply to an objection that the residuary legatees under the will should have been made parties, Mr. Chief Justice Marshall observed: 'They have undoubtedly an interest in reducing the sum to be allowed out of it to the complainant, but they have the same interest in reducing every demand on the estate. Whatever remains sinks into the residuum, and that residuum is diminished as well by the claims of creditors and specific legatees as by this. In all such cases the executors represent the residuary legatees and guard their interests. It is a part of that duty which requires them to protect the interests of the estate. In such suits the residuary legatees are never made parties. To require it would be an intolerable burden on those who have claims on an estate in the hands of executors.' If this be the law with respect to residuary legatees, who are necessarily and directly interested in defeating every other claim against the estate, with much greater force is the rule applicable to specific legatees, who are in much less danger of being affected by the allowance of other claims. That such legatees need not be joined is as clearly settled as that other libelants need not be joined as respondents in a suit in admiralty to establish a claim against a vessel, although they may be admitted to defend."

85. Dandridge *v.* Washington, 2 Pet. 370, 376, 7 L. Ed. 454.

86. Armstrong *v.* Lear, 8 Pet. 52, 72, 8 L. Ed. 863.

fact that the administrator is ordered to account before a master does not make parties all who were entitled to distribution, nor authorize a decree in their favor. If such persons do not appear before the master, no decree can be made for or against them, because they would not be bound thereby. If they should appear and claim an interest, if there are controverted matters between them and the administrator outside of the mere accounting to be made by him, this can only be decided on proper pleadings and regular hearing by the court. A bill which seeks to set aside a fraudulent receipt obtained by an administrator from one distributee, and to recover the amount coming to that distributee, is not a suit in which all other persons interested in the estate can be heard unless they are made parties, or make themselves parties to the suit in some appropriate mode.[87] Where the executor paid legacies to persons who had occupied property, which, it was alleged, belonged to the deceased, and the occupiers claimed to hold it in consequence of an uninterrupted possession of twenty years, the justice of their claim could not be tried in a collateral manner, by objecting to this item of the executor's account, on the ground that he should have set up the claim for rent in set-off to the legacy.[88] Under the laws of some jurisdictions, the executor has a right to refrain from pleading the statute of limitations when sued, and to pay a judgment thus obtained against him. The judgment, at all events, must stand good until reversed.[89] As to enforcement of distribution in federal courts, see the title COURTS, vol. 4, p. 895.

13. CONCLUSIVENESS OF DISTRIBUTION.—A decree of a court of competent jurisdiction awarding a sum in the hands of an administrator to distributees, cannot be attacked collaterally.[90] The payment of a legacy to an innocent party who takes the same without knowledge of the fact that the funds so received are being misapplied by the executor, is conclusive as against a third person who may have suffered loss by reason of the payment of the legacy.[91] In the distribution of a common fund amongst the several parties interested, an absent party, who had no notice of the proceedings, and who was not guilty of willful laches or unreasonable neglect, will not be concluded by the decree of distribution from the assertion of his right by will or petition against the trustee, executor, or administrator; or, in case they have distributed the fund in pursuance of an order of the court, against the distributees.[92]

W. Accounting—1. DUTY TO ACCOUNT.—It is the duty of the personal representative to render accounts of his transactions,[93] except where the circumstances of the case render it unnecessary.[94] An administrator who is displaced

87. Hook *v.* Payne, 14 Wall. 252, 20 L. Ed. 887.

88. Set-off.—West *v.* Smith, 8 How. 402, 12 L. Ed. 1130.

89. Waiver of limitation of actions.—West *v.* Smith, 8 How. 402, 12 L. Ed. 1130.

90. Conclusiveness of distribution.—Stovall *v.* Banks, 10 Wall. 583, 19 L. Ed. 1036.

91. Holly *v.* Missionary Society, 180 U. S. 284, 295, 45 L. Ed. 531.

T., executor, paid to M. a legacy which H., client of T., claimed to be a misapplication of the funds within the hands of T. It was held that in view of the fact that M. had no notice or knowledge, actual or imputable, that T. was misapplying funds entrusted to him by a third person with whom M. had no relations whatever, as against M., H. had no equities, and even if it could be said that equities were equal, a court of equity would not transfer a loss that had already fallen upon one innocent party to another equally innocent. Holly *v.* Missionary Society, 180 U. S. 284, 295, 45 L. Ed. 531.

92. Williams *v.* Gibbes, 17 How. 239, 15 L. Ed. 135.

If the portion of the absentee had been paid over by the executors in pursuance of an order of the court in an administration suit, the defendants would be protected to that extent, and the complainant compelled to proceed against the distributees. Williams *v.* Gibbes, 17 How. 239, 257, 15 L. Ed. 135.

93. Duty to account.—Telfair *v.* Stead, 2 Cranch 407, 416, 2 L. Ed. 320.

94. There is no need of having an accounting of personal estate where the evidence in the record shows that there is no personal estate. Burton *v.* Smith, 13 Pet. 464, 484, 10 L. Ed. 248.

In Peter *v.* Beverly, 10 Pet. 532, 570, 9 L. Ed. 522, approved in Bank *v.* Beverly, 1 How. 134, 147, 11 L. Ed. 75, it was held that: "From the nature of the expenditure for the daily expenses of the family, it could hardly be expected that a regular

must account to his successor.[95] According to the English law, as administered by the ecclesiastical courts, the representative of a deceased administrator or executor intestate, are required to account directly to the persons beneficially interested in the estate, distributees, next of kin, or creditors, and the accounting may be made or enforced in the probate court, which is the proper court to supervise the conduct of administrators and executors.[96]

2. To What Court Made.—Regularly an accounting should be made to the court which grants the letters of administration.[97]

3. Compelling Accounting.—A court of chancery, as an incident to its power to enforce trusts, and make those holding a fiduciary relation account, has jurisdiction to compel executors and administrators to account and distribute the assets in their hands.[98] Where a suit in chancery was brought by legatees, claiming an account, in order to pay their legacies, and their bill was dismissed, without an account, the court held that such decree could only be supported by showing that there were in the hands of the administrator no assets which ought to have been applied to the purposes prayed in the bill.[99]

4. Charges.—The matters with which a personal representative will stand charged, will be found treated elsewhere.[1]

5. Credits—a. *Commission.*—On general principles, it would seem just and proper for courts to make some compensation to executors for such services as paying over legacies, no less than for paying debts. In the case of specific legacies, the trouble and risk are as great, if not greater, than in moneyed legacies, and it would be difficult to find elementary principles to justify commissions in one case, withholding them in the other.[2] Where the matter of commissions is submitted to the discretion of the court, its decision within its authority and jurisdiction, must be considered binding.[3] Where an administrator sued to recover a

account would be kept; and especially, under the large discretion given by the testator in his will, in relation to his maintenance of his family."

If an administrator of a deceased partner and all the beneficiaries acquiesce in and consent to the continued employment of the partnership property in the business of the partnership subsequently carried on by the surviving partners, and there is no difficulty or dispute between the parties in interest as to the extent of their several shares, there is no imperative necessity for the administrator to present accounts to the probate court as long as it is deemed expedient to continue all the property in the joint business, as an account would have no practical value because no immediate settlement of the estate is proposed. Hoyt *v.* Sprague, 103 U. S. 613, 627, 26 L. Ed. 585.

95. Where representative is displaced.—Beall *v.* New Mexico, 16 Wall. 535, 21 L. Ed. 292; United States *v.* Walker, 109 U. S. 258, 261, 27 L. Ed. 927; Ro Bards *v.* Lamb, 127 U. S. 58, 62, 32 L. Ed. 60.

The statutes of some states provide that where there are two or more administrators, and the letters of one are revoked, he must account to his coadministrator "as to an administrator de bonis non," and as, in the instance of the resignation of a sole administrator, he must account to his successor, so where there are more than one, he who resigns must account to his coadministrator, as such successor, who would in effect in such case be an administrator de bonis non. Veach *v.* Rice, 131 U. S. 293, 316, 33 L. Ed. 163.

The act of congress of February 20, 1846, to enlarge the power of the several orphans' courts held in and for the District of Columbia, providing the court shall have power to order and require any assets and estate of the decedent which may remain unadministered to be delivered to the newly-appointed administrator de bonis non, did not mean that the removed administrator must "deliver" damages to the successor. United States *v.* Walker, 109 U. S. 258, 265, 27 L. Ed. 927.

96. Representative of deceased administrator or executor.—Beall *v.* New Mexico, 16 Wall. 535, 21 L. Ed. 292; United States *v.* Walker, 109 U. S. 258, 261, 27 L. Ed. 927.

97. To what court made.—Glover *v.* Patten, 165 U. S. 394, 41 L. Ed. 760. See, generally, post, "Accounting," XI, E.

98. Compelling accounting.—Payne *v.* Hook, 7 Wall. 425, 431, 19 L. Ed. 260.

99. Silsby *v.* Young, 3 Cranch 249, 261, 2 L. Ed. 429.

1. Charges.—See ante, "Personal Liability of Executor or Administrator," VI, X.

2. Right to commissions.—West *v.* Smith, 8 How. 402, 411, 12 L. Ed. 1130.

3. Conclusiveness of allowance of commissions.—West *v.* Smith, 8 How. 402, 411, 12 L. Ed. 1130; Nicholls *v.* Hodges, 1 Pet. 562, 565, 7 L. Ed. 263; Barney *v.* Saunders, 16 How. 535, 14 L. Ed. 1047.

There were two trustees of real and

certain amount, which was granted, but the court also allowed the defendant to pay only a certain part and retain the amount he would be entitled to by distribution of the estate, it was held that the administrator could get commission on all recovered—that actually paid and that not paid.[4] The law does not forbid gratuitous services, even in fiduciary relations, and if acts purport to be done gratuitously, no claim for payment can be founded upon them at a later date.[5]

b. *Reimbursement for Expenditures.*—It being the business and duty of the representative to defend the will, he is entitled to a reasonable allowance for what he has to pay in doing so.[6] An amount paid by executors for the curtails and discounts on notes of their testator running in the banks, is properly allowed to their credit. These are debts due from the estate; and whatever payments are made, are for, and on account of, the estate.[7]

6. CONCLUSIVENESS OF SETTLEMENT—a. *General Rule as to Collateral Attack.*—The accounts of an administrator settled by the probate court cannot be collaterally attacked or questioned. They are conclusive, until impeached for fraud or mistake in a direct proceeding in equity, instituted for that purpose.[8]

b. *Conclusiveness upon Issue of Devastavit Vel Non.*—A final account settled by the administrator with the orphans' court, is not conclusive evidence in his favor, upon the issue of devastavit vel non.[9]

c. *Conclusiveness as to Property Accidentally or Fraudulently Withheld.*—It is well established that a settlement of an administrator's account, by the decree of a probate court, does not conclude as to property accidentally or fraudulently withheld from the account. If the property be omitted by mistake, or be subsequently discovered, a court of equity may exercise its jurisdiction in the premises, and take such action as justice to the heirs of the deceased or to the creditors of the estate may require, even if the probate court might, in such case, open its decree and administer upon the omitted property. And a fraudulent concealment of property, or a fraudulent disposition of it, is a general and always existing ground for the interposition of equity.[10]

d. *Settlement by Referees.*—It has been held that a settlement was not conclusive, where left by consent with referees on a citation before the register of wills.[11]

e. *Conclusiveness as to Advertisement of Sale.*—In Louisiana the account of

personal estate for the benefit of a minor. One of the trustees was also administrator de bonis non upon the estate of the father of the minor, and the other trustee was appointed guardian to the minor. When the minor arrived at the proper age, and the accounts came to be settled, the trustees ought not to have been charged with an amount of money, which the administrator trustee had paid himself as a commission, that item having been allowed by the orphans' court, its correctness could not be reviewed, collaterally, by another court. Barney *v.* Saunders, 16 How. 535, 14 L. Ed. 1047.

4. Amount of commission.—Harrison *v.* Perea, 168 U. S. 311, 325, 42 L. Ed. 478.

5. Gratuitous services.—McIntire *v.* McIntire, 192 U. S. 116, 123, 48 L. Ed. 369.

Where an order was by consent of all parties, to the effect, among other things, that one should act as administrator, "but without any allowance for commission or other charge for his services as such administrator," and the assets should remain in the hands of the court, and later the assets were put into the hands of the administrator, upon petition by him offering to give an additional bond, the second order putting the assets in the administrator's hands, and his giving an additional bond did not entitle him to receive commissions. McIntire *v.* McIntire, 192 U. S. 116, 123, 48 L. Ed. 369.

6. Reimbursement for attorneys' fees.—McIntire *v.* McIntire, 192 U. S. 116, 122, 48 L. Ed. 369; Harrison *v.* Perea, 168 U. S. 311, 325, 42 L. Ed. 478.

7. Reimbursement for discounts on notes.—Peter *v.* Beverly, 10 Pet. 532, 570, 9 L. Ed. 522, approved in Bank *v.* Beverly, 1 How. 134, 147, 11 L. Ed. 75.

8. General rule as to collateral attack.—Tate *v.* Norton, 94 U. S. 746, 751, 24 L. Ed. 222. See, also, Alexander *v.* Bryan, 110 U. S. 414, 420, 28 L. Ed. 195; Security Trust Co. *v.* Black River Nat. Bank, 187 U. S. 211, 47 L. Ed. 147.

9. Conclusiveness of issue of devastavit vel non.—Beatty *v.* Maryland, 7 Cranch 281, 3 L. Ed. 343.

10. Conclusiveness as to property accidentally or fraudulently withheld.—Griffith *v.* Godey, 113 U. S. 89, 93, 28 L. Ed. 934.

11. Settlement by referees.—Marriot *v.* Davey, 1 Dall. 164, 1 L. Ed. 83.

an executrix recorded in the probate court is competent evidence to prove the advertisement of a sale.[12]

f. *Where Representative Charges Himself with Assets before Collection.*—Nothing is more common than for an executor or an administrator to charge himself with debts due the estate before they are collected, and thus expedite a final settlement; it would be dangerous to hold that, as between the executor or administrator and the debtor, such a settlement was conclusive evidence of the actual payment of the debt and the discharge of the debtor.[13]

g. *Settlement as Having Force and Effect of Judgment.*—Undoubtedly, final settlements of administrators and executors, when adjudicated, have the force and effect of judgments as between the parties to such settlements.[14]

h. *On Whom Binding.*—An executor's settlement when adjudicated binds only the parties thereto.[15] Testamentary accounts confirmed by a probate court "in all respects in which they are not opposed," cannot be regarded as "duly homologated," so as to conclude persons whose opposition has never been withdrawn, but is still active.[16]

i. *Direct Attack.*—If one seeks to impeach ex parte settlements of accounts by executors, in the courts, it should be by a suit brought, recenti facto, within a reasonable time, and at most, within the period prescribed by the statute of limitations for actions at law on matters of account; or else assign some ground of exception or disability, within the analogy of the statute, to justify or excuse the delay; otherwise, it will be imputed to their voluntary laches, and relief will not be given by a court of equity.[17] Ex parte settlements of accounts by executors, in the orphans' court, being matters within the acknowledged jurisdiction of the court in the administration of estates, are prima facie evidence of their correctness, and the onus probandi is upon those who seek to impeach them.[18]

X. Personal Liability of Executor or Administrator—1. STATEMENT AS TO LIABILITY.—An executor or administrator is responsible for all the assets of whatsoever kind which come into his hands as personal representative and which he has not accounted for and paid over as directed by the will.[19] An admin-

12. Conclusiveness as to advertisement of sale.—Davis *v.* Gaines, 104 U. S. 386, 398, 26 L. Ed. 757.

13. Where representative charges himself with assets before collection.—Butterfield *v.* Smith, 101 U. S. 570, 572, 25 L. Ed. 868.

14. Settlement as having force and effect of judgment.—Butterfield *v.* Smith, 101 U. S. 570, 572, 25 L. Ed. 868.

15. On whom settlement binding.—Butterfield *v.* Smith, 101 U. S. 570, 25 L. Ed. 868.

An executor charged himself in the inventory of the estate of the testator with a note payable to the latter and secured by mortgage. His accounts were settled on that basis. An administrator with the will annexed subsequently brought suit to foreclose the mortgage. Held, that the probate record showing that inventory and the order for distributing the assets of the testator is not conclusive evidence that the note has been paid. Butterfield *v.* Smith, 101 U. S. 570, 25 L. Ed. 868.

16. Gaines *v.* New Orleans, 6 Wall. 642, 18 L. Ed. 950.

17. Effect of delay in attacking.—Lupton *v.* Janney, 13 Pet. 381, 10 L. Ed. 210.

The executor of L. filed his accounts in the orphans' court of Alexandria, in 1816 and 1818, and settled his final account in 1821; no exceptions were taken to the accounts; in November, 1831, a subpœna was issued against the executor, and in June, 1833, a bill was filed by the devisee and legatee, against the executor, the object of which was to surcharge and falsify the accounts filed and settled in the orphans' court; the bill did not charge the executor with fraud, but imputed negligence, which was alleged to amount to a devastavit; no reason was given, or facts stated, to excuse the long delay and laches in bringing the bill. Held, that the lapse of time from the settlement of the accounts of the executor was a bar to this proceeding. Lupton *v.* Janney, 13 Pet. 381, 10 L. Ed. 210.

Where an executor has settled what appears to be a final account, it must be a very strong case of fraud proved in such a settlement, or of clear accident or mistake, to make it just to reopen and revise the account after the lapse of twenty years and the death of the parties concerned. Taylor *v.* Benham, 5 How. 233, 263, 12 L. Ed. 130.

18. Presumptions and burden of proof.—Lupton *v.* Janney, 13 Pet. 381, 10 L. Ed. 210.

19. Personal liability for assets.—De-

istrator who stands charged on record as owing his estate money, which he ought to have put into his account and held as an identified fund, is liable for legal interest.[20] And in a state where the law allows ten per cent. per annum interest, a decree will not be reversed, because it allows against a fraudulent administrator eight per cent. interest with annual rests.[21] If the personal representative fail in the proper discharge of his trust, he is liable to the parties injured thereby, as all trustees are liable in such cases,[22] whether he himself gains by his misbehavior or not,[23] and his accomplices, if he has any, are held liable on the same principle and to the same extent.[24] Thus, the executor or administrator will be held personally liable where he grossly misconstrues the will,[25] wantonly neglects the property,[26] converts the estate to his individual use,[27] unreasonably calls in good investments,[28] takes insufficient secu-

Valengin *v.* Duffy, 14 Pet. 282, 290, 10 L. Ed. 457; United States *v.* Walker, 109 U. S. 258, 263, 27 L. Ed. 927.

As to liability of the executor or administrator in his representative capacity, see ante, "Liability for Assets Received," VI, S.

An executor having sold the lands of the estate and received the consideration, he must be responsible to the residuary legatees. But he is not responsible for more money than he receives, with interest, unless in case of very supine negligence or willful default. And where the claim is advanced that the funds derived from the sale are insufficient to cover the expenses, such claim has no weight when advanced by the representative of the executor, unless accompanied by an exhibit of the account. Taylor *v.* Benham, 5 How. 233, 275, 12 L. Ed. 130.

"When assets have been turned into money by an executor or administrator, he is bound to account, not for the identical money received, but for an equal amount; and if he fails to account for and pay over this equal amount he is liable in damages, which are measured by the proceeds of the assets so turned into money." United States *v.* Walker, 109 U. S. 258, 265, 27 L. Ed. 927.

20. Interest.—McIntire *v.* McIntire, 192 U. S. 116, 124, 48 L. Ed. 369.

21. Hook *v.* Payne, 14 Wall. 252, 20 L. Ed. 887.

22. Personal liability for improper discharge of trust.—Glasgow *v.* Lipse, 117 U. S. 327, 334, 29 L. Ed. 901; McBurney *v.* Carson, 99 U. S. 567, 572, 25 L. Ed. 378; Taylor *v.* Benham, 5 How. 233, 275, 12 L. Ed. 130.

23. Taylor *v.* Benham, 5 How. 233, 275, 12 L. Ed. 130.

24. Liability of accomplices.—McBurney *v.* Carson, 99 U. S. 567, 572, 25 L. Ed. 378; Glasgow *v.* Lipse, 117 U. S. 327, 334, 29 L. Ed. 901, in which case the court said: "We may even concede the doctrine declared by the court of appeals of Virginia, that a debtor who pays to an executor in depreciated currency a debt payable in gold or its equivalent, knowing at the time that the currency is not needed for the payment of debts or legacies, or other uses of the estate, and that the safety of the debt does not require its collection, may be also charged as a participant in the devastavit." See, generally, the title ACCOMPLICES AND ACCESSORIES, vol. 1, p. 63.

25. Gross misconstruction of will.—A testator provided in his will that if all his debts and legacies could be paid before certain bonds could be collected then what remained due on the bonds should go to certain persons; providing further that in case of accident by fire before his debts and legacies were paid, then the executors were to hold his estate together, until they could add $10,000 to what would be received from insurance. The debts and legacies could be paid before the bonds were collected, and then the buildings were destroyed by fire, and the executors applied the bonds towards raising the sum of $10,000. Held, that this was a misapplication of assets. Pray *v.* Belt, 1 Pet. 670, 679, 7 L. Ed. 309.

26. Wanton neglect of property.—The personal representative cannot wantonly neglect the property without incurring personal liability for the consequent depreciation. Glasgow *v.* Lipse, 117 U. S. 327, 333, 29 L. Ed. 901.

27. Converting estate to individual use.—Where the assets of the estate have been wrongfully and knowingly taken and converted to the individual use of the personal representative, he is personally liable for such funds, together with the usual rate of interest, without investigation into the question as to what profits he may have made. Harrison *v.* Perea, 168 U. S. 311, 323, 42 L. Ed. 478.

28. Unreasonable calling in of investments.—If the personal representative call in good investments when the money is not needed, he thereby renders himself personally liable. Glasgow *v.* Lipse, 117 U. S. 327, 333, 29 L. Ed. 901.

In many cases it has been held that the payment by the executor of his own private debt with the assets of the testator is a devastavit; that is, a wasting of the estate. There are, indeed, some exceptions to this, as where the executor has paid debts of the testator with his own money to the value of the assets used. But, beyond a few exceptions of this kind, such a use of the assets is considered entirely

rity,[29] accepts payment in depreciated currency,[30] makes investments in unstable bonds,[31] accepts payment of debts for less than their face value,[32] unreasonably extends time of payment,[33] fails to pay debts when discovered,[34] prematurely distributes the estate,[35] or wrongfully obstructs the distribution thereof,[36] contracts in his own name,[37] fails to account for proceeds of sales,[38] or fails to file a tableau;[39] but the general rule is that a personal representative will not be sub-

indefensible, and the party receiving them will not be permitted to retain them, on the ground that the transaction itself gives him notice of their misapplication, and thus necessarily involves him as a participator in the fraud. And the doctrine is supported by many authorities that where a party has reasonable grounds for believing that an executor intends to misapply them, or is in the very transaction converting them to private uses, such party can take no advantage from the transaction. Smith *v.* Ayer, 101 U. S. 320, 327, 25 L. Ed. 955.

29. Taking insufficient security.—An executor, who, by taking an inferior security, brings a loss upon his testator's estate, shall himself be liable. Hunter *v.* Bryant, 2 Wheat. 32, 42, 4 L. Ed. 177.

30. Accepting payment in depreciated currency.—The personal representative renders himself personally liable if he accepts the payment of debts in depreciated currency when better currency can be had, unless it can be advantageously used in meeting expenses, discharging debts, paying legacies, and the like. Glasgow *v.* Lipse, 117 U. S. 327, 333, 29 L. Ed. 901.

He may, however, take payment of a debt, when not secured, in the best money he can get, when its safety requires its collection. Glasgow *v.* Lipse, 117 U. S. 327, 333, 29 L. Ed. 901.

31. Investments in Confederate bonds.—It has been held that an executor was not discharged from his liability to legatees by having invested funds, pursuant to a statute of the state, and with the approval of the probate court by which he had been appointed, in bonds of the Confederate States, which became worthless in his hands. Lamar *v.* Micou, 112 U. S. 452, 476, 28 L. Ed. 751; Horn *v.* Lockhart, 17 Wall. 570, 580, 21 L. Ed. 657; McBurney *v.* Carson, 99 U. S. 567, 571, 25 L. Ed. 378; Baldy *v.* Hunter, 171 U. S. 388, 395, 43 L. Ed. 208; Knotts *v.* Stearns, 91 U. S. 638, 642, 23 L. Ed. 252; Alexander *v.* Bryan, 110 U. S. 414, 417, 28 L. Ed. 195.

But as to the rule where the representative, in the collection of assets, accepts such depreciated currency, see ante, "Accepting Depreciated Currency," VI, I, 3.

32. Accepting payment of debts for less than face value.—The personal representative by accepting payment of debts for less than the face value when the full amount can be recovered without unnecessary delay and expense, renders himself personally liable for any loss sustained by his action. Glasgow *v.* Lipse, 117 U. S. 327, 333, 29 L. Ed. 901.

33. Unreasonable extension of time of payment.—It be generally true, that the executor, who, by unreasonably extending time of payment, brings a loss upon his testator's estate, shall himself be liable. Hunter *v.* Bryant, 2 Wheat. 32, 42, 4 L. Ed. 177.

34. Failure to pay debts.—The duty of an administrator arises to pay the debts when their existence is discovered, and his bond is forfeited when that duty is disregarded. Green *v.* Creighton, 23 How. 90, 108, 16 L. Ed. 419.

35. Premature distribution.—If an executor shall have prematurely distributed the estate of his testator, the creditor has an action at law against him. Riddle *v.* Mandeville, 5 Cranch 322, 330, 3 L. Ed. 114.

36. Wrongful obstruction of distribution.—Where an administrator willfully obstructed the distribution of the assets of the estate and by his conduct rendered it necessary for one to bring suit to obtain possession of them, the necessity for commencing arose entirely out of his wrongful conduct, it was held that the administrator was responsible for the costs of the suit. Harrison *v.* Perea, 168 U. S. 311, 327, 42 L. Ed. 478.

A breach of administration bonds occurs where an administrator continues to hold in his hands sums of money belonging to the distributees of the intestate's estate, which he has been ordered to pay over by a court of competent jurisdiction. Stovall *v.* Banks, 10 Wall. 583, 588, 19 L. Ed. 1036.

37. Contracts in executor's own name.—An executor who covenants in his own name, and yet describes himself as executor, is personally liable, for the obvious reason that he substitutes himself for his principal. Duvall *v.* Craig, 2 Wheat. 45, 56, 4 L. Ed. 180.

38. Failure to account for proceeds of sale.—Where an administrator sells property which has been conveyed to him for the purpose of securing a debt due to his intestate's estate, his failure to account for the proceeds amounts to a devastavit. Long *v.* O'Fallon, 19 How. 116, 15 L. Ed. 550.

39. Effect of failure to file tableau.—Under the laws of Louisiana if the administrator or curator neglect or refuse to file a tableau of the estate, and obtain the order of the judge to make payment, he can be compelled to do so on the demand of the party interested, or in default thereof render himself responsible in his personal capacity, this procedure being as indispensable under the Louisiana law to

jected to liability for losses which he could not foresee.[40] The liabilities of coexecutors will be found treated elsewhere in this article.[41]

2. PROCEDURE[42]—a. *Judgment as Prerequisite.*—At common law, an executor or administrator is not chargeable on a devastavit, until a judgment shall be obtained against him.[43]

b. *Manner in Which Defenses Must Be Set Up.*—An executor or administrator is bound to defend himself by legal pleading, and can have no relief in equity.[44]

c. *Effect of Admission of Assets.*—The executor's admission that he had assets may be taken against him for the purpose of charging him with a liability,[45] but it cannot serve him as evidence to prove the truth of his plea. His mere allegation cannot be received as proof of its own truth where the fact is directly in issue, and the burden of proof is on him.[46]

d. *Effect of Plea of General Issue.*—If an executor or administrator pleads only the general issue, and has a verdict against him, it is an admission of assets.[47]

e. *Effect of False Plea in Bar.*—If the executor or administrator file a plea in bar which he knows to be false, it is an admission of assets.[48]

authorize a proceeding against the executor or administrator to make him personally responsible, as an action and judgment are necessary at common law to charge him with a devastavit. McGill *v.* Armour, 11 How. 142, 152, 13 L. Ed. 638.

40. Losses impossible to foresee.—Tate *v.* Norton, 94 U. S. 746, 750, 24 L. Ed. 222.

Prior to the Civil War an Arkansas administrator became possessed of a large estate of his decedent, consisting of lands, stock, slaves, and a small amount of money. He cultivated the land and had paid all the debts but one when the Civil War ensued. The state was a battle field. The slaves were sent to Texas, and the mules and other live stock were swept away in the conflict. The lands hardly paid the expenses of cultivating them, and finally the slaves as property were stricken out of existence. This involved an immense loss to the estate, and the administrator became wholly unable to pay the remaining debt. It was held that the calamity was unforeseen and one for which he was not responsible. Tate *v.* Norton, 49 U. S. 746, 748, 24 L. Ed. 222.

"The executor, who takes charge of the affairs of a man in trade, must, necessarily, on the winding up of his affairs, be allowed a reasonable latitude of discretion; and in general, where there is manifest fidelity, diligence and ordinary judgment displayed, this court will always, with some reluctance, enforce the rigid rules which courts have been obliged, for the protection of estates, to impose upon the conduct of executors." Hunter *v.* Bryant, 2 Wheat. 32, 42, 4 L. Ed. 177.

41. Liability for devastavit of coexecutor.—See ante, "Rights and Duties of Coexecutors and Coadministrators," VI, P.

42. Procedure.—See post, "Action on Bond," VII, H.

43. Judgment as prerequisite.—McGill *v.* Armour, 11 How. 142, 152, 13 L. Ed. 638. And see Beall *v.* New Mexico, 16 Wall. 535, 21 L. Ed. 292.

There can be no devastavit which will sustain an action against an administrator until he has violated an order of the probate court to pay creditors; and his accounts settled by that court cannot be collaterally attacked, but are conclusive, until, by a direct proceeding in equity instituted for that purpose, they are impeached for fraud or mistake. Tate *v.* Norton, 94 U. S. 746, 24 L. Ed. 222.

44. Manner in which defenses must be set up.—McGill *v.* Armour, 11 How. 142, 152, 13 L. Ed. 638.

45. Admission of assets.—Kennedy *v.* Creswell, 101 U. S. 641, 645, 25 L. Ed. 1075.

A bill filed by A. for himself and other creditors against B., executor of C., and the devisees of the latter, alleged that C. was indebted to him, that the personal assets were insufficient to pay the debts, and that B. was paying some of them in full and leaving others unsatisfied. It prayed for an account of the personal estate, the application thereof to the payment of the debt, and the discovery of the real estate whereof C. died seised. The defendants pleaded in bar that B. had in his hands assets sufficient to pay A.'s claim and all others. To this plea A. filed a replication. The proofs sustained the allegations of the bill, but showed those of the plea to be untrue. Held, that as by reason of B.'s admission of assets no discovery was required, a decree against him rendering him individually liable was proper. Kennedy *v.* Creswell, 101 U. S. 641, 25 L. Ed. 1075.

46. Kennedy *v.* Creswell, 101 U. S. 641, 643, 25 L. Ed. 1075.

47. Effect of plea of general issue.—McGill *v.* Armour, 11 How. 142, 152, 13 L. Ed. 638.

48. Effect of false plea in bar.—McGill

f. *Plea of Plene Administravit.*—Plene administravit is doubtless a good plea, and, if sustained by sufficient evidence, it is a good defense; but the rule is, that the jury, under such a plea, if no devastavit is averred, must find the amount of the assets, if any, before any judgment can be rendered.[49] If the representative plead plene administravit, and on this plea assets are found to be in his hands, he is liable only to the amount of such assets.[50] It is not required that the plea should state with precision the assets remaining unadministered; and an executor or administrator would always incur great hazard, if he were required to state and prove the precise sum remaining in his hands, under the penalty of being exposed to a judgment for the whole amount claimed, whatever it might be. To state a full administration, without proving it, would be useless. The rule and usage, therefore, is, that if the plea of fully administered be found against the defendant, the verdict ought to find the amount of assets unadministered, and the defendant is liable for that sum only.[51] When an administrator pleads plene administravit, the plaintiff may admit the plea, and take judgment of assets, quando acciderint.[52]

g. *Effect of Default Judgment.*—If an executor or administrator suffer judgment by default, it is an admission of assets.[53]

h. *Limitation of Actions.*—A claim for damages for mismanagement of the estate would be subject to the operation of the statute of limitations.[54] The statute of limitations, if it runs at all in favor of an executor, should begin from the time of his final accounting, and any special excuse for not suing within the prescribed time should be pleaded.[55] Where the cestui que trusts resided in a foreign country, it was held that the statute of limitations did not begin to run until a demand was made upon the executor for the money, as his retaining it during that time was no evidence that he did not intend to account for it.[56]

i. *Parties.*—Where a citizen of one state applies to the federal courts in another state to enforce his claim against an administrator arising out of the wrongful administration of the estate, the other distributees need not be made parties.[57]

j. *Form of Judgment.*—As to whether the judgment should be de bonis testatoris or de bonis propriis, see post, "Form of Judgment," IX, B, 6.

v. Armour, 11 How. 142, 152, 13 L. Ed. 638.

A bill filed by A. for himself and other creditors against B., executor of C., and the devisees of the latter, alleged that C. was indebted to him, that the personal assets were insufficient to pay the debts, and that B. was paying some of them in full and leaving others unsatisfied. It prayed for an account of the personal estate, and the application thereof to the payment of the debt, and the discovery of the real estate whereof C. died seized. The defendants pleaded in bar that B. had in his hands assets sufficient to pay A.'s claim and all others. To this plea A. filed a replication. The proof sustained the allegation of the bill, but showed those of the plea to be untrue. Held, that A. was entitled to a decree as though the bill had been confessed or admitted. Kennedy *v.* Creswell, 101 U. S. 641, 25 L. Ed. 1075.

49. Plea of plene administravit.—Smith *v.* Chapman, 93 U. S. 41, 43, 23 L. Ed. 795, citing Fairfax *v.* Fairfax, 5 Cranch 19, 3 L. Ed. 24.

50. McGill *v.* Armour, 11 How. 142, 152, 13 L. Ed. 638.

51. Siglar *v.* Haywood, 8 Wheat. 675, 679, 5 L. Ed. 713.

Upon the issue of plene administravit, the jury must find specially the amount of assets in the hands of the executor; otherwise, the court cannot render judgment upon the verdict. Fairfax *v.* Fairfax, 5 Cranch 19, 3 L. Ed. 24.

52. Peck *v.* Jenness, 7 How. 612, 623, 12 L. Ed. 841.

53. Effect of default judgment.—McGill *v.* Armour, 11 How. 142, 152, 13 L. Ed. 638. Dickson *v.* Wilkinson, 3 How. 57, 11 L. Ed. 891.

54. Limitation of actions.—Taylor *v.* Benham, 5 How. 233, 275, 12 L. Ed. 130. See, generally, the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION.

55. Taylor *v.* Benham, 5 How. 233, 278, 12 L. Ed. 130.

56. Taylor *v.* Benham, 5 How. 233, 234, 276, 12 L. Ed. 130.

57. Parties.—Byers *v.* McAuley, 149 U. S. 608, 616, 37 L. Ed. 867.

As to the jurisdiction of such federal courts, see the title COURTS, vol. 4, p. 895.

VII. Administration Bonds.

A. Purpose.—The ordinary bond for faithful administration is not intended to transfer the jurisdiction of questions connected with such administration from the appropriate and exclusive sphere of the probate courts to that of the common-law courts, but is designed to secure the enforcement of the decrees of the probate court, after they are rendered against the executor or administrator, whereby his breach of duty is established in the proper forum.[58]

B. What Law Governs.—Where one has given bonds, as executor, under the laws of one state, it has been held that the obligations of the executor and his sureties was determined by what had been the judicial interpretation and administration of that law in such state, uncontrolled by any decisions of other courts elsewhere.[59]

C. Control.—The ordinary bond for faithful administration is subject to control of the court by which it was taken.[60]

D. Form.—The ordinary bond for faithful administration is taken by the probate court,[61] or in the name of the state, but is held for the security of the persons interested in the estate of the deceased.[62]

E. Property Covered.—Where the laws of a state provide that the heirs of an intestate may take the property and pay the debts, and in pursuance of their right the heirs withdraw property from the administrator and sell it, by that act the responsibility as to that property, ceases.[63]

F. Additional Bonds.—Where the orphans' court of the District of Columbia called for bonds to secure the amount with which an administrator then stood charged, and such as he might afterwards get, it was held that the bonds were properly taken out under act of 1846.[64]

G. Liability of Principal.—The guaranty of an administrator's bond is not against general wrongdoing on the part of the administrator, but simply against his misconduct while in charge of the property of the estate. When that property passes out of his custody, his liability and that of his sureties cease.[65] A principal in an administration bond may be liable beyond the stipulation of the instrument.[66] As to the personal liability of representatives, generally, see ante, "Personal Liability of Executor or Administrator," VI, X.

H. Action on Bond.—The jurisdiction of a court of equity to enforce an administrator's bond arises from its jurisdiction over administrators, its disposition to prevent multiplicity of suits, and its power to adapt its decrees to the substantial justice of the case.[67] An action at law on an administrator's bond, to recover the value of property unnecessarily and improperly sold by him, and the damages resulting from such sale, is not a bill for an accounting.[68] Regularly, a decree of the probate court against the administrator for an amount due, and an order for leave to prosecute his bond, are prerequisite to the maintenance of a suit thereon.[69]

I. Rights and Liabilities of Sureties—1. General Statement as to Lia-

58. Purpose of administration bond.—Beall *v.* New Mexico, 16 Wall. 535, 542, 21 L. Ed. 292.

59. What law governs.—Ennis *v.* Smith, 14 How. 400, 415, 14 L. Ed. 472.

60. Control over administration bonds.—Beall *v.* New Mexico, 16 Wall. 535, 542, 21 L. Ed. 292.

61. Form of bond.—Beall *v.* New Mexico, 16 Wall. 535, 542, 21 L. Ed. 292.

62. Maryland *v.* Baldwin, 112 U. S. 490, 491, 28 L. Ed. 822.

63. Property covered.—Norman *v.* Buckner, 135 U. S. 500, 503, 34 L. Ed. 252.

64. Additional bonds.—Ennis *v.* Smith, 14 How. 400, 14 L. Ed. 472.

65. Norman *v.* Buckner, 135 U. S. 500, 503, 34 L. Ed. 252.

66. Stovall *v.* Banks, 10 Wall. 583, 588, 19 L. Ed. 1036.

67. Jurisdiction over administration bonds.—Green *v.* Creighton, 23 How. 90, 108, 16 L. Ed. 419.

As to jurisdiction of the federal courts, see the title COURTS, vol. 4, p. 942.

68. Nature of action on bond.—Norman *v.* Buckman, 135 U. S. 500, 507, 34 L. Ed. 252.

69. Jurisdictional determination as a prerequisite.—Beall *v.* New Mexico, 16 Wall. 535, 21 L. Ed. 292. See post, "Jurisdictional Ascertainment and Judgment as a Prerequisite to Action against Surety," VII, I, 2.

BILITY.—The general rule is that the sureties in an administration bond are bound to the full extent to which their principal is bound.[70]

2. JUDICIAL ASCERTAINMENT AND JUDGMENT AS A PREREQUISITE OF ACTION AGAINST SURETY.—In some states until there is a judicial ascertainment of the default of the principal, the liability of the surety is not fixed, and it is only that ascertainment which creates a cause of action against the surety, and authorizes suit against him.[71] And after there has been a judicial ascertainment of a default by an executor, to be able to collect from the surety on the executor's bond, there must be a decree ordering payment and on which process can issue against the principal.[72]

3. BINDING EFFECT OF DECREE AGAINST PRINCIPAL.—Sureties in an administration bond are bound by a decree against their administrator finding assets in his hands, and nonpayment of them over, to the same extent to which the administrator himself is bound. They cannot attack collaterally a decree made against him on such a subject.[73]

4. WHERE PRINCIPAL ACTS IN MORE THAN ONE CAPACITY.—In case of a trust created by a will and no trustee appointed, the executor must act as such trustee, and his sureties are liable for his defaults, whether in one sphere of duty or the other.[74] Also, where one is administrator of one estate and executor of another, his sureties on his administration bond are not liable for waste committed by him as executor, and even though the deceased persons were partners.[75]

5. EXTENT OF LIABILITY AS REGARDS MEDIUM OF PAYMENT.—Where an Alabama probate decree ascertained a distributee's share to be so much and ordered the executor to make payment in Confederate bonds, it was held that, since this was no direction to pay in lawful money of the United States and only an order to turn over the bonds, the executor could not be sued to pay in anything but the bonds, hence the surety could not be sued to pay in lawful money of the United States.[76]

6. DISCOVERY.—Where the original debtor and his surety are both dead, insolvent, and a portion of the assets of the estate of the latter can be traced to the possession of his administrator and his surety, the power of a court of

70. Liability of sureties.—Stovall *v.* Banks, 10 Wall. 583, 588, 19 L. Ed. 1036.

A principal in an administration bond may be liable beyond the stipulation of the instrument, independently of them, but so far as his liability is in consequence of the bond, and by force of its term, his surety is bound with him. There may be special defenses for a surety arising out of circumstances, but in their absence, whatever concludes his principal as an obligor concludes him. Stovall *v.* Banks, 10 Wall. 583, 588, 19 L. Ed. 1036.

And failure to account for proceeds of property sold, which was conveyed to him to secure a debt due his intestate's estate, renders the sureties liable as well as the administrator himself. Long *v.* O'Fallon, 19 How. 116, 15 L. Ed. 550.

71. Judicial ascertainment and judgment as a prerequisite.—Alexander *v.* Bryan, 110 U. S. 414, 418, 28 L. Ed. 195. See, also, Mackey *v.* Coxe, 18 How. 100, 104, 15 L. Ed. 299.

72. Alexander *v.* Bryan, 110 U. S. 414, 418, 419, 28 L. Ed. 195.

It is well settled that no one can proceed at law against the sureties on an administration bond until he has obtained a judgment against the administrator; but this rule is not founded upon the supposition that there is no breach of the bond until a judgment is actually obtained. Green *v.* Creighton, 23 How. 90, 16 L. Ed. 419.

73. Binding effect of decree against principal.—Stovall *v.* Banks, 10 Wall. 583, 19 L. Ed. 1036. See, also, Alexander *v.* Bryan, 110 U. S. 414, 420, 28 L. Ed. 195.

As to the general treatment as to who are bound by judgments and decrees, see the titles JUDGMENTS AND DECREES; RES ADJUDICATA.

A judgment against the administrator in which a devastavit had been suggested, and a return of nulla bona to an execution, was good evidence against the surety of the administrator, and also against the fraudulent grantee of the intestate. McLaughlin *v.* Bank, 7 How. 220, 12 L. Ed. 675.

74. Where principal acts in more than one capacity.—McBurney *v.* Carson, 99 U. S. 567, 572, 25 L. Ed. 378.

75. Norman *v.* Buckner, 135 U. S. 500, 506, 34 L. Ed. 252.

76. Extent of liability as regards medium of payment.—Alexander *v.* Bryan, 110 U. S. 414, 419, 28 L. Ed. 195.

equity is required to call for a discovery of the amount and nature of the assets in hand.[77]

7. Sureties Holding Claims against the Estate.—Where sureties on an administrator's bond, held claims against the estate, and the heirs withdrew property from the possession of the administrator and sold it, the purchaser assuming the payment of debts and the administrator became executor of the estate of the purchaser, it was held that the sureties were not obliged to enforce their claims against the estate of the purchaser, but could go immediately against whatever was left of the estate of the original debtor.[78]

8. Where Additional Bonds Required.—Where, under the act of 1846, additional bonds were called for by the orphans' court of the District of Columbia to secure the amount with which an administrator then stood charged, and such as he might afterwards get and they were accepted and approved by the court for that purpose, the sureties being fully aware of the state of the account which the administrator had filed, the sureties were answerable for the administrator's waste, unless there existed something else in case to relieve them.[79] But when other sureties are called for by the orphans' court, under the third section of the act of February 20, 1846, and are given, they do not bear the same relation to the administrator that his original sureties did, and they will be bound for the waste of their principal to the amount of the estate, or funds which he has charged himself by his return to the orphans' court, as administrator de bonis non, when it called for additional sureties, and for such as the administrator may afterwards receive.[80]

9. Agreements to Indemnify Surety.—Agreements by third parties to indemnify from loss a surety, who signs an administration bond under an arrangement whereby the estate is to be administered by them instead of the administrator appointed, are against the policy of law and illegal.[81] Where loss is sustained by a surety in an administration bond, who entered into the suretyship under a representation from a firm of which the administrator is a member, that they intended to take into possession of the partnership all the assets of the intestate, to make the administration a matter of partnership business and share as partners the gains and losses resulting from the administration, so that in signing the bond he would become the surety of the firm and not of the individual partner, it cannot be recovered by the surety from the firm.[82]

10. Limitation of Actions.—In Alabama in case of an executor's misfeasance or malfeasance, to bind the executor's surety, the bar in favor of the surety must be computed from the ascertainment of the default of the principal, and there must be something more than an auditing of accounts, or an ascertainment or judgment that a distributee's share is so much or that the distributee is entitled to so much, but there must be a decree ordering payment and on which process to collect can issue against the principal.[83]

11. Release or Discharge of Sureties.—Where the laws of a state provide that the heirs of an intestate may take the property and pay the debts, and in pursuance of their right the heirs withdraw property from the administrator and sell it, by that act the responsibility of the sureties on the administrator's bond, as to that property, ceases; and this release of liability is in no manner abridged by the fact that the administrator may thereafter, in his individual or in some other representative capacity, obtain the title or possession of the property thus

77. **Discovery.**—Green *v.* Creighton, 23 How. 90, 16 L. Ed. 419. See, generally, the title DISCOVERY, vol. 5, p. 350.

78. **Sureties holding claims against the estate.**—Norman *v.* Buckner, 135 U. S. 500, 505, 507, 34 L. Ed. 252.

79. **Where additional bonds required.**—Ennis *v.* Smith, 14 How. 400, 14 L. Ed. 472.

80. Ennis *v.* Smith, 14 How. 400, 14 L. Ed. 472.

81. **Agreements to indemnify surety.**—Forsyth *v.* Woods, 11 Wall. 484, 20 L. Ed. 207. See, generally, the title ILLEGAL CONTRACTS.

82. Forsyth *v.* Woods, 11 Wall. 484, 20 L. Ed. 207.

83. **Limitation of actions.**—Alexander *v.* Bryan, 110 U. S. 414, 418, 28 L. Ed. 195.

removed from his custody as administrator.[84] Where several supposed sureties were discharged from liability on an administrator's bond because their names had been improperly signed, such discharge did not release the other sureties, where the bond was taken in good faith.[85] Where, under a power of attorney from the administrators of the estate of a decedent, one is authorized to collect money due the estate in another jurisdiction, and for that purpose takes out letters of administration therein, and on collection signs a receipt as attorney for money paid by himself as attorney for the administrators, the receipt is good, and the sureties on his administration bond remain no longer liable.[86]

J. Payment into Court of Money Recovered on Bond.—The money which may be recovered on the ordinary bond for faithful administration is ordinarily to be paid into the court by which it was taken, for distribution as assets of the estate, unless recovered to satisfy a particular judgment or decree.[88]

VIII. Resort to Court for Direction and Advice.

When in doubt as to the proper course he should pursue, the personal representative should seek the authority and direction of the proper court.[89] Where bills in equity are filed by executors for their protection, that they may have a construction of the will, and the direction of the court as to the disposition of property, courts from necessity, and in order to protect the trustee, are compelled to settle questions as to the validity and effect of contingent limitations in a will, even to persons not in esse, in order to make a final decree and give proper instructions in relation to the execution of the trusts.[90] And where an appropriation is made to a party for the benefit of others, and himself included, who, on obtaining payment of the sum appropriated, goes into a court of equity, seeking to have the fund distributed under its authority, stating all the facts, and while claiming the right to share in the distribution of the money, submits the whole question as to proper distribution to the court, the court has jurisdiction to determine as to the real meaning and proper construction of the act of congress.[91] Where executors resort to equity for advice and construction of a will, by reason of claims for estate made thereunder, they appear as complainants and make all of the legatees and distributees, or those claiming to be en-

84. Release or discharge of sureties.—Norman *v.* Buckner, 135 U. S. 500, 503, 34 L. Ed. 252.

85. Effect of discharge of cosurety.—Veach *v.* Rice, 131 U. S. 293, 318, 33 L. Ed. 163.

86. Where principal pays money in one capacity and receipts in another.—Mackey *v.* Coxe, 18 How. 100, 15 L. Ed. 299.

Administrators upon an estate who were appointed in the Cherokee nation gave a power of attorney to A to collect the money belonging to the decedent due from the United States. The United States would not pay unless A took out letters of administration in the District of Columbia. A took out the letters and B acted as his surety. A then collected the money and died without enough to pay what he had collected. Suit was then brought by the administrators of the decedent against the surety on A's bond. It was held that they could not collect, for A was their duly authorized agent and the money was placed in his hands with full power to receive it. Mackey *v.* Coxe, 18 How. 100, 104, 15 L. Ed. 299.

88. Payment into court of money recovered on bond.—Beall *v.* New Mexico, 16 Wall. 535, 542, 21 L. Ed. 292.

89. Resort to court for direction and advice.—Glasgow *v.* Lipse, 117 U. S. 327, 333, 29 L. Ed. 901.

If the personal representative is doubtful as to the meaning of any clause in the will, he should appeal to the court for its consideration and direction. Adams *v.* Cowen, 177 U. S. 471, 483, 44 L. Ed. 851.

It is competent and proper, when claims for estate are made under a will, for executors to file a bill in equity to obtain a construction of the will and advice of court. Colt *v.* Colt, 111 U. S. 566, 582, 28 L. Ed. 520.

"There is authority for saying that a trustee having notice that it is doubtful if the trust fund should be distributed according to the trusts under which he holds it, he should apply to the court for its direction, before he executed the trust, by paying over the fund." Williams *v.* Gibbes, 20 How. 535, 540, 15 L. Ed. 1013.

90. Duty of courts to direct and advise.—Cross *v.* DeValle, 5 Wall. 1, 15, 17 L. Ed. 515.

91. Buchanan *v.* Patterson, 190 U. S. 353, 47 L. Ed. 1093.

titled as such, parties defendant. They cannot make themselves defendants as trustees; or file a bill as complainants in double character and for different purposes and represent inconsistent interests. But they may, as executors and complainants, set forth whatever case exists, with all its questions and claims in which they may have inconsistent interests, officially and personally, bringing themselves before the court in every character in which they have an interest to assert or defend, and all others beneficially interested in the subject matter of the controversy.[92]

IX. Actions by and against Executors or Administrators.[93]

A. Actions by Executors or Administrators—1. CAPACITY TO SUE—a. *General Statement.*—The right of the administrator or executor to sue in the ordinary courts of the country to enforce the payment of debts owing the decedent in his lifetime, and unpaid at his death, has always been recognized; and it is believed that no system of administering the estate of decedents has changed this principle.[94] Where the letters of administration state that the deceased, at time of death, had personal property in the state granting the letters, it shows prima facie authority in the administrator to sue in that state.[95] In an action brought by an executor or administrator touching the collection and settlement of the estate of the deceased, the letters issued to an executor or administrator are conclusive evidence of his right to sue for and receive whatever was due to the deceased. The letters are conclusive evidence of the probate of the will.[96]

b. *Necessity for Probate.*—Until probate of the will, and until letters testamentary are obtained, the executor cannot obtain any judgment, because it cannot appear that he is executor.[97]

c. *Suits against Himself.*—An executor cannot maintain a suit at law against himself.[98]

d. *Effect of Substitution of Administrator as a Party.*—The substitution in the appellate court of an administrator as a party in place of his intestate on the record, in a case pending on appeal, only authorizes the prosecution of that case in his name; it confers no right to prosecute any other suit in his name.[99]

e. *As Affected by Removal.*—By removal from office, the executor is as

92. **Procedure when asking directions.**—Colt *v.* Colt, 111 U. S. 566, 582, 28 L. Ed. 520.

Where the subject matter of the litigation was not any trust estate in property held by the executors, but was the residuary stock, and the respective rights and interests of all the legatees in its distribution, it was held that the executors were not trustees for some of the legatees in the sense of being bound to assert their claims adversely to all others, for whom equally they were trustees of the residuum, and their duty, both as trustees and executors, was fully performed when they invoked the judgment of the court, in the proceeding as framed, in the presence of all the parties beneficially interested. Colt *v.* Colt, 111 U. S. 566, 583, 584, 28 L. Ed. 520.

93. **Actions by and against executors or administrators.**—See ante, "Protection of Estate," VI, H; "Collection of Assets," VI, I; "Enforcement of Claims," VI, U, 12; "Enforcement of Distribution," VI, V, 12.

94. **Capacity to sue.**—Hess *v.* Reynolds, 113 U. S. 73, 76, 28 L. Ed. 927. See the title COURTS, vol. 4, p. 895. And see ante, "Protection of Estate," VI, H.

95. New England Mut. Life Ins. Co. *v.* Woodworth, 111 U. S. 138, 143, 28 L. Ed. 379.

96. Mutual Benefit Life Ins. Co. *v.* Tisdale, 91 U. S. 238, 243, 23 L. Ed. 314.

But in a suit brought by the plaintiff in his individual character, and not as administrator, to recover a debt upon a contract between him and the defendant, where the right of action depends upon the death of a third person, letters of administration upon the estate of such person granted by the proper probate court, in a proceeding to which the defendant was a stranger, afford no legal evidence of such death. Mutual Benefit Life Ins. Co. *v.* Tisdale, 91 U. S. 238, 23 L. Ed. 314.

97. **Necessity for probate.**—Griffith *v.* Frazier, 8 Cranch 9, 21, 3 L. Ed. 471.

98. **Suits against himself.**—Glover *v.* Patten, 165 U. S. 394, 405, 41 L. Ed. 760; Page *v.* Patton, 5 Pet. 304, 313, 8 L. Ed. 134; Field, J., in Bryan *v.* Kales, 134 U. S. 126, 135, 33 L. Ed. 829.

99. **Effect of substitution of administrator as party.**—Noonan *v.* Bradley, 9 Wall. 394, 19 L. Ed. 757.

completely separated from the business of the estate as if he had been dead, and has no right to appear in or be a party in any court, to a suit which the law confided to the representative of the deceased.[1]

2. Capacity in Which Suit May Be Brought.—The declaration, in an action by an executor for the recovery of money received by the defendant, after the decease of the testator, may be in the name of the plaintiff, as executor, or in his own name, without stating that he is executor. The distinction is, that when an executor sues on a cause of action which accrued in the lifetime of his testator, he must declare in the detinet, that is, in his representative capacity only; but when the cause of action accrues after the death of the testator, if the money, when recovered, will be assets, the executor may declare in his representative character, or in his own name.[2] Where an administrator holds negotiable paper by virtue of a blank endorsement, he has the right, and the sole right, to say in which capacity he elects to hold, as owner, or as administrator, and consequently may sue as administrator or in his own right.[3] After judgment recovered in a suit by an administrator, the debt is due to the plaintiff in his personal capacity, and he may declare that the debt is due to himself.[4]

3. Averments as to Official Character.—That it is not necessary, in actions upon such judgments, that the plaintiff name himself as administrator, follows, from his not being bound to make profert of the letters of administration, and when he does so name himself, it may be rejected as surplusage.[5] Where a bill made no distinction between the two characters in which the executor acted, namely, as an executor proper, and as an executor having a power coupled with a trust, no objection being taken in the court below upon this ground, it was held that an amendment is imperatively necessary.[6]

4. Profert and Oyer of Letters.—The necessity of a profert of letters of administration depends upon the local laws of a state.[7] As a general rule at law, the defendant might crave oyer; but in equity they must petition that the will and letters testamentary may be produced, and it is no cause of demurrer that they are not set forth in the bill.[8] It has been held that unless oyer be craved and granted, the letters cannot be judicially examined.[9] It is not necessary, under the general issue, to produce letters testamentary. If the defendant in the cause wished to have them produced, he should have pleaded, and put the matter in issue.[10] In an action upon a judgment recovered in favor of an administrator, the plaintiff is not bound to make a profert of the letters of administration.[11] Upon the death of a plaintiff, and appearance of his executor, the defendant is not entitled to a continuance. But he may insist on the production of the letters testamentary, before the executor shall be permitted to prosecute.[12] But an objection for failure to make profert, if it has any founda-

1. Effect of removal.—Taylor *v.* Savage, 1 How. 282, 286, 11 L. Ed. 132, cited in Taylor *v.* Savage, 2 How. 395, 11 L. Ed. 313.

2. Capacity in which suit may be brought.—Kane *v.* Paul, 14 Pet. 33, 10 L. Ed. 341.

3. Matheson *v.* Grant, 2 How. 263, 264, 283, 11 L. Ed. 261.

4. Biddle *v.* Wilkins, 1 Pet. 686, 692, 7 L. Ed. 315.

A. as administrator of W. recovered a judgment against B. in Pennsylvania. Upon this judgment he sued B. in Mississippi and B. set up the defense that he was administrator of W., having been appointed in Mississippi, and therefore the debt due was an asset in his hands. Held, that such defense should have been pleaded in the original action and could not be inquired into a suit upon the judgment. Biddle *v.* Wilkins, 1 Pet. 686, 692, 7 L. Ed. 315.

5. Averments as to official character.—Biddle *v.* Wilkins, 1 Pet. 686, 692, 7 L. Ed. 315.

6. Taylor *v.* Benham, 5 How. 233, 234, 277, 12 L. Ed. 130.

7. Profert and oyer of letters.—Matheson *v.* Grant, 2 How. 263, 11 L. Ed. 261.

8. Telfair *v.* Stead, 2 Cranch 407, 416, 2 L. Ed. 320.

9. Childress *v.* Emory, 8 Wheat. 642, 671, 5 L. Ed. 705.

10. McKimm *v.* Riddle, 2 Dall. 100, 1 L. Ed. 306.

11. Biddle *v.* Wilkins, 1 Pet. 686, 692, 7 L. Ed. 315.

12. Wilson *v.* Codman, 3 Cranch 193, 2 L. Ed. 408.

tion, is cured by the verdict.[13]

5. Objection for Want of Authority.—Whether the objection to the character of the plaintiff as administrator or executor should be taken by a plea in abatement or a special plea in bar, would appear to have been, at one time, a matter upon which there was some diversity of opinion. In some of the cases the language used would indicate that a plea in abatement was the only appropriate form in which the objection could be presented, whilst in other cases the objection taken by a special plea in bar has been sustained.[14] The plea of ne unques executor does not deny the cause of action, but only that he is one of the representatives of the testator.[15] A distinction seems to be taken between an action brought by a person who has no right to sue, and an action brought by a person capable of suing at the time, but who becomes incapable, while it is depending; in the first case, the plaintiff may be nonsuited at the trial; in the last, the disability must be pleaded.[16]

13. Matheson *v.* Grant, 2 How. 263, 283, 11 L. Ed. 261.

14. Matheson *v.* Grant, 2 How. 263, 264, 283, 11 L. Ed. 261.

Objection for want of authority.—The objection was sustained by the supreme court, when taken by a special plea in bar, in Fenwick *v.* Sears, 1 Cranch 259, 2 L. Ed. 101, and in Dixon *v.* Ramsay, 3 Cranch 319, 2 L. Ed. 453, already cited. In the latter case a foreign executor brought an action in the District of Columbia. The defendant pleaded that he had not obtained letters in the District or in the United States, and, on demurrer, the plea was sustained. There is no principle in pleading which should prevent the objection from being taken in this way. It is only in virtue of his representative character that the plaintiff is entitled to the matters in controversy, and a plea which denies to him that character is, in its nature, a plea in bar of the action. Noonan *v.* Bradley, 9 Wall. 394, 400, 19 L. Ed. 757.

Kane *v.* Paul, 14 Pet. 33, 10 L. Ed. 341, held that the certificate of the register of wills, annexed to the proceedings of the orphans' court of Maryland, granting letters testamentary to the executor, shows that the will had been proved, and that the letters had been granted; this is proof that the person holding the letters is executor, as far as the law requires it to be proved, in an action of assumpsit upon a cause of action which arose in the time of the testator or of the executor. On the plea of the general issue, in such an action, and even in a case where that plea raises the question of right or title in the executor, the certificate of probate and qualification meets the requisition. A judicial examination into their validity can only be gone into, upon a plea in abatement, after over has been craved and granted; and then, upon issue joined, the plaintiff's title, as executor or administrator, may be disputed, by showing any of those causes which make the grant void ab initio, or that the administration had been revoked.

In Noonan *v.* Bradley, 9 Wall. 394, 401, 19 L. Ed. 757, the court said: "The language used by this court in Childress *v.* Emory, 8 Wheat. 642, 5 L. Ed. 705, and Kane *v.* Paul, 14 Pet. 33, 38, 10 L. Ed. 341, cited by counsel, was not intended to deny that the objection to the authority of the plaintiff as administrator or executor could be taken by a plea in bar, but was only intended to indicate that the objection must be specially pleaded, and could not be urged on demurrer to the declaration for alleged insufficient exhibition of letters testamentary, when profert of the letters was made, or under a plea to the merits. In the first case the court observed that if the defendant desired to object to the letters as insufficient, he should have craved oyer of them, and had them brought before the court, that unless oyer was craved and granted, the letters could not be judicially examined, and then added that if the plaintiffs were not executors, that objection should have been taken by way of abatement, and did not arise upon a demurrer in bar. The point decided was that the objection could not be taken, when profert of letters was made, without oyer of them, and did not arise in such case upon demurrer. There was no question as to the form of the plea to be used, if the objection were presented in that way; and it is clear that no determination as to the form was intended. In the second case the plea was nonassumpsit, which admitted plaintiff's right to sue. It was objected that the letters testamentary appeared on their face to have been granted in violation of the law of Maryland, but the court observed that the plea was the general issue, and that a judicial examination into their validity could only be gone into upon a plea in abatement, meaning evidently that such examination could not be had unless the objection were taken by special plea. There was no intention on the part of the court to determine as to the form of the special plea in such cases."

15. Minor *v.* Mechanics' Bank, 1 Pet. 46, 76, 7 L. Ed. 47.

16. Yeaton *v.* Lynn, 5 Pet. 224, 8 L.Ed. 105.

6. Admission of Representative Character by Plea to the Merits.—In an action by a plaintiff as administrator, a plea to the merits admits the representative character of the plaintiff to the extent stated in the declaration, and if that statement is consistent with the grant of letters within the state, it also admits his right to sue in that capacity; but such a plea admits nothing more than the title stated in the declaration.[17]

7. Actions by Coexecutors or Coadministrators.—As to actions by coexecutors or coadministrators, see ante, "Rights and Duties of Coexecutors and Coadministrators," VI, P.

8. Actions by Foreign Executors or Administrators.—As to actions by foreign executors or administrators, see post, "Capacity to Sue," XI, F, 1.

B. Actions against Executors or Administrators—1. Action of Debt.—Debt will not lie against executors, on a simple contract of the testator. A demurrer should be sustained in such a case, but if issue is pleaded no objection can afterwards be made.[18] Debt, against an executor, should be in the detinet only, unless he has made himself personally responsible, as by a devastavit.[19]

2. Garnishment.—A garnishment will not lie against an executor.[20]

3. Joinder of Actions.—Where three persons had filed three bills against an administrator, one claiming as legatee, another as creditor, and another as heir at law, it was held that all three of the bills ought, if possible, to have been brought to a hearing at the same time, in the circuit court, in order that a final disposition may, at the same time, have been made of all of the questions arising in all of them.[21]

4. Where Administrator Is Limited to Plead What Intestate Could Have Pleaded.—In Virginia, if the defendant dies after interlocutory judgment and a writ of inquiry awarded, his administrator, upon scire facias, can only plead what his intestate could have pleaded.[22]

5. Limitation of Actions.—If an executor do not cause himself to be made party to a suit, brought in the lifetime, and in the name, of the testator, and pending at his death, it is to be considered as a voluntary abandonment of the action, so as to exclude the executor from the equity of the exceptions to the statute of limitations.[23] The New York statute, which declares that the time which shall have elapsed between the death of any person and the granting of letters testamentary or of administration on his estate, not exceeding six months, and the period of six months after the granting of such letters, shall not be deemed any part of the time limited by any law for the commencement of actions by executors or administrators, does not give the party claiming the benefit of its provisions both of the two periods of six months therein mentioned, but only such time, not exceeding six months, as elapsed after the death of the testator or intestate before the granting of letters, and the additional time of six months after the granting of letters.[24]

6. Form of Judgment.—The owner of property, or of money received by an administrator, may resort to the administrator in his personal character, and charge him, de bonis propriis,[25] with the amount thus received; he may do this, or proceed against him as executor or administrator, at his election.[26] Where

17. Plea to the merits.—Noonan *v.* Bradley, 9 Wall. 394, 19 L. Ed. 757.

18. Action of debt.—Carson *v.* Hood, 4 Dall. 108, 1 L. Ed. 762.

19. Childress *v.* Emory, 8 Wheat. 642, 5 L. Ed. 705.

20. Garnishment.—McCoombe *v.* Dunch, 2 Dall. 73, 1 L. Ed. 294; Pringle *v.* Black, 2 Dall. 97, 1 L. Ed. 305.

21. Joinder of actions.—Armstrong *v.* Lear, 8 Pet. 52, 72, 8 L. Ed. 863.

22. McKnight *v.* Craig, 6 Cranch 183, 3 L. Ed. 193.

23. Limitation of actions.—Richards *v.* Maryland Ins. Co., 8 Cranch 84, 3 L. Ed. 496. See ante, "Limitation of Actions," VI, T, 12, o, (3); "Effect of Failure to Include Property in Inventory," VI, T, 12, h; "Limitation of Actions," VI, X, 2, h; "Limitation of Actions," VII, I, 10.

24. Kirby *v.* Lake Shore, etc., Railroad, 120 U. S. 130, 139, 30 L. Ed. 569.

25. Form of judgment.—See ante, "Personal Liability of Executor or Administrator," VI, X.

26. De Valengin *v.* Duffy, 14 Pet. 282, 10 L. Ed. 457.

there is nothing to show that the defendant has become personally liable, the judgment should be de bonis testatoris.[27] In common-law actions, it is not unusual to render two distinct judgments against an executor, one directing money to be levied of the goods of the deceased in his hands to be administered, and the other, if he has made himself personally liable, and there are not sufficient goods of the testator, directing the same money to be levied of his own proper goods. This is always the case with regard to the costs of the suit. In Louisiana, where the course of procedure is more flexible and more closely adapted to the nature of the case, it is not an unusual thing to render distinct judgments against the same person in several capacities.[28] Where a bill had been filed

27. Smith *v.* Chapman, 93 U. S. 41, 42, 23 L. Ed. 795; Siglar *v.* Haywood, 8 Wheat. 675, 5 L. Ed. 713; Telfair *v.* Stead, 2 Cranch 407, 418, 2 L. Ed. 320.

"When the suit is against the defendant as executor, and no devastavit is alleged, it is clear that a judgment de bonis propriis is unwarranted, even if it appear that the defendant has received assets, unless it appears that no assets can be found." Smith *v.* Chapman, 93 U. S. 41, 43, 23 L. Ed. 795; Boyce *v.* Grundy, 9 Pet. 275, 288, 9 L. Ed. 127.

An executor or administrator is not liable to a judgment, beyond the assets to be administered, unless he pleads a false plea. If he fails to sustain his plea of plene administravit, it is not necessarily a false plea, within his own knowledge; and if it be found against him, the verdict ought to find the amount of assets unadministered, and the defendant is liable for that sum only. In such a case, the judgment is de bonis testatoris, and not de bonis propriis. Siglar *v.* Haywood, 8 Wheat. 675, 5 L. Ed. 713; Smith *v.* Chapman, 93 U. S. 41, 42, 23 L. Ed. 795.

On the hearing of the case of Boyce *v.* Grundy, at January term, 1830, on an appeal from the decree of the circuit court of West Tennessee, 3 Pet. 210, 7 L. Ed. 655, the decree of the circuit court was affirmed; by which, after decreeing a rescission of a contract made between Felix Grundy and James Boyce, the intestate, for the purchase, by the former from the latter, of a tract of land lying in the state of Mississippi; the court also decreed, that Robert Boyce, the administrator of James Boyce, of the goods, etc., of James Boyce, deceased, do pay the sum of $2,065.21, to be levied on the goods of the said James Boyce, in his hands to be administered; and execution issue therefor as at law; in this decree, nothing was said as to any allowance of damages or interest. A mandate was issued in the usual form, to the circuit court, to carry the same into effect; on filing the mandate in the circuit court, in 1830, the cause was referred to the clerk, as master, to take an account of the assets of James Boyce, in the hands of the administrator, who reported that no assets appeared in the hands of the administrator, but that Robert Boyce had, under an agreement with the appellee, received for rents of the land in Mississippi, before the 1st of January, 1824, $2,100, which, with interest thereon, $1,120, to the 1st of September, 1830, would amount to $3,220; and that the land in Mississippi was devised by James Boyce, the intestate, to his son Robert Boyce. The report was confirmed, except as to the $1,120 interest; the circuit court decreed, that the plaintiff recover of Robert Boyce, $2,100, with interest from the decree; to be levied on his proper goods and chattels; and for the balance due the plaintiff, $496.46, with interest, in case the same was not paid by him; the plaintiff had for the whole amount of the decree, a lien on the lands in the state of Mississippi; and that the same should be sold to satisfy the same, by the clerk of the court, acting as a commissioner. Held, that if the sum of $2,100, the rents of the lands in Mississippi, came into the hands of Robert Boyce, as assets of the estate of James Boyce, no decree could be had against him in his individual capacity, in this case; the rents, under the agreement, upon the rescission of the contract for the sale of the land, became virtually the money of James Boyce, the intestate, and were assets in the hands of his administrator; the decree should have been rendered against his defendant in the circuit court, as administrator, and not individually. Boyce *v.* Grundy, 9 Pet. 275, 9 L. Ed. 127.

"Even if it appear that an executor has received assets, still the judgment or decree should be against him, in his representative character, to be levied out of the assets in his hands, when no devastavit is averred and proved, unless it appear that no such assets can be found; in which event, the rule is, that the judgment may, if so ordered, be levied out of his own proper goods." Smith *v.* Chapman, 93 U. S. 41, 43, 23 L. Ed. 795.

28. Kittredge *v.* Race, 92 U. S. 116, 119, 23 L. Ed. 488.

Under the code of practice in Louisiana, a suit may be brought and distinct judgments rendered against a defendant, as administratrix of her deceased husband, as widow in community, and as tutrix of his minor heirs. Kittredge *v.* Race, 92 U. S. 116, 23 L. Ed. 488.

It is not error, under the law of Louisiana, to render an absolute judgment

against a trustee of real estate, and after his death, administration had been granted to one who, on the petition of creditors, interested in the trust, was also appointed by the court, the substituted trustee, and the court went on to decree, that such person, as trustee, should execute certain conveyances; the decree was held to be invalid; the course of proceeding, being rather to make the decree against him, in the character of administrator, because he claimed, as administrator, under a title derived from the original trustee, and was the person designated by law to represent him; or that a supplemental bill, in the nature of a bill of revivor, should have been filed against the substituted trustee; in which all the proceedings should have been stated, and he required to answer the charges contained in the original and supplemental bill.[29] On only one ground may executors be permitted to defend an action of ejectment, and that is when they have an interest derived from the will, and so costs against an executor in such case should be de bonis propriis.[30]

7. Conclusiveness of Judgment.—If a judgment be rendered against one, as executor, who is not executor, it does not bind the estate of the testator.[31]

8. Actions against Coexecutor or Coadministrator.—As to actions against coexecutors or coadministrators, see ante, "Rights and Duties of Coexecutors and Coadministrators," VI, P.

9. Actions against Foreign Executors or Administrators.—As to actions against foreign executors or administrators, see post, "Liability to Suit," XI, F, 2.

C. Witnesses.—As to competency of witnesses in actions by or against personal representatives, see the title Witnesses.

X. Limited and Special Executors or Administrators.

An executor may be appointed for one of several purposes, for a part of the effects in possession of the testator at the time of his death, or for such as may be in action, if it be only for a debt due.[32] But though the executor's trust or appointment may be limited, he is, as to the creditor of the testator, executor in privity with the primary representative, bearing to the creditor the same responsibility as if there was only one executor.[33] Courts vested with the jurisdiction of granting letters testamentary and of administration have the inherent power of granting a limited administration, whenever it is necessary for the purposes of justice; as, for instance, durante minore ætate, while the executor named in the will is under age; ad litem, to defend a suit in chancery while the probate of a will is under contest; or durante absentia, when the administrator is out of the jurisdiction and therefore has not taken out letters testamentary;[34] but if the administrator durante absentia be only the agent of the executor, the executor can himself appoint, and is the proper person to appoint,

against the administrator of the succession of a surety, on a bond of a United States officer, on the theory that the judgment should have been against the administrator in due course of administration; for if by the law of Louisiana the judgment is so payable, it will be thus interpreted and enforced, subject to the priority given to the government in the distribution of the proceeds of an estate of any person indebted to the United States whose estate is insufficient to pay all debts against it. Rev. Stat., §§ 3466, 3467. Smythe *v.* United States, 188 U. S. 156, 177, 47 L. Ed. 425.

29. Greenleaf *v.* Queen, 1 Pet. 138, 148, 7 L. Ed. 85.

30. Bagnell *v.* Broderick, 13 Pet. 436, 447, 10 L. Ed. 235.

31. Conclusiveness of judgment.—Griffith *v.* Frazier, 8 Cranch 9, 3 L. Ed. 471.

As to conclusiveness of judgments, generally, see the titles JUDGMENTS AND DECREES; RES ADJUDICATA.

32. Limited and special representatives.—Hill *v.* Tucker, 13 How. 458, 466, 14 L. Ed. 223; Goodall *v.* Tucker, 13 How. 469, 14 L. Ed. 227.

33. Hill *v.* Tucker, 13 How. 458, 466, 14 L. Ed. 223; Goodall *v.* Tucker, 13 How. 469, 14 L. Ed. 227.

34. McArthur *v.* Scott, 113 U. S. 340, 399, 28 L. Ed. 1015.

A court of probate has inherent power, without specific statute authority, to grant administration limited to the defense of a particular suit. McArthur *v.* Scott, 113 U. S. 340, 28 L. Ed. 1015.

his own agent, there being no necessity for the intrusion of the ordinary.[35] The powers exercised by the English courts in these respects appertain to the courts of like jurisdiction in this country, although not specified in the statutes under which they act.[36] Until probate of the will, and until letters testamentary are obtained, the executor cannot obtain any judgment; because it cannot appear that he is executor. There is, therefore, an absolute necessity for appointing some person who, until probate, shall take care of the estate.[37] But this is not the case with an executor who, after taking out letters testamentary, absents himself from the state. He is still capable of performing, and he is still bound to perform, all the duties of an executor. There exists no legal disability in the executor, and consequently, there is no necessity for transferring to another those powers which the testator has conferred on a person selected by himself.[38] It has been held that administration durante absentia executoris, cannot be granted, after probate of the will and letters testamentary granted.[39] When a suit is brought by an administrator, during the minority of the executor, his powers as administrator are determined, when the executor has attained his full age; and the fact that he has not attained his full age must be averred in the declaration; but if this averment be omitted, and the defendant pleads in bar, he admits the ability of the plaintiff to sue, and the judgment is not void.[40] The grant of a temporary administration, as, during the minority of an executor, is ad usum et commodum executoris.[41] When a special administrator ceases to act as such, that is, when his functions cease by operation of law, he must account for the property and estate in his hands to the executor or administrator with the will annexed.[42] In matters involved in the accounts of a special administrator having charge of the estate of a testator pending a contest as to the validity of his will the executor or administrator with the will annexed represents all claiming under the will. The regular representative of the estate, before passing his receipt to the special administrator, has an opportunity to examine this settlement, and, if it is not satisfactory, to contest its correctness by some appropriate proceeding.[43] As, therefore, the regular representative of the estate has an opportunity to contest the final settlement of the special administrator, before giving him an acquittance, it cannot be said that the absence of notice to the distributees of such settlement amounts to a deprivation of their rights of property without due process of law.[44]

XI. Foreign Executors or Administrators.

A. Definition and Distinction.—The administration of an estate at the domicile of the decedent is the principal or primary administration;[45] an administration elsewhere is known as an ancillary administration, and generally is made subservient to the domestic creditors.[46]

B. Extraterritorial Powers Generally.—Every grant of administration is strictly confined in its authority and operation to the limits of the territory of the government which grants it, and does not, de jure, extend to other countries;[47] and whatever operation is allowed it beyond its original territory is a

35. Griffith *v.* Frazier, 8 Cranch 9, 24, 3 L. Ed. 471.

36. McArthur *v.* Scott, 113 U. S. 340, 399, 28 L. Ed. 1015.

37. Griffith *v.* Frazier, 8 Cranch 9, 21, 3 L. Ed. 471.

38. Griffith *v.* Frazier, 8 Cranch 9, 22, 3 L. Ed. 471.

39. Griffith *v.* Frazier, 8 Cranch 9, 3 L. Ed. 471.

40. Yeaton *v.* Lynn, 5 Pet. 224, 8 L. Ed. 105.

41. Griffith *v.* Frazier, 8 Cranch 9, 27, 3 L. Ed. 471.

42. RoBards *v.* Lamb, 127 U. S. 58, 62, 32 L. Ed. 60.

43. RoBards *v.* Lamb, 127 U. S. 58, 62, 32 L. Ed. 60.

44. RoBards *v.* Lamb, 127 U. S. 58, 62, 32 L. Ed. 60.

45. Primary administration.—Borer *v.* Chapman, 119 U. S. 587, 599, 30 L. Ed. 532; Wilkins *v.* Ellett, 108 U. S. 256, 258, 27 L. Ed. 718; Aspden *v.* Nixon, 4 How. 467, 498, 11 L. Ed. 1059.

46. Ancillary administrator.—Wilkins *v.* Ellett, 9 Wall. 740, 742, 19 L. Ed. 586; Borer *v.* Chapman, 119 U. S. 587, 599, 30 L. Ed. 532.

47. Extraterritorial powers.—Vaughan *v.* Northrup, 15 Pet. 1, 5, 10 L. Ed. 639; Dixon *v.* Ramsay, 3 Cranch 319, 2 L. Ed.

mere matter of comity, which every nation is at liberty to yield or withhold, according to its own policy and pleasure, with reference to its own institutions, and the interests of its own citizens.[48]

C. Privity between Different Personal Representatives—1. ADMINISTRATORS.—Administrators in different states are in privity to the testator, and will be estopped by a judgment against him, but they have no privity with each other in law or estate. They receive their authority from different sovereignties and over different property. The authority of each is paramount to the other. Each is administrator to the ordinary from which he receives his commission. Nor does the one come by succession to the other into the trust of the same property, encumbered by the same debts.[49]

2. EXECUTORS.—All executors have the same privity with each other and to the same testator, and the same responsibility to the creditors, notwithstanding the fact that they may have been qualified as executors in different sovereignties,[50] or that some of them are limited executors.[51] The privity arises from their obligation to pay the testator's debts, wherever his effects may be, just as his obligation was to pay them.[52]

D. Collection and Disposal of Assets—1. COLLECTION.—A grant of administration in one state cannot confer, as a matter of right, any authority to

453; Aspden *v.* Nixon, 4 How. 467, 11 L. Ed. 1059; Stacy *v.* Thrasher, 6 How. 44, 12 L. Ed. 337; Noonan *v.* Bradley, 9 Wall. 394, 19 L. Ed. 757; Wilkins *v.* Ellett, 9 Wall. 740, 19 L. Ed. 586; Johnson *v.* Powers, 139 U. S. 156, 35 L. Ed. 112; Reynolds *v.* Stockton, 140 U. S. 254, 35 L. Ed. 464; Lawrence *v.* Nelson, 143 U. S. 215, 36 L. Ed. 130; McLean *v.* Meek, 18 How. 16, 18, 15 L. Ed. 277.

In an action in one state by an administrator appointed in another state, on a bond given to the intestate, a plea that the bond was bona notabilia on the death of the decedent, in the state other than the one which appointed the administrator suing as plaintiff, and that an administrator of the effects of the decedent in that state has been appointed and qualified, is a good answer to the action. It is an averment of facts which in law excludes all right to, and control over, the property in that state by the foreign administrator. Noonan *v.* Bradley, 9 Wall. 394, 19 L. Ed. 757.

48. Vaughan *v.* Northrup, 15 Pet. 1, 10 L. Ed. 639.

49. Privity between administrators in different states.—Stacy *v.* Thrasher, 6 How. 44, 12 L. Ed. 337; Hill *v.* Tucker, 13 How. 458, 467, 14 L. Ed. 223; Goodall *v.* Tucker, 13 How. 469, 472, 14 L. Ed. 227; McLean *v.* Meek, 18 How. 16, 15 L. Ed. 277; Carpenter *v.* Strange, 141 U. S. 87, 104, 35 L. Ed. 640; Johnson *v.* Powers, 139 U. S. 156, 160, 35 L. Ed. 112. See, also, the title RES ADJUDICATA.

In Johnson *v.* Powers, 139 U. S. 156, 160, 35 L. Ed. 112, citing Stacy *v.* Thrasher, 6 How. 44, 60, 61, 12 L. Ed. 337, the court said: "'It is for those who assert this privity to show wherein it lies, and the argument for it seems to be this: That the judgment against the administrator is against the estate of the intestate, and that his estate, wheresoever situate, is liable to pay his debts; therefore the plaintiff, having once established his claim against the estate by the judgment of a court, should not be called on to make proof of it again. This argument assumes that the judgment is in rem, and not in personam, or that the estate has a sort of corporate entity and unity. But this is not true, either in fact or in legal construction. The judgment is against the person of the administrator, that he shall pay the debt of the intestate out of the funds committed to his care. If there be another administrator in another state, liable to pay the same debt, he may be subjected to a like judgment upon the same demand, but the assets in his hands cannot be affected by a judgment to which he is personally a stranger.' 'The laws and courts of a state can only affect persons and things within their jurisdiction. Consequently, both as to the administrator and the property confided to him, a judgment in another state is res inter alios acta. It cannot be even prima facie evidence of a debt; for if it have any effect at all, it must be as a judgment, and operate by way of estoppel.'"

An action of debt will not lie against an administrator, in one state, on a judgment obtained against a different administrator of the same intestate, appointed under the authority of another state. Stacy *v.* Thrasher, 6 How. 44, 12 L. Ed. 337.

50. Privity between executors.—Hill *v.* Tucker, 13 How. 458, 14 L. Ed. 223; Goodall *v.* Tucker, 13 How. 469, 14 L. Ed. 227.

51. Hill *v.* Tucker, 13 How. 458, 466, 14 L. Ed. 223; Goodall *v.* Tucker, 13 How. 469, 14 L. Ed. 227. See ante, "Limited and Special Executors or Administrators," X.

52. Hill *v.* Tucker, 13 How. 458, 466, 14 L. Ed. 223; Goodall *v.* Tucker, 13 How. 469, 14 L. Ed. 227.

collect assets of the deceased in any other state.[53] But payment to the administrator appointed in the state in which the intestate had his domicile at the time of his death, whether made within or without that state, is good against any administrator appointed elsewhere,[54] and payment of a debt arising under a life insurance contract to an administrator appointed in the state where the policy is paid will be good against an administrator appointed elsewhere.[55] The administrator of a creditor of the government, duly appointed in the state where he was domiciled at his death, has full authority to receive payment, and give a full discharge of the debt due to his intestate, in any place where the government may choose to pay it; whether it be at the seat of government, or at any other place where the funds are deposited.[56] By the act of congress of June, 1812, all debts due in the District of Columbia may be received by an administrator appointed in any of the states of the United States.[57] And a bona fide payment of a debt, to the administrator, which was due to the estate, is a legal discharge to the debtor, whether the administration be void or voidable.[58]

2. DISPOSAL.—After settlement of claims under the ancillary administration, the residuum is transmitted to the probate court of the country of the domicile, for the final settlement of the estate.[59] But a party acting in a representative capacity, under jurisdictions foreign to each other, is without power to voluntarily transfer assets from one jurisdiction to the other, as such a transfer would be a violation of his letters in the country from which the assets were removed.[60]

53. **Right of administrator to collect assets in foreign states.**—Vaughan *v.* Northrup, 15 Pet. 1, 10 L. Ed. 639; Wilkins *v.* Ellett, 9 Wall. 740, 742, 19 L. Ed. 586; McLean *v.* Meek, 18 How. 16, 18, 15 L. Ed. 277. See ante, "Collection of Assets," VI, I.

The statute of Missouri of 1868 (1 Wagner's Stat., Ed. 1872, p. 122, § 8) does not authorize a suit by a public administrator in that state against a foreign insurance company doing business there, to enforce the payment of a policy of insurance, not made or to be executed in that state, upon the life of a citizen of Wisconsin, who neither resided, died, nor left any estate in Missouri. Insurance Co. *v.* Lewis, 97 U. S. 682, 24 L. Ed. 1114.

54. **Voluntary payment to foreign representative.**—Mackey *v.* Coxe, 18 How. 100, 104, 15 L. Ed. 299; Wyman *v.* Halstead, 109 U. S. 654, 656, 27 L. Ed. 1068; Wilkins *v.* Ellett, 9 Wall. 740, 19 L. Ed. 586; Wilkins *v.* Ellett, 108 U. S. 256, 258, 27 L. Ed. 718.

55. **Payment of life insurance policy.**—Where the domicile of the intestate was in Michigan and her administrator appointed in Illinois sued and obtained judgment on a life insurance policy, it was held that the payment of its debt to the administrator in Illinois would be good against any administrator appointed elsewhere; the defendant company would be protected in paying the judgment, especially as the husband was the exclusive beneficiary under the policy, and was the administrator and the plaintiff, and the money could not be liable for any debts of the wife. New England Mut. Life Ins. Co. *v.* Woodworth, 111 U. S. 138, 28 L. Ed. 279, citing Wyman *v.* Halstead, 109 U. S. 654, 27 L. Ed. 1068.

56. **Administrator of creditor of government.**—Mackey *v.* Coxe, 18 How. 100, 105, 15 L. Ed. 299; Vaughan *v.* Northrup, 15 Pet. 1, 10 L. Ed. 639.

57. **Debts due in District of Columbia.**—Vaughan *v.* Northrup, 15 Pet. 1, 10 L. Ed. 639, citing Kane *v.* Paul, 14 Pet. 33, 10 L. Ed. 341.

Payment to a person acting under a power from administrators appointed in the Cherokee nation would be valid. Mackey *v.* Coxe, 18 How. 100, 15 L. Ed. 299. See the title INDIANS.

58. **Validity of payment as affected by validity of administration.**—Kane *v.* Paul, 14 Pet. 33, 10 L. Ed. 341.

59. **Disposal.**—Wilkins *v.* Ellett, 9 Wall. 740, 742, 19 L. Ed. 586.

60. **Transmission of assets to foreign jurisdiction.**—Aspden *v.* Nixon, 4 How. 467, 497, 11 L. Ed. 1059.

Where a person domiciled in England died, leaving property both in England and Pennsylvania, and the executor took out letters testamentary in both countries, in a suit in England against the executor by the administrator of a deceased claimant, the parties were restricted to the limits of the country to which their letters extended. The executor could not rightfully transmit the Pennsylvania assets to be distributed by a foreign jurisdiction. So, the administrator of the deceased claimant, acting under letters granted in England, only represented the intestate to the extent of these English letters and could not be known as a representative in Pennsylvania. Aspden *v.* Nixon, 4 How. 467, 11 L. Ed. 1059.

One country cannot transmit assets to another when there is a suit pending in the former for local assets. Although, in cases peculiarly circumstanced, one jurisdiction administering assets may, as mat-

E. Accounting.— The general rule is that an administrator's duty to account is limited to the state from whose courts he derives his authority,[61] and the tribunals of other states have no right to interfere with or to control the application of those assets, according to the lex loci.[62] But debts due by persons in the District of Columbia are not deemed by the act of congress of June, 1822, local assets, for which a foreign administrator would be bound to account in the courts of the district; they are general assets which he has full authority to receive, and for which he is bound to account in the courts of the state from which he derives his letters of administration.[63]

F. Actions—1. CAPACITY TO SUE.—The general rule is that a personal representative cannot sue in the courts held in another state in which he has not been appointed,[64] except where such power may be given by virtue of some

ter of comity, transmit them to a foreign jurisdiction, yet they cannot be sent to England where a suit is pending in this country for the American assets. A decree of the high court of chancery in England, purporting to distribute assets so situated, may be treated as void for one of jurisdiction. Aspden *v.* Nixon, 4 How. 467, 11 L. Ed. 1059.

Under an ancillary administration, it depends upon the discretion of the orphans' court, which granted it, whether the money, remaining in the hands of the ancillary administrator, after the satisfaction of all claims in that jurisdiction, should be distributed there, by the ancillary administrator, or remitted to the principal administrators for distribution. Mackey *v.* Coxe, 18 How. 100, 105, 15 L. Ed. 299.

61. Administrator's duty to account.— Peale *v.* Phipps, 14 How. 368, 374, 14 L. Ed. 459; Lawrence *v.* Nelson, 143 U. S. 215, 222, 36 L. Ed. 130, citing Vaughan *v.* Northrup, 15 Pet. 1, 10 L. Ed. 639; Aspden *v.* Nixon, 4 How. 467, 11 L. Ed. 1059; Stacy *v.* Thrasher, 6 How. 44, 12 L. Ed. 337; Johnson *v.* Powers, 139 U. S. 156, 35 L. Ed. 112; Reynolds *v.* Stockton, 140 U. S. 254, 272, 35 L. Ed. 464; McLean *v.* Meek, 18 How. 16, 18, 15 L. Ed. 277; Wyman *v.* Halstead, 109 U. S. 654, 657, 27 L. Ed. 1068. See ante, "Accounting," VI, W.

62. Interference by other tribunals.— Vaughan *v.* Northrup, 15 Pet. 1, 5, 10 L. Ed. 639.

63. Debts due by residents of District of Columbia.—Vaughan *v.* Northrup, 15 Pet. 1, 10 L. Ed. 639, citing Kane *v.* Paul, 14 Pet. 33, 10 L. Ed. 341. See post, "Liability to Suit," XI, F, 2.

64. Capacity of foreign administrator to sue.—Græme *v.* Harris, 1 Dall. 456, 1 L. Ed. 221; McCulloch *v.* Young, 4 Dall. 292, 1 L. Ed. 838; Mackey *v.* Coxe, 18 How. 100, 104, 15 L. Ed. 299; Noonan *v.* Bradley, 9 Wall. 394, 19 L. Ed. 757; Lawrence *v.* Nelson, 143 U. S. 215, 222, 36 L. Ed. 130, citing Vaughan *v.* Northrup, 15 Pet. 1, 10 L. Ed. 639; Aspden *v.* Nixon, 4 How. 467, 11 L. Ed. 1059; Stacy *v.* Thrasher, 6 How. 44, 12 L. Ed. 337; New England Mut. Life Ins. Co. *v.* Woodworth, 111 U. S. 138, 146, 28 L. Ed. 379; Johnson *v.* Powers, 139 U. S. 156, 35 L. Ed. 112; Reynolds *v.* Stockton, 140 U. S. 254, 272, 35 L. Ed. 464; Wilkins *v.* Ellett, 9 Wall. 740, 742, 19 L. Ed. 586; Noonan *v.* Bradley, 12 Wall. 121, 20 L. Ed. 279; Fenwick *v.* Sears, 1 Cranch 259, 2 L. Ed. 101; Dixon *v.* Ramsay, 3 Cranch 319, 2 L. Ed. 453; Kerr *v.* Moon, 9 Wheat. 565, 6 L. Ed. 161; Lewis *v.* McFarland, 9 Cranch 151, 3 L. Ed. 687.

In Smith *v.* Union Bank, 5 Pet. 518, 527, 8 L. Ed. 212, the court said: "It has been solemnly adjudged in this court, and is the general principle in, perhaps, every state in the Union, that one administering in one state cannot bring suit in the courts of another state. This necessity of administering, where the debt is to be recovered, effectually places the application of the proceeds under the control of the laws of the state of the administration. And if, in any instance, the rule is deviated from, it forms, pro hac, an exception; a voluntary relinquishment of a right, countenanced by universal practice; and is of the character of the treaty stipulations already remarked upon, by which foreign nations surrender virtually a right, which locality certainly puts in their power. Whether it would or would not be politic, to establish a different rule by a convention of the states, under constitutional sanction, is not a question for our consideration. But such an arrangement could only be carried into effect by a reciprocal relinquishment of the right of granting adminstration to the country of the domicile of the deceased, exclusively, and the mutual concession of the right to the administrator, so constituted, to prosecute suits everywhere, in virtue of the power so locally granted him; both of which concessions would most materially interfere with the exercise of sovereign right, as at present generally asserted and exercised."

A grant of letters of administration in Maryland, before the separation of the District of Columbia from the original states, did not authorize an action by an administrator as such in that part of the district ceded by Maryland, but he must take out new letters within the district; and this doctrine was applicable to executors, the right to sue in both instances depending upon the letters. Dixon *v.*

statutory authority.[65] But if a nonresident debtor, being in the state in which the administrator is appointed, is there sued by the administrator, and the judgment recovered against him, the administrator may bring suit in his own name upon that judgment in the state where the debtor resided.[66] And on a note made to the intestate, payable to bearer, an administrator appointed in one state may sue in his own name in another state.[67] The reason for the rule that no suit for the recovery of a debt due to the intestate at the time of his death can be brought by an administrator as such in any state in which he has not taken out administration, is not because of any defect of the administrator's title in the property, but is the policy of the foreign country to protect the rights of citizens of the state in which the suit is brought.[68] This rule has never been understood to extend to a suit for lands devised to an executor. In such case, the executor sues as devisee. His right is derived from the will, and the letters testamentary do not give the title.[69]

2. LIABILITY TO SUIT.—A personal representative cannot be sued in another state in which he has not been appointed,[70] except where otherwise provided by statute.[71] But where a testator, who held the land as trustee, having died in one

Ramsay, 3 Cranch 319, 2 L. Ed. 453; Fenwick *v.* Sears, 1 Cranch 259, 2 L. Ed. 101; Noonan *v.* Bradley, 9 Wall. 394, 400, 19 L. Ed. 757.

But an action was brought by an administrator under letters of administration granted in the state of Maryland, and it was held that the action could be maintained in Pennsylvania upon letters testamentary granted in Maryland. McCulloch *v.* Young, 4 Dall. 292, 1 L. Ed. 838.

65. Statutory authority giving foreign administrators power to sue.—Relfe *v.* Rundle, 103 U. S. 222, 225, 26 L. Ed. 337; Noonan *v.* Bradley, 9 Wall. 394, 19 L. Ed. 757; Kerr *v.* Moon, 9 Wheat. 565, 6 L. Ed. 161.

Under statute in some jurisdictions an executor or administrator, by virtue of letters obtained in another state, may prosecute an action in the courts of the state without first taking out letters therein, provided such executor or administrator shall, upon commencing suit, file in the office of the clerk of the court in which such suit shall be brought an exemplified copy of the record of his or their appointment. Lawrence *v.* Nelson, 143 U. S. 215, 36 L. Ed. 130; Hayes *v.* Pratt, 147 U. S. 557, 569, 37 L. Ed. 279.

Suits in District of Columbia.—The act of congress of June, 1812, authorizes any person to whom letters testamentary or of administration have been granted in a state of the United States, to prosecute claims by suit, in the courts of the District of Columbia, in the same manner as if the same has been granted to such persons by proper authority in the District of Columbia. The power is limited by its terms to the institution of suits. Vaughan *v.* Northrup, 15 Pet. 1, 10 L. Ed. 639; Kane *v.* Paul, 14 Pet. 33, 10 L. Ed. 341.

But prior to the passage of the above statute it was held that an executor could not maintain a suit, in the District of Columbia, upon letters testamentary, granted in a foreign country. Dixon *v.* Ramsay, 3 Cranch 319, 2 L. Ed. 453.

Administrators upon an estate who were appointed in the Cherokee nation have a right to maintain a suit or prosecute a claim for money in the District of Columbia. Mackey *v.* Coxe, 18 How. 100, 15 L. Ed. 299. See the title INDIANS.

66. Suit on judgments.—Biddle *v.* Wilkins, 1 Pet. 686, 7 L. Ed. 315; Wilkins *v.* Ellett, 108 U. S. 256, 258, 27 L. Ed. 718.

67. Suits on notes payable to bearer.—Wilkins *v.* Ellett, 108 U. S. 256, 259, 27 L. Ed. 718.

68. Reason for rule.—Wilkins *v.* Ellett, 108 U. S. 256, 258, 27 L. Ed. 718.

69. Lewis *v.* McFarland, 9 Cranch 151, 152, 3 L. Ed. 687.

70. Liability to suit.—Lawrence *v.* Nelson, 143 U. S. 215, 222, 36 L. Ed. 130, citing Vaughan *v.* Northrup, 15 Pet. 1, 10 L. Ed. 639; Aspden *v.* Nixon, 4 How. 467, 11 L. Ed. 1059; Stacy *v.* Thrasher, 6 How. 44, 12 L. Ed. 337; Johnson *v.* Powers, 139 U. S. 156, 35 L. Ed. 112; Reynolds *v.* Stockton, 140 U. S. 254, 272, 35 L. Ed. 464; Taylor *v.* Benham, 5 How. 233, 271, 12 L. Ed. 130; Wyman *v.* Halstead, 109 U. S. 654, 657, 27 L. Ed. 1068; Milligan *v.* Milledge, 3 Cranch 220, 2 L. Ed. 417; Fenwick *v.* Sears, 1 Cranch 259, 2 L. Ed. 101; Dixon *v.* Ramsay, 3 Cranch 319, 2 L. Ed. 453; Kerr *v.* Moon, 9 Wheat. 565, 6 L. Ed. 161; Vaughan *v.* Northrup, 15 Pet. 1, 5, 10 L. Ed. 639; Peale *v.* Phipps, 14 How. 368, 374, 14 L. Ed. 459.

Where there was an executor who had qualified in South Carolina, and had some real estate in Georgia, but had never qualified there, the court held that suit should have been brought against the executor in South Carolina and established the debt, and then carried that judgment to Georgia and have execution. Milligan *v.* Milledge, 3 Cranch 220, 226, 2 L. Ed. 417.

This rule is applicable to the District of Columbia. Vaughan *v.* Northrup, 15 Pet. 1, 10 L. Ed. 639; Wyman *v.* Halstead, 109 U. S. 654, 657, 27 L. Ed. 1068.

71. Statutory provision.—By statute in

state, the executor took out letters testamentary in that state, sold the lands which were in another state, and then removed his residence to a third state; he can be sued in the latter for the proceeds of the lands, because his transactions in reference to them were not necessarily connected with the settlement of the estate under his letters testamentary.[72]

XII. Administrators De Bonis Non or with the Will Annexed.

A. General Statement.—Every administrator after the first is an administrator de bonis non in fact, and it is not important it should so appear of record.[73]

B. Rights, Powers, Duties and Liabilities—1. TITLE ACQUIRED.—To the administrator de bonis non is committed only the administration of the goods, chattels, and credits of the deceased which have not been administered,[74] and all assets of the testator or intestate in the hands of third persons at the death of an administrator or executor intestate;[75] but he can have no concern with property administered and accounted for by his predecessor in trust.[76] But whatever authority an administrator de bonis non may possess as to the real estate must be derived from the will. If not found there in express terms, or by nec-

Kansas, real estate situated therein, the title to which is vested in the nonresident executor and to whom letters testamentary have been issued by a court of another jurisdiction, may be attached and sold, in an action of debt against the nonresident executor. Manley *v.* Park, 187 U. S. 547, 47 L. Ed. 296.

72. Taylor *v.* Benham, 5 How. 233, 12 L. Ed. 130.

73. Administrators de bonis non.—Veach *v.* Rice, 131 U. S. 293, 315, 33 L. Ed. 163.

74. Title acquired.—Ingle *v.* Jones, 9 Wall. 486, 497, 19 L. Ed. 621; Beall *v.* New Mexico, 16 Wall. 535, 21 L. Ed. 292; United States *v.* Walker, 109 U. S. 258, 261, 27 L. Ed. 927; Wilson *v.* Arrick, 112 U. S. 83, 86, 28 L. Ed. 617; Veach *v.* Rice, 131 U. S. 293, 316, 33 L. Ed. 163.

Money received by the former executor or administrator, in his character as such, and kept by itself, will be so regarded, but if mixed with the administrator's own money, it is considered as connected, or as, technically speaking, "administered." Beall *v.* New Mexico, 16 Wall. 535, 21 L. Ed. 292; United States *v.* Walker, 109 U. S. 258, 261, 27 L. Ed. 927.

In Maryland, if an executor or administrator changes any part of an estate from what it was into something else, it is said to be administered. Ennis *v.* Smith, 14 How. 400, 14 L. Ed. 472.

And where a debt due the deceased is collected or a chattel of his estate is sold, the money received becomes the property of the administrator, which he is not bound to turn over to his successor. United States *v.* Walker, 109 U. S. 258, 263, 27 L. Ed. 927.

By statute in some states an administrator is entitled to the bonds, notes, accounts and evidence of debts which a deceased administrator or executor may have taken, and the money in his hands in his representative capacity, which he is authorized to recover in manner provided. De Valengin *v.* Duffy, 14 Pet. 282, 291, 10 L. Ed. 457.

"It is holden that if an executor receives money in right of the testator, and lays it up by itself and dies intestate, that this money shall go to the administrator de bonis non, being as easily distinguished as part of the testator's effects, as goods in specie. But if A dies intestate, and his son takes out administration to him and receives part of a debt, being rent arrear to the intestate, and accepts a promissory note for the residue, and then dies intestate, this acceptance of the note is such an alteration of the property as vests it in the son; and therefore, on his death, it shall go on to his administrator, and not to the administrator de bonis non." United States *v.* Walker, 109 U. S. 258, 260, 27 L. Ed. 927.

Where a statute authorizes the delivery of unadministered assets to the administrator de bonis non, on the removal of an executor or administrator, an order directing a delivery of administered assets is void. United States *v.* Walker, 109 U. S. 258, 267, 27 L. Ed. 927.

The act of congress of February 20th, 1846, to enlarge the powers of the several orphans' courts held in and for the District of Columbia, did not change the common-law rule as to the authority of an administrator de bonis non over unadministered assets of an estate, and the statute applies the same rule to the case of a removal as has been applied to the case of a deceased executor or administrator. United States *v.* Walker, 109 U. S. 258, 263, 27 L. Ed. 927.

75. Beall *v.* New Mexico, 16 Wall. 535, 541, 21 L. Ed. 292.

76. Stearns *v.* Page, 7 How. 819, 835, 12 L. Ed. 928.

In Maryland property received by an administrator of an estate and converted into money in his lifetime must be accounted for by his administrator and would not pass to the administrator de bonis non, prior to act of 1820. De Valengin *v.* Duffy, 14 Pet. 282, 291, 10 L. Ed. 457.

essary implication, it has no existence.[77] Where real and personal property is devised and bequeathed to executors in trust for certain designated purposes, it is doubtful, to say the least, whether the trust is not such a personal confidence reposed by the testator in the person's named, that it would in no event pass to an administrator with the will annexed, but must, if all those named in the will should die before full performance of the trust, be executed by a trustee specially appointed for the purpose;[78] if his appointment could be treated as vesting the title to the real estate, it certainly would not authorize him to undertake the performance of the trust created by the will, so long as an alternative executor and trustee therein named still lives, and had but recently known that there remained any estate of the testator undisposed of according to his will.[79]

2. Derivation of Title.—An administrator de bonis non derives his title from the deceased, and not from the former executor or administrator.[80]

3. Where Extraordinary Duties Were Imposed on Executor.—When a will imposes on an executor, who is named, duties foreign to those which come within the scope of an executor's ordinary functions, such powers do not pass to an administrator unless it be clear that it was the intention of the testator to make him a donee of the power. A mere administrator, not the donee of such a power, cannot plead the statute of limitations to defeat a suit brought on a judgment, by a creditor seeking to charge the realty with his debt.[81]

4. Right to Call First Administrator, His Sureties and Representatives to Account.—Where unadministered goods of the intestate remain in the hands of the discharged administrator or his representatives, in specie, an administrator de bonis non may sue for them either directly or on his bond.[82] Where an administrator de bonis non is appointed to succeed a removed administrator, no action lies in favor of the administrator de bonis non to recover money collected by the removed administrator from the United States on a claim belonging to the estate of the decedent, and the surety on the bond of the

77. Ingle *v.* Jones, 9 Wall. 486, 497, 19 L. Ed. 621.

A testatrix left property in trust to her executors who were clothed with important powers and duties in regard to both real and personal estate. After the debts and legacies were satisfied the entire estate was to be delivered to certain named trustees, to whom it was devised, to enable them to found a female orphan asylum. This charity was admitted to be void and the trust resulted for the benefit of the heirs at law. The will provided that if the surviving executor should die while the trust remained executory its execution should devolve upon such person or persons as should be elected by the vestries of a certain church; and that letters of administration, with the will annexed, and other competent authority, should be granted to such person or persons. On the death of the surviving executor, the vestries made no election and letters were granted as if the will contained no such provision. It was held that powers touching real estate never pass by devolution to an administrator, unless it be clear that it was the intention of the testator that he should become donee of the power, a place of the executor appointed by the will. If no provision should be made by the will for such substitution, the power would not become extinguished, but the case would fall within the category of those where a court of equity will not permit a trust to fail for the want of a testator, but will appoint one and clothe him with authority adequate to the duties to be discharged. That the testatrix did not intend that any one not clothed with the sanction she described should be instrusted with any duty touching her estate; and the administrator occupied the same relation to her realty as if he were an administrator de bonis non without the will annexed, and the testatrix had died intestate. Ingle *v.* Jones, 9 Wall. 486, 497, 19 L. Ed. 621.

78. Hayes *v.* Pratt, 147 U. S. 557, 567, 37 L. Ed. 279, citing Ingle *v.* Jones, 9 Wall. 486, 497, 498, 19 L. Ed. 621.

79. Hayes *v.* Pratt, 147 U. S. 557, 567, 37 L. Ed. 279.

80. **Derivation of title.**—United States *v.* Walker, 109 U. S. 258, 261, 27 L. Ed. 927; Wilson *v.* Arrick, 112 U. S. 83, 86, 28 L. Ed. 617.

81. **Where extraordinary duties were imposed on executor.**—Ingle *v.* Jones, 9 Wall. 486, 19 L. Ed. 621.

82. **Right to accounting from predecessors.**—Beall *v.* New Mexico, 16 Wall. 535, 21 L. Ed. 292.

Where B., as executor of A., sold property under the direction of the will, taking notes therefor, and on B.'s death, C., his executor, pledged them to D., for purposes not authorized by B.'s will, of which D. was aware, it was held that he could not hold them against the claim of B.'s

removed administrator is liable only at the suit of creditors, distributees and legatees entitled to the fund.[83] An administrator de bonis non cannot sue the former administrator or his representatives for a devastavit, or for delinquencies in office; nor can he maintain an action on the former administrator's bond for such cause. The former administrator, or his representatives, are liable directly to creditors or next of kin.[84] When an executor or administrator with the will annexed proposes to make a final settlement of his own accounts, he is required to give notice to creditors and distributees; for there are no other representatives of the estate.[85] An administrator with the will annexed, in receiving what had been temporarily in the charge of a special administrator, acts for all interested in the distribution of the estate.[86]

5. Liability for Assets in Possession of Former Representative.—By the laws of some states, an administrator de bonis non, with the will annexed, is liable for assets in the hands of a former executor.[87]

6. Privity between Administrator and Administrators De Bonis Non.—An administrator de bonis non may truly be said to have an official privity with his predecessor in the same trust, and therefore liable to the same duties; he comes by succession into the trust of the same property, encumbered by the same debts.[88] But where a creditor instituted suit against an administrator of an estate and the administrator died before the termination of the suit, but had received property in his representative capacity and controverted it into money during his lifetime, to which the administrators de bonis non were entitled under a Maryland statute, the creditor had a right to make them parties to the suit which he had instituted against the first administrator, and to continue it against them, as they were not injured nor in any manner placed in danger by such proceeding, for they were not liable, unless the money should be recovered by the representatives or sureties of the deceased administrator, provided there was no negligence or breach of duty on their part.[89]

7. Duty to Transmit Assets to Place of Principal Administration.—An administrator with will annexed, having no special reason for administering the assets in the state of his appointment should transmit them for distribution to the executor appointed at the testator's domicile.[90]

representatives; and the resignation of C., who connived at the misappropriation, having been accepted, and an administrator de bonis non having been appointed in his place, there was no objection to the prosecution of the suits in the latter's name, in conjunction with the representatives of A.'s estate, to compel the restoration of the notes; and as the notes in fact belonged to A.'s estate, the administrators de bonis non of that estate might insist that, when the notes were returned by D., they be delivered to them. Smith *v.* Ayer, 101 U. S. 320, 25 L. Ed. 955.

83. United States *v.* Walker, 109 U. S. 258, 265, 27 L. Ed. 927.

Where claims of an estate against the United States government were settled by the issuance of warrants to the administratrix of the estate who endorsed them over to another who drew the money thereon, it was held, that this was an administration of these assets of the estate; that the mere acceptance even of the warrants was such alteration of the property as vested title in the administratrix, and as tantamount to their administration; and that the warrants and the money received on them became the property of the administratrix, and she was responsible therefor to the creditors, legatees and distributees of the estate, and they alone were entitled to sue thereon. Wilson *v.* Arrick, 112 U. S. 83, 87, 28 L. Ed. 617.

84. Beall *v.* New Mexico, 16 Wall. 535, 21 L. Ed. 292; Wilson *v.* Arrick, 112 U. S. 83, 87, 28 L. Ed. 617.

85. RoBards *v.* Lamb, 127 U. S. 58, 62, 32 L. Ed. 60.

86. RoBards *v.* Lamb, 127 U. S. 58, 62, 32 L. Ed. 60. See ante, "Limited and Special Executors or Administrators," X.

87. Liability for assets in possession of former representative.—Taylor *v.* Benham, 5 How. 233, 261, 12 L. Ed. 130.

88. Administrators de bonis non.—Stacy *v.* Thrasher, 6 How. 44, 12 L. Ed. 337; Hill *v.* Tucker, 13 How. 458, 467, 14 L. Ed. 223; Goodall *v.* Tucker, 13 How. 469, 14 L. Ed. 227.

Where a contract made by the first administrator gave to attorneys a power coupled with an interest, authority to compromise was not impaired by the death of the first administrator, and his successor was bound by the contract. Jeffries *v.* Mutual Life Ins. Co., 110 U. S. 305, 310, 28 L. Ed. 156.

89. De Valengin *v.* Duffy, 14 Pet. 283, 291, 10 L. Ed. 457.

90. Duty to transmit assets.—Hayes *v.* Pratt, 147 U. S. 557, 570, 37 L. Ed. 279.

8. Liability to Action of Assumpsit.—Without proof of an express assumpsit, an action of assumpsit will not lie against an administrator with the will annexed.[91]

9. Liabilities of Sureties on Bond.—And the rule in some states that a change by an executor or administrator of any part of an estate from what it was into something else constitutes administration of it, relieves the sureties of an administrator de bonis non of liability for waste of such changed estate acquired by him and charged as assets, as they are only liable for such assets of the deceased as remain in specie, unadministered by his predecessor, in the administration.[92]

XIII. Executor De Son Tort.

A person makes himself an executor de son tort by intermeddling with the estate of the testator and by taking it into his possession, and undertaking to dispose of it, and, as such, is responsible for what comes into his hands.[93]

XIV. Insolvent Estates.

The laws of some states provide that where the insolvency of the estate of a deceased person shall be reported to certain courts, the court shall order a sale of the property and distribute the proceeds thereof among the creditors pro rata.[94] Where the object is to sell the real estate of an insolvent or embarrassed succession, the settled doctrine is, there are no adversary parties, the administrator represents the land, and the proceedings are in rem. The proceedings are analogous to proceedings in admiralty, where the only question of jurisdiction is the power of the court over the things, the subject matter before them, without regard to the parties who may have an interest in it.[95] Under the laws of a state directing that, where the insolvency of the estate of a deceased person shall be reported to the orphans' court, that court shall order the sale of the property, and distribute the proceeds thereof among the creditors pro rata, and that in the meantime no execution shall issue upon judgments obtained against such insolvent estate. Judgment obtained against an administrator before the declaration by the orphans' court of the insolvency of the estate, is not, upon that account, entitled to a preference, but must share in the general distribution.[96] As to the effect of state laws upon the power of federal courts in matters pertaining to insolvent estates, see the title Courts, vol. 4, p. 895.

EXECUTORY AGREEMENT.—As used in the law of sales an executory agreement is an agreement for sale of a thing not specified, or for an article not manufactured, or for a certain quantity of goods in general without any identification of them or an appropriation of the same to the contract, or when something remains to be done to put the goods into a deliverable state, or to ascertain the price to be paid by the buyer.[1]

EXECUTORY CONTRACTS.—See the titles Contracts, vol. 4, p. 568; Sales.

citing Wilkins *v.* Ellett, 9 Wall. 740, 742, 19 L. Ed. 586. See ante, "Disposal," XI, D, 2.

An administrator with the will annexed who has received money from the income and sale of the real estate, and settled his account therefor in the court which appointed him, and has without any order of court, and without right, and with notice of an outstanding claim, paid the money to a distributee taking a bond of indemnity, was rightly held liable to account for it, with interest from the date when he so settled his account after having determined so to pay it. Hayes *v.* Pratt, 147 U. S. 557, 570, 37 L. Ed. 279.

91. Liability to action of assumpsit.—Holloback *v.* Van Buskink, 4 Dall. 147, 1 L. Ed. 777.

92. Liabilities of sureties.—Ennis *v.* Smith, 14 How. 400, 14 L. Ed. 472.

93. Executor de son tort.—Blake *v.* Hawkins, 98 U. S. 315, 331, 25 L. Ed. 139.

94. Insolvent estates.—Williams *v.* Benedict, 8 How. 107, 12 L. Ed. 1007.

95. Beauregard *v.* New Orleans, 18 How. 497, 15 L. Ed. 469.

96. Williams *v.* Benedict, 8 How. 107, 12 L. Ed. 1007.

1. Hatch *v.* Oil Co., 100 U. S. 124, 132, 25 L. Ed. 554. See the title SALE.

EXECUTORY DEVISES.—See the titles REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS; WILLS.

EXECUTORY LIMITATIONS.—See the title REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS. See, also, the titles PERPETUITIES; WILLS.

EXECUTORY PROCESS.—In Louisiana, the order of seizure and sale, called executory process, made upon nonpayment of a mortgage debt, is said to be issued as upon the judgment by confession, and is in substance a decree of foreclosure and sale, which has been repeatedly held to be a final decree.[1]

EXECUTORY REMAINDERS.—See the titles REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS; WILLS.

EXECUTORY TRUST OR USE.—See the title TRUSTS AND TRUSTEES.

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EXEMPLARY DAMAGES.

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I. Definition.

Punative damages are damages beyond and above the amount which a plaintiff has really suffered.[1a]

II. Award of Exemplary Damages.

A. General Rule.—The allowance of anything more that an adequate pecuniary indemnity for a wrong suffered is a great departure from the prin-

1. Marion *v.* Lally, 17 Wall. 14, 15, 17, 21 L. Ed. 591. See the titles APPEAL AND ERROR, vol. 1, p. 948; MORTGAGES AND DEEDS OF TRUST.

1a. **Definition.**—Washington Gas Light Co. *v.* Lansden, 172 U. S. 534, 553, 43 L. Ed. 543.

"Damages have been defined to be the compensation which the law will award for an injury done, and are said to be exemplary and allowable in excess of the actual loss, where a tort is aggravated by evil motive, actual malice, deliberate violence or oppression. While some courts and text-writers have questioned the soundness of this doctrine, it has been accepted in England, in most of the states of this Union, and has received the sanction of this court." Scott *v.* Donald, 165 U. S. 58, 41 L. Ed. 632.

ciple on which damages in civil suits are awarded,[2] but the doctrine is well settled now that exemplary damages may be recovered in certain cases.[3] By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts, by means of a civil action, and the damages, inflicted by way of penalty or punishment, given to the party injured.[4] Punitive damages are awarded upon the theory that they are a punishment to the defendant, and not a mere matter of compensation for injuries sustained by the plaintiff.[5]

B. In Actions for Torts—1. In General.—In all actions on the case for torts a jury may give exemplary or vindictive damages depending upon the peculiar circumstances of each case,[6] and exemplary damages are allowable in excess of the actual loss where a tort is aggravated by evil motive, actual malice, deliberate violence or oppression.[7]

2. Trespass.—In actions of trespass, where the injury has been wanton and malicious, or gross and outrageous, courts permit juries to add to the measured compensation of the plaintiff which he would have been entitled to recover, had the injury been inflicted without design or intention, something further by way

2. General rule.—Milwaukee, etc., R. Co. *v.* Arms, 91 U. S. 489, 492, 23 L. Ed. 374. See, generally, the title DAMAGES, vol. 5, p. 157.

3. Milwaukee, etc., R. Co. *v.* Arms, 91 U. S. 489, 492, 23 L. Ed. 374.

"In many civil actions, such as libel, slander, seduction, etc., the wrong done to the plaintiff is incapable of being measured by a money standard; and the damages assessed depend on the circumstances, showing the degree of moral turpitude or atrocity of the defendant's conduct, and may properly be termed exemplary or vindictive rather than compensatory." Day *v.* Woodworth, 13 How. 363, 371, 14 L. Ed. 182.

4. Day *v.* Woodworth, 13 How. 363, 371, 14 L. Ed. 182.

5. Washington Gas Light Co. *v.* Lansden, 172 U. S. 534, 553, 43 L. Ed. 543.

"Where an injury is wanton or malicious, a jury may inflict vindictive or exemplary damages, not to recompense the plaintiff, but to punish the defendant." Seymour *v.* McCormick, 16 How. 480, 14 L. Ed. 1024.

Jurists have chosen to place the doctrine of exemplary damages on the ground, not that the sufferer is to be recompensed, but that the offender is to be punished; and, although some text-writers and courts have questioned its soundness, it has been accepted as the general rule in England and in most of the states of this country. Milwaukee, etc., R. Co. *v.* Arms, 91 U. S. 489, 492, 23 L. Ed. 374.

"Exemplary or punitive damages, being awarded, not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others, can only be awarded against one who has participated in the offense." Lake Shore, etc., R. Co. *v.* Prentice, 147 U. S. 101, 107, 37 L. Ed. 97.

6. In general.—Day *v.* Woodworth, 13 How. 363, 370, 14 L. Ed. 182.

The power of a jury is recognized in certain actions of tort to assess against the tort feasor punitive or exemplary damages. Whenever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity, the jury are not limited to the ascertainment of a simple compensation for the wrong committed against the aggrieved person. But the malice spoken of in this rule is not merely the doing of an unlawful or injurious act. The word implies that the act complained of was conceived in the spirit of mischief, or of criminal indifference to civil obligations. Philadelphia, etc., R. Co. *v.* Quigley, 21 How. 202, 213, 16 L. Ed. 73.

The intentional, malicious and repeated interference by the defendants with the exercise of personal rights and privileges secured to the plaintiff by the constitution of the United States, constitutes a wrong and injury not the subject of compensation by a mere money standard, but fairly within the doctrine of the cases wherein exemplary damages have been allowed. Scott *v.* Donald, 165 U. S. 58, 89, 41 L. Ed. 632.

7. Scott *v.* Donald, 165 U. S. 58, 86, 41 L. Ed. 632.

"The doctrine is well settled, that in actions of tort the jury, in addition to the sum awarded by way of compensation for the plaintiff's injury, may award exemplary, punitive or vindictive damages, sometimes called smart money, if the defendant has acted wantonly, or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations. But such guilty intention on the part of the defendant is required in order to charge him with exemplary or punitive damages." Lake Shore, etc., R. Co. *v.* Prentice, 147 U. S. 101, 107, 37 L. Ed. 97. See, also, The Amiable Nancy, 3 Wheat. 546, 558, 559, 4 L. Ed. 456; Day *v.* Woodworth, 13 How. 363, 371, 14 L. Ed. 182; Philadelphia, etc., R. Co. *v.* Quigley, 21 How. 202, 213, 214, 16 L. Ed. 73; Milwaukee, etc., R. Co. *v.* Arms, 91 U. S. 489, 493, 495, 23 L. Ed.

of punishment or example, which has sometimes been called "smart money."[8] Where the cause of action is willful and malicious trespass in seizing and taking personal property with circumstances of aggravation and averments of special damage, exemplary damages will be allowed.[9]

3. Wrongful Seizure of Property.—On an illegal seizure of a ship by the officers of a privateer, the original wrongdoers may be made responsible, beyond the loss actually sustained, in a case of gross and wanton outrage; but the owners of the privateer, who are only constructively liable, are not bound to the extent of vindictive damages.[10]

4. Negligence.—For injuries resulting from neglect of duties, in the discharge of which the public is interested, juries are permitted to assess exemplary damages.[11] A railroad company may be liable for exemplary damages for neglecting to comply with a law requiring it to maintain fences and cattle guards, and thus causing damage to property.[12]

C. Persons Liable for Exemplary Damages—1. In General.—Where a ministerial officer acts in good faith, he is not liable to exemplary damages for an injury done; but he can claim no further exemption, where his acts are clearly against law.[13]

374; Missouri Pac. R. Co. *v.* Humes, 115 U. S. 512, 521, 29 L. Ed. 463; Barry *v.* Edmunds, 116 U. S. 550, 562, 563, 29 L. Ed. 729; Denver, etc., Railway *v.* Harris, 122 U. S. 597, 609, 610, 30 L. Ed. 1146; Minneapolis, etc., R. Co. *v.* Beckwith, 129 U. S. 26, 36, 32 L. Ed. 585.

8. Trespass.—Day *v.* Woodworth, 13 How. 363, 371, 14 L. Ed. 182.

"It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offense rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument." Day *v.* Woodworth, 13 How. 363, 370, 14 L. Ed. 182.

9. Barry *v.* Edmunds, 116 U. S. 550, 562, 29 L. Ed. 729.

In an action for trespass, notwithstanding the fact that there were mitigating circumstances set up by the defendants, if the trespass was lawless and wholly inexcusable, was of an aggravated nature and was a resort to physical force in defiance of law endangering life and property, it gave a high claim to the injured party for exemplary damages. McAfee *v.* Crofford, 13 How. 447, 458, 14 L. Ed. 217.

10. Wrongful seizure of property.—The Amiable Nancy, 3 Wheat. 546, 4 L. Ed. 456.

11. Negligence.—Missouri Pac. R. Co. *v.* Humes, 115 U. S. 512, 521, 29 L. Ed. 463.

"For injuries resulting from a neglect of duties, in the discharge of which the public is interested, juries are also permitted to assess exemplary damages. These may perhaps be considered as falling under the head of cases of gross negligence, for any neglect of duties imposed for the protection of life or property is culpable, and deserves punishment." Missouri Pac. R. Co. *v.* Humes, 115 U. S. 512, 521, 29 L. Ed. 463.

"The statutes of nearly every state of the Union provide for the increase of damages where the injury complained of results from the neglect of duties imposed for the better security of life and property, and make that increase in many cases double, in some cases treble, and even quadruple the actual damages. And experience favors this legislation as the most efficient mode of preventing, with the least inconvenience, the commission of injuries. The decisions of the highest courts have affirmed the validity of such legislation. The injury actually received is often so small that in many cases no effort would be made by the sufferer to obtain redress, if the private interest were not supported by the imposition of punitive damages." Missouri Pac. R. Co. *v.* Humes, 115 U. S. 512, 29 L. Ed. 463.

Carriers.—Exemplary damages should not be awarded for an injury received by a passenger in a railway car in a collision caused by the negligence of the employees of the company unless the injury is the result of the willful misconduct of the employees of the company, or of that reckless indifference to the rights of others which is equivalent to an intentionally violation of them. Milwaukee, etc., R. Co. *v.* Arms, 91 U. S. 489, 23 L. Ed. 374. See, also, Western Union Tel. Co. *v.* Eyser, 91 U. S. 495, 23 L. Ed. 377.

12. Missouri Pac. R. Co. *v.* Humes, 115 U. S. 512, 522, 29 L. Ed. 463; Minneapolis, etc., R. Co. *v.* Bechwith, 129 U. S. 26, 32 L. Ed. 585. See, also, the title ANIMALS, vol. 1, p. 322.

13. In general.—Tracy *v.* Swartwout, 10 Pet. 80, 9 L. Ed. 354.

"A public officer, intrusted on the high

2. Corporations.—A corporation, like a natural person, may be held liable in exemplary or punitive damages for the act of an agent within the scope of his employment, provided the criminal intent, necessary to warrant the imposition of such damages, is brought home to the corporation.[14] A railroad corporation is not chargeable with punitive or exemplary damages for the illegal, wanton and oppressive conduct of a conductor of one of its trains towards a passenger.[15]

3. Principal and Agent.—A principal, though of course liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held liable for exemplary or punitive damages, merely by reason of wanton, oppressive or malicious intent on the part of the agent.[16]

III. Measure of Exemplary Damages.

A. In General.—The amount of exemplary damages depends upon the degree of malice, wantonness, oppression, or outrage of the defendant's conduct.[17]

Counsel Fees.—Damages assessed by way of example, may indirectly compensate the plaintiff for money expended in counsel fees, but the amount of these fees cannot be taken as the measure of punishment or a necessary element in its infliction.[18]

B. Discretion of Jury.—The amount of exemplary damages has always been left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case.[19]

C. Discretion of Court.—The patent act of 1836 confines the jury to the assessment of "actual damages" for the infringement of a patent right. The power to inflict vindictive or punitive damages is committed to the discretion and judgment of the court within the limit of trebling the actual damages found by the injury.[20]

seas to perform a duty deemed necessary by his country, and executing according to the best of his judgment the orders he has received, if he is a victim of any mistake he commits, ought certainly never to be assessed with vindictive or speculative damages." The Charming Betsy, 2 Cranch 64, 124, 2 L. Ed. 208.

Agent.—A firm of merchants in Boston ordered their agent to purchase certain goods in Havana, but he failed to purchase them as ordered. It was held, that the agent was not liable for vindictive damages for the failure to comply with the orders of the principals. Bell *v.* Cunningham, 3 Pet. 69, 84, 7 L. Ed. 606.

14. Corporations.—Lake Shore, etc., R. Co. *v.* Prentice, 147 U. S. 101, 111, 37 L. Ed. 97.

The doctrine of punitive damages should certainly apply in a case where a corporation, by its controlling officers, wantonly disturbed the peace of the community, and by the use of violent means endangered the lives of citizens in order to maintain rights, for the vindication of which, if they existed, an appeal should have been made to the judicial tribunals of the country. Denver, etc., Railway *v.* Harris, 122 U. S. 597, 610, 30 L. Ed. 1146.

15. Lake Shore, etc., R. Co. *v.* Prentice, 147 U. S. 101, 106, 37 L. Ed. 97.

16. Principal and agent.—Lake Shore, etc., R. Co. *v.* Prentice, 147 U. S. 101, 107, 37 L. Ed. 97. See ante, "Wrongful Seizure of Property," II, B, 3; "In General," II, C, 1.

Though a principal is liable to make compensation for a libel published or a malicious prosecution instituted by his agent, he is not liable to be punished by exemplary damages for an intent in which he did not participate. Lake Shore, etc., R. Co. *v.* Prentice, 147 U. S. 101, 110, 37 L. Ed. 97.

17. In general.—Day *v.* Woodworth, 13 How. 363, 371, 14 L. Ed. 182.

18. Counsel fees.—Day *v.* Woodworth, 13 How. 363, 371, 14 L. Ed. 182.

19. Discretion of jury.—Day *v.* Woodworth, 13 How. 363, 371, 14 L. Ed. 182. See post, "Discretion of Court," III, C.

The law permits the jury to give punitive or exemplary damages and the discretion of the jury in such cases is not controlled by any very definite rules. Missouri Pac. R. Co. *v.* Humes, 115 U. S. 512, 521, 29 L. Ed. 463.

Redress commensurate to the injuries should be afforded. "In ascertaining its extent, the jury may consider all the facts which relate to the wrongful act of the defendant, and its consequences to the plaintiff; but they are not at liberty to go farther, unless it was done willfully, or was the result of that reckless indifference to the rights of others which is equivalent to an intentional violation of them. In that case, the jury are authorized, for the sake of public example to give such additional damages as the circumstances require. The tort is aggravated by the evil motive, and on this rests the rule of exemplary damages." Milwaukee, etc., R. Co. *v.* Arms, 91 U. S. 489, 492, 23 L. Ed. 374.

20. Discretion of court.—Seymour *v.*

D. Against Joint Defendants.—When a plaintiff voluntarily joins several parties as defendants, he must be held to thereby waive any right to recover punitive damages against all, founded upon evidence of the ability of one of the several defendants to pay them.[21]

EXEMPLIFICATION.—See the titles BEST AND SECONDARY EVIDENCE, vol. 3, p. 214; DOCUMENTARY EVIDENCE, vol. 5, p. 431; FOREIGN JUDGMENTS, RECORDS AND JUDICIAL PROCEEDINGS. See note 1.

EXEMPLIFICATION OF DOCUMENTS, JUDGMENTS AND RECORDS FOR USE IN EVIDENCE.—See the titles DOCUMENTARY EVIDENCE, vol. 5, p. 431; FOREIGN JUDGMENTS, RECORDS AND JUDICIAL PROCEEDINGS; FOREIGN LAWS; RECORDS; STATUTES.

EXEMPT.—See PRIVILEGE.

EXEMPTION.—See the title APPEAL AND ERROR, vol. 1, pp. 546, 558. The word exemption used in the judiciary act of 1789, which authorizes the supreme court to re-examine the decisions of the highest court of a state in certain cases, where any title, right, privilege, or exemption was claimed under any statute of the United States, has substantially the same meaning as the word immunity used in the judiciary act, February 5, 1867, which authorizes the supreme court to re-examine the decisions of the highest court of a state in certain cases, where any title, right, privilege, or immunity is claimed under any statute of the United States.[2]

EXEMPTIONS.—See the titles HOMESTEAD EXEMPTIONS; LICENSES; REVENUE LAWS. See, also, references made from EXEMPTIONS FROM EXECUTION AND ATTACHMENT. As to exemption from water rates, see the title WATER COMPANIES AND WATERWORKS. As to exemption from taxation, see the titles CONSTITUTIONAL LAW, vol. 4, p. 393, et seq.; SPECIAL ASSESSMENTS; TAXATION. As to constitutionality of exemption laws, see the title IMPAIRMENT OF OBLIGATION OF CONTRACTS.

EXEMPTIONS FROM EXECUTION AND ATTACHMENT.—See the titles ATTACHMENT AND GARNISHMENT, vol. 2, p. 660; EXECUTIONS, ante, p. 84; HOMESTEAD EXEMPTIONS; IMPAIRMENT OF OBLIGATION OF CONTRACTS. As to exemption under bankruptcy laws, see the title BANKRUPTCY, vol. 2, pp. 821, 847, 853, 854, 887, 907. As to what law governs exemptions, see the title CONFLICT OF LAWS, vol. 3, p. 1092. As to exemption of proceeds of an insurance policy, see the title INSURANCE. As to exemption of pensions, see the title PENSIONS. As to constitutionality of a statute exempting a city's share of stock in a water works company, see the titles CONSTITUTIONAL LAW, vol. 4, p. 438; WATER COMPANIES AND WATERWORKS. As to exemption of the waterworks of a city, see the title WATER COMPANIES AND WATERWORKS. As to exemption laws of states as rules of decision in federal courts, see the title COURTS, vol. 4, p. 1147.

McCormick, 16 How. 480, 488, 14 L. Ed. 1024.

21. Against joint defendants.—Washington Gas Light Co. *v.* Lansden, 172 U. S. 534, 553, 43 L. Ed. 543.

"While all defendants joined are liable for compensatory damages, there is no justice in allowing the recovery of punitive damages in an action against several defendants, based upon evidence of the wealth and ability to pay such damages on the part of one of the defendants only. As the verdict must be for one sum against all defendants who are guilty, it seems to be plain that when a plaintiff voluntarily joins several parties as defendants, he must be held to thereby waive any right to recover punitive damages against all, founded upon evidence of the ability of one of the several defendants to pay them. This rule does not prevent the recovery of punitive damages in all cases where several defendants are joined." Washington Gas Light Co. *v.* Lansden, 175 U. S. 534, 553, 43 L. Ed. 543.

1. Exemplification.—In United States *v.* Arredondo, 6 Pet. 691, 728, 8 L. Ed. 547, it is said: "A patent under the seal of the United States, or a state, is conclusive proof of the act of granting by its authority; its **exemplification** is a record of absolute verity. Patterson *v.* Winn, 5 Pet. 241, 8 L. Ed. 108." See, generally, the title PUBLIC LANDS.

2. Exemption.—Long *v.* Converse, 91 U. S. 105, 113, 24 L. Ed. 233.

EXHIBITION.—See the title THEATERS AND SHOWS.

EXHIBITS.—See the titles DOCUMENTARY EVIDENCE, vol. 5, p. 431; EVIDENCE, vol. 5, p. 1004; EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL, ante, p. 1. As to the effect upon admissibility in evidence where there has been a failure to annex an exhibit to a contract, see the title DOCUMENTARY EVIDENCE, vol. 5, p. 453. See, also, the titles DEPOSITIONS, vol. 5, p. 321; EXPERIMENTS IN EVIDENCE; HANDWRITING; INSPECTION AND PHYSICAL EXAMINATION; PLEADING. As to record or transcript on appeal, see the title APPEAL AND ERROR, vol. 2, p. 194, et seq.

EXISTING LAWS.—See note 1.

EXONERATION.—See the titles BAIL AND RECOGNIZANCE, vol. 2, p. 769, et seq., 776, et seq.; CONTRIBUTION AND EXONERATION, vol. 4, p. 597; EXECUTORS AND ADMINISTRATORS, ante, p. 119; GUARANTY; INDEMNITY; PRINCIPAL AND SURETY; TAXATION.

EXONERETUR.—See the title BAIL AND RECOGNIZANCE, vol. 2, p. 765.

EX PARTE PROCEEDINGS.—See the titles BANKRUPTCY, vol. 2, p. 792; DEPOSITIONS, vol. 5, p. 321; DIVORCE AND ALIMONY, vol. 5, p. 412; HABEAS CORPUS; MOTIONS. In criminal cases, see the titles COMMITMENT AND PRELIMINARY EXAMINATION OF ACCUSED, vol. 3, p. 951; CRIMINAL LAW, vol. 5, p. 96.

EXPATRIATION.—See the title CITIZENSHIP, vol. 3, p. 807, et seq. See, also, the title NATURALIZATION.

EXPECTANCY.—See the titles REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS. As to assignability, see the titles ASSIGNMENTS, vol. 2, p. 564, et seq.; CHATTEL MORTGAGES, vol. 3, p. 699; MORTGAGES AND DEEDS OF TRUST. See, also, the titles CONSTITUTIONAL LAW, vol. 4, p. 432; CURTESY, vol. 5, p. 155; DAMAGES, vol. 5, p. 157; ESTATES, vol. 5, p. 904.

EXPECTANT RIGHT.—See the title CONSTITUTIONAL LAW, vol. 4, p. 412.

EXPEDIENTE.—See note 2.

EXPEDITION.—See MILITARY EXPEDITION.

EXPENDITURE AND EXPENSE.—See the titles COSTS, vol. 4, p. 802; DISTRICT AND PROSECUTING ATTORNEYS, vol. 5, p. 400; DIVORCE AND ALIMONY, vol. 5, p. 412; PRINCIPAL AND AGENT. As element of damage, see the titles DAMAGES, vol. 5, p. 184; DEATH BY WRONGFUL ACT, vol. 5, p. 200; EMINENT DOMAIN, vol. 5, p. 746. As to burial expenses, see the title EXECUTORS AND ADMINISTRATORS, vol. 5, p. 119. As to estoppel by allowing, see the title ESTOPPEL, vol. 5, p. 913.

EXPENSES.—See note 3.

1. **Existing laws.**—The constitution of Illinois provided that "no county, city, town, township, or other municipality shall ever become subscribers to the capital stock of any railroad or private corporation, or make donation to or loan its credit in aid of such corporation: Provided, however, that the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions where the same have been authorized, under **existing laws**, by a vote of the people of such municipality prior to such adoption." The court said that the phrase "under **existing laws**," in the section of the constitution referred to, related to the time of the adoption of the constitution rather than to the time when the vote of the people was in fact taken. Jonesboro City *v.* Cairo, etc., R. Co., 110 U. S. 193, 198, 28 L. Ed. 116.

2. An **expediente** is a complete statement of every step taken in the proceedings for a Mexican grant, and a testimonio is the first copy of the **expediente.** Ainsa *v.* United States, 161 U. S. 208, 219, 40 L. Ed. 673.

In United States *v.* Castillero, 2 Black 1, 100, 17 L. Ed. 360, it is said: "The word **expediente** has long been familiar here. It is the junction of all the separate papers made in the course of any one proceeding, and which remains in the office at the close of it." See the title PUBLIC LANDS.

3. **Expenses of partnership.**—In Withers *v.* Withers, 8 Pet. 356, 358, 8 L. Ed. 972, it is said: "The bill alleges that each party was to pay his own individual **expenses.** The answer to this allegation is, that although it was stipulated in the articles of copartnership that each party was to pay his own individual **expenses,** yet the same was meant and intended to apply when the parties were at home, and not traveling on the business of the concern. This was substantially the construction adopted by the court below, and

EXPERIMENTS.—See the title PATENTS.

EXPERIMENTS IN EVIDENCE.

CROSS REFERENCES.

See the title EVIDENCE, vol. 5, p. 1004.

Discretion of Court.—Where there is conflicting testimony, upon a trial for murder, as to whether a gun in defendant's possession will scatter low mould buck shot, and the defendant requests permission of the court to take the gun out and shoot it in the presence of a deputy marshal in order to test how it threw such shot, the granting or refusal of such a request is within the discretion of the court.[1]

Experiments to Show Value.—It has been held admissible to give in evidence the experiments of practical engineers to show the value of a machine.[2]

which we think is the fair and reasonable interpretation of the argument, even standing alone upon the complainant's own statement. It was manifestly intended to apply to private or family expenses, not connected with the business of the partnership. But it would be an unjust and forced construction of the stipulation, to extend it to extra expenses, incurred when abroad on the business of the partnership."

Where parties associated in trade contract that one partner shall receive a certain share of the profits arising from the sale of goods, deducting "the actual expenses that may appertain to the goods themselves," taxes, clerk hire, and advertising are as clearly chargeable among these expenses as storage, commission or insurance. Foster *v.* Goddard, 1 Black 506, 17 L. Ed. 228. See the title PARTNERSHIP.

1. **Discretion of court.**—United States *v.* Ball, 163 U. S. 662, 673, 41 L. Ed. 300.

2. **Experiments to show value.**—Washington, etc., Steam Packet Co. *v.* Sickles, 10 How. 419, 437, 13 L. Ed. 479.

Where the declaration contained two counts; viz, the first upon a special contract that the plaintiffs had placed a machine for saving fuel on board of the steamboat of the defendants, and were entitled to a certain portion of the savings; the second, upon a quantum meruit; it was admissible to give in evidence by the plaintiffs the experiments of practical engineers to show the value of the machine. Evidence had previously been given, tending to prove the value in the mode pointed out in the contract, and the evidence in question tended not to contradict, but to corroborate it. It was therefore admissible under the first count, and clearly so under the second. Washington, etc., Steam Packet Co. *v.* Sickles, 10 How. 419, 13 L. Ed. 479.

EXPERT AND OPINION EVIDENCE.

BY ERNEST P. STEINHAUER.

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See the titles EVIDENCE, vol. 5, p. 1004; FOREIGN LAWS; HANDWRITING; INSANITY; INSTRUCTIONS; INSURANCE; NEGLIGENCE; PHYSICIANS AND SURGEONS; SHIPS AND SHIPPING.

As to the admissibility of testimony in regard to the growth of an accretion, see the title ACCESSION, ACCRETION AND RELICTION, vol. 1, p. 57. In regard to the admissibility of the testimony of a witness as to condition of a legal title to machinery at and before giving a chattel mortgage, see the title CHATTEL MORTGAGES, vol. 3, p. 763. As to the opinion of an expert in regard to the jurisdiction of a foreign judge in a divorce suit, see the title DIVORCE AND ALIMONY, vol. 5, p. 412. As to the admissibility of evidence in regard to foreign laws, see the title FOREIGN LAWS. As to evidence in regard to handwriting, see the title HANDWRITING. As to the admissibility of a deposition by an officer of the land office in regard to its practice and the opinions of the attorney general, as to what the law is, see the title STATUTES.

I. Expert Evidence.

A. Definition.—Experts are persons examined as witnesses in a cause, who testify in regard to some professional or technical matter arising in the case, and who are permitted to give their opinions as to such matter on account of their special training, skill, or familiarity with it.[1]

B. Admissibility of Expert Testimony—1. IN GENERAL.—Men who have made questions of skill or science the object of their particular study, are competent to give their opinions in evidence. Such opinions ought, in general, to be deduced from facts that are not disputed, or from facts given in evidence; but they need not be founded upon their own personal knowledge of such facts, but may be founded upon the statement of facts proved in the case.[2]

1. **Definition.**—Black's Law Dict. 461.

2. **Admissibility in general.**—Spring Co. *v.* Edgar, 99 U. S. 645, 657, 25 L. Ed. 487.

It is upon subjects on which the jury are not as well able to judge for themselves as is the witness that an expert as such is expected to testify. Transportation Line *v.* Hope, 95 U. S. 297, 298, 24 L. Ed. 477.

The general rule undoubtedly is, that witnesses are restricted to proof of facts within their personal knowledge, and may not express their opinion or judgment as to matters which the jury or the court are required to determine, or which must constitute elements in such determination. To this rule there is a well-established exception in the case of witnesses having special knowledge or skill in the business, art, or science, the principles of which are involved in the issue to be tried. Connecticut Mut. Life Ins. Co. *v.* Lathrop, 111 U. S. 612, 618, 28 L. Ed. 536.

Witnesses are not ordinarily allowed to give opinions as to conclusions dependent upon facts not necessarily involved in the controversy; but an exception to that rule is recognized in the case of experts, who are entitled to give their opinions as to conclusions from facts within the range of their specialties, which are too recondite to be properly comprehended and weighed by ordinary reasoners. Spring Co. *v.* Edgar, 99 U. S. 645, 657, 25 L. Ed. 487.

"The witness was an expert, and was called and testified as such. His knowledge and experience fairly entitled him to that position. It is permitted to ask

2. Matters of Common Knowledge.—Where the subject of a proposed inquiry before a court is not a matter of science, but of common observation, upon which the ordinary mind is capable of forming a judgment, experts ought not to be permitted to state their conclusions.[3]

3. Medical Experts—a. *In General.*—Medical men may give their opinions not only as to the state of a patient they may have visited, or as to the cause of the death of a person whose body they have examined, or as to the nature of the instruments which caused the wounds they have examined,[4] but also in cases where they have not themselves seen the patient, and have only heard the symptoms and particulars of his state detailed by other witnesses at the trial.[5]

b. *Insanity.*—The opinions of medical men are admissible in evidence as to the sanity or insanity of a person at a particular time, because they are supposed to have become, by study and experience, familiar with the symptoms of mental disease, and, therefore qualified to assist the court or jury in reaching a correct conclusion. And such opinions of medical experts may be based as well upon facts within their personal knowledge, as upon a hypothetical case disclosed by the testimony of others.[6] When evidence has been given tending to show the insanity of a grantor, and other evidence tending to show his sanity, a medical

questions of a witness of this class which cannot be put to ordinary witnesses. It is not an objection, as is assumed, that he was asked a question involving the point to be decided by the jury. As an expert, he could properly aid the jury by such evidence, although it would not be competent to be given by an ordinary witness." Transportation Line *v.* Hope, 95 U. S. 297, 298, 24 L. Ed. 477.

3. Matters of common knowledge.—Milwaukee, etc., R. Co. *v.* Kellogg, 94 U. S. 469, 24 L. Ed. 256.

"A second exception taken in the court below, and here insisted upon, is that the court refused to permit the defendants to prove by witnesses who were experts, experienced in the business of fire insurance, and accustomed by their profession to estimating and calculating the hazard and exposures to fire from one building to another, and to fixing rates of insurance, that, owing to the distance between the elevator and the mill, and the distance between the elevator and the lumber piles, the elevator would not be considered as an exposure to the mill or lumber, and would not be considered in fixing a rate thereon, or in measuring the hazard of mill or lumber. This exception is quite unsustainable. The subject of proposed inquiry was a matter of common observation, upon which the lay or uneducated mind is capable of forming a judgment." Milwaukee, etc., R. Co. *v.* Kellogg, 94 U. S. 469, 472, 24 L. Ed 256.

The opinion of commercial experts in the place of that of the jury, upon a question which was as well understood by the community at large as by merchants and importers, is inadmissible. Schmieder *v.* Barney, 113 U. S. 645, 648, 28 L. Ed. 1130.

Where there was an issue as to whether certain imported "Saxony dress goods" were "goods of similiar description" to "delaines" within the meaning of that term as used in the tariff act of July 14, 1862, ch. 163, § 9, 12 Stat. 553, it was held that the testimony of merchants and commercial experts was inadmissible to prove that, in trade, among merchants and importers, "Saxony woven dress goods" were not, in 1861 and 1862, and prior thereto, "commercially known or considered as goods of similar description to delaines." Schmieder *v.* Barney, 113 U. S. 645, 28 L. Ed. 1130.

The question as to whether a position of two or three feet from the fender piles off a certain wharf is a reasonably safe place for a person to stand when a boat is approaching to make a landing or unload freight, is a question for the jury to decide, and requires no special training or experience; therefore, the opinions of witnesses are inadmissible. Inland, etc., Coasting Co. *v.* Tolson, 139 U. S. 551, 560, 35 L. Ed. 270.

4. Medical experts—In general.—Spring Co. *v.* Edgar, 99 U. S. 645, 657, 25 L. Ed. 487. See, generally, the title PHYSICIANS AND SURGEONS. And see post, "Insurance," I, B, 12; "Manner in Which Medical Examination Made," I, D, 2; "Medical Expert," I, D, 3, c.

Where a person is killed by a blow inflicted upon the side of his head, the opinion of a physician, who made a post mortem examination of the body, is admissible to show from which direction the blow was delivered. Hopt *v.* Utah, 120 U. S. 430, 438, 30 L. Ed. 708.

5. Spring Co. *v.* Edgar, 99 U. S. 645, 657, 25 L. Ed. 487.

It is permissible to ask a medical witness, whether, in his opinion, a man standing at the hip of a recumbent person and striking blows on that person's head and forehead with an axe would necessarily be spattered with, or covered with, some of the blood. Bram *v.* United States, 168 U. S. 532, 569, 42 L. Ed. 568.

6. Insanity.—Connecticut Mut. Life Ins. Co. *v.* Lathrop, 111 U. S. 612, 618, 28 L. Ed. 536. See, generally, the title INSANITY.

expert cannot be asked his opinion respecting that person's sanity or insanity, forming his opinion from the facts and symptoms detailed in the evidence.[7]

4. Diseases.—Officers of the department of agriculture are competent to testify as experts to the nature and symptoms of a cattle disease in a certain district, although they have never been in such district; the nature of their business, the correspondence of the department and the investigation of such diseases would render them better acquainted with the districts where such diseases originated or were prevalent, than if they were merely local physicians and testified as to what came within their personal observation.[8]

5. Premature Abortion of Calves.—An experienced cattleman may be asked in an action to recover damages for loss of cattle caused by a railroad collision, if in his judgment a trip from Scotland to this country, and detention in quarantine, and shipment by rail to Missouri, would cause cows to prematurely lose their calves or abort them, if no unusual accident had occurred to them.[9]

6. Dangerous Character of Animals.—The testimony of experts as to the dangerous character of a buck deer, is admissible in an action brought to recover damages for injuries resulting from an attack made by such deer.[10]

7. Terms of Art—Construction of Written Instruments.—Experts may be examined as to the meaning of terms of art,[11] on the principles of, "cuique in sua arte credendam," but not as to the construction of written instruments.[12]

8. Patents.—See the title Patents.

9. Bridges.—The testimony of experts who are shown to have had experience in the science of bridge building and as civil engineers are admissible and entitled to due weight as to whether or not work spoken of as a dyke is a part of a bridge or approach.[13]

10. Fire Hose.—A person having had sufficient experience to be an expert

7. Dexter *v.* Hall, 15 Wall. 9, 21 L. Ed. 73.

8. **Diseases.**—Grayson *v.* Lynch, 163 U. S. 468, 480, 41 L. Ed. 230.

9. **Premature abortion of calves.**—New York, etc., R. Co. *v.* Estill, 147 U. S. 591, 612, 37 L. Ed. 292.

10. **Dangerous character of animals.**—Spring Co. *v.* Edgar, 99 U. S. 645, 25 L. Ed. 487. See, generally, the titles ANIMALS, vol. 1, p. 316; NEGLIGENCE.

11. **Terms of art—Construction of written instrument.**—Corning *v.* Burden, 15 How. 252, 270, 14 L. Ed. 683. See post, "Patents," I, B, 8.

"Experts may be examined to explain the terms of art, and the state of the art at any given time." Spring Co. *v.* Edgar, 99 U. S. 645, 658, 25 L. Ed. 487.

"Cases arise undoubtedly in which the testimony of expert witnesses is admissible to explain terms of art and technical words or phrases, and it may be admitted that a written instrument may be so interspersed with such technical terms that it would be error in the court to exclude the testimony of persons skilled in such matters, if duly offered by the proper party in the litigation." Moran *v.* Prather, 23 Wall. 492, 499, 23 L. Ed. 121.

12. Corning *v.* Burden, 15 How. 252, 270, 14 L. Ed. 683.

"Terms of art, in the absence of parol testimony, must be understood in their primary sense, unless the context evidently shows that they were used in the particular case in some other and peculiar sense, in which case the testimony of persons skilled in the art of science may be admitted to aid the court in ascertaining the true intent and meaning of that part of the instrument, but the words of the instrument which have reference to the usual transaction of life must be interpreted according to their plain, ordinary, and popular meaning; and the rule is that parol evidence is not admissible to contradict or vary such instrument." Moran *v.* Prather, 23 Wall. 492, 499, 23 L. Ed. 121.

13. **Bridges.**—Union Pac. R. Co. *v.* Clopper, 131 U. S. cxcii, cxcv, 26 L. Ed. 243. See, generally, the title BRIDGES, vol. 3, p. 516.

"That the opinion of a practical civil engineer of experience in bridge building is entitled to weight with the jury in deciding whether part of this track through the bottom, which had been protected by stone, was so constructed as a dyke against the current of water, or as the approach to the bridge, is, we think, too clear for argument. Such a witness would know what is usually meant by the term approach to a bridge much better than the average juror, and would have, perhaps, little difficulty in forming a just opinion, when the ordinary juror would have been wholly at a loss." Union Pac. R. Co. *v.* Clopper, 131 U. S. cxcii, cxcv, 26 L. Ed. 243.

in testing the strength of fire hose, may state that a particular test applied ex parte, was not a fair one.[14]

11. Nautical Matters—a. *In General.*—Where, in any case, a disputed question of navigation arises, in regard to which neither sailing rules and regulations prescribed by law, nor the rules of the supreme court regulating the practice in admiralty, have made provision, evidence of experts as to a general usage regulating the matter is admissible.[15]

b. *Skill.*—The testimony of experts is admissible in determining an issue involving a question of nautical skill.[16]

c. *Construction of Vessel.*—One who built a ship and had sailed her for seven years is competent to testify as to the construction of the vessel.[17]

d. *Depth to Which a Vessel May Be Loaded.*—Where a charter party stipulated that a vessel should receive a full cargo, the opinions of experts are the best criteria of how deeply she can be loaded with safety to the lives of the passengers.[18]

e. *Damages for Collision.*—See post, "Damages for Collision," I, B, 14, c, (1).

12. Insurance.—The opinion of a medical witness made prior to an application for insurance that a person was not worthy of insurance, is not competent evidence in a suit on a policy issued several months afterwards; there being no issue made in the pleadings as to the health of the assured prior to the date of the policy.[19]

13. Purpose or Quality of an Act.—The purpose or quality of an act may be stated by a witness who was present and cognizant of the whole transaction, as whether the delivery of money by one man to another was by way of payment or otherwise.[20]

14. Value—a. *In General.*—Testimony as to value may be properly received from the mouths of witnesses, who are duly qualified to testify in relation to the subject of inquiry.[21]

b. *Attorney's Fees for Professional Services.*—See the title Attorney and Client, vol. 2, pp. 727, 728.

14. Fire hose.—Chicago *v.* Greer, 9 Wall. 726, 19 L. Ed. 769.

The testimony of a person, not an expert, that fire hose of a peculiar size which the city had contracted for, would "not answer the city's purpose," is inadmissible on a suit by the manufacturer against the city for the contract price; inadmissible both because the witness is not an expert, and because in such a suit the only questions are what did the contract call for, and what did the manufacturer furnish. Chicago *v.* Greer, 9 Wall. 726, 19 L. Ed. 769.

15. Nautical matters—In general.—The City of Washington, 92 U. S. 31, 23 L. Ed. 600. See, generally, the title SHIPS AND SHIPPING.

"What is a competent crew for the voyage? at what time such crew should be on board? what is a proper pilot ground? what is the course and usage of trade in relation to the master and crew being on board, when the ship breaks ground for the voyage? are question of fact, dependent upon nautical testimony; and are incapable of being solved by a court, without assuming to itself the province of a jury, and judicially relying on its own skill in maritime affairs." McLanahan *v.* Universal Ins. Co., 1 Pet. 170, 184, 7 L. Ed. 98.

It is competent for experts to testify to material questions touching marine risks, such as whether certain acts will increase the risk and enhance the premiums. McLanahan *v.* Universal Ins. Co., 1 Pet. 170, 187, 7 L. Ed. 98.

16. Skill.—Transportation Line *v.* Hope, 95 U. S. 297, 24 L. Ed. 477.

Expert testimony is proper as to the prudent management of a boat. Union Ins. Co. *v.* Smith, 124 U. S. 405, 423, 31 L. Ed. 497.

The master, fireman, and mate are competent to testify as experts as to the prudent management of a boat and its loss, where they were on board at the time, and had had several years previous experience in navigation. Union Ins. Co. *v.* Smith, 124 U. S. 405, 423, 31 L. Ed. 497.

17. Construction of vessel.—Andersen *v.* United States, 170 U. S. 481, 502, 42 L. Ed. 1116.

18. Depth to which a vessel may be loaded.—Ogden *v.* Parsons, 23 How. 167, 16 L. Ed. 410.

19. Insurance.—Insurance Co. *v.* Mahone, 21 Wall. 152, 22 L. Ed. 593. See post, "Insurance," I, B, 14, e. See, generally, the title INSURANCE.

20. Purpose or quality of an act.—Bank *v.* Kennedy, 17 Wall. 19, 20, 21 L. Ed. 551.

21. Value—In general.—The Conqueror, 166 U. S. 110, 131, 41 L. Ed. 937.

c. *Ships and Shipping*—(1) *Damages for Collision*—(a) *Where Opinions of Experts Conflict.*—As to the value of a ship, the evidence of her builders as to her original cost and what she would have been worth at the time of the collision if she had been kept in good repair, and also testimony that the owner concluded a sale at a certain price for one-half the ship which was to have been delivered and the money paid on the day following that upon which she was lost, is better evidence of her actual value than the conflicting opinions of experts more or less friendly to the owner.[22]

(b) *Where Ship Has Been Abandoned.*—In cases of collision, where the injured vessel has been abandoned, the measure of damages is the difference between her value in her crippled condition and her value before the collision; and this is to be ascertained by the testimony of experts, who can judge of the probable expense of raising and repairing the vessel.[24]

(c) *Where Ship Has Been Raised and Repaired.*—But where the vessel has been raised and repaired, or is undergoing repairs, there is no necessity for resorting even to the opinion and estimates of experts, as to probable expenses, for as to these the reasonable expenses incurred in raising and repairing her are matters of fact that may be ascertained from the parties concerned in the work.[25]

(d) *Propelling Engines.*—Where a hydraulic engineer had been engaged in the construction of steam engines and other machinery for many years, his testimony as an expert is admissible as to the value of propelling engines for a boat upon which he had traveled and seen the engines in operation, and also as to what it would cost to make the engines good.[26]

d. *Appraisement of Goods Fraudulently Imported.*—In the trial of a cause where goods had been seized upon suspicion of being fraudulently imported, it was proper to allow to go to the jury, as evidence, appraisements of the goods made either by the official appraiser or appraisers acting under an appeal, they being present to verify the papers. The objection that the appraisements had not been made in presence of the jury was not sufficient.[27]

e. *Insurance.*—In a case of contributing policies, adjustments of loss made by an expert may be submitted to the jury, not as evidence of the facts stated therein, or as obligatory, but for the purpose of assisting the jury in calculating the amount of liability of the insurer upon the several hypotheses of fact mentioned in the adjustment, if they find either hypothesis correct.[28]

C. Qualification of Expert.—Discretion of Court.—How much knowledge a witness must possess before a party is entitled to his opinion as an expert is a matter which, in the nature of things, must be left largely to the discretion of the trial court, and its ruling thereon will not be disturbed unless clearly erroneous.[29]

22. When evidence of experts conflict.—The Albert Dumois, 177 U. S. 240, 255, 44 L. Ed. 751.

"There was no error in fixing the value of the Argo at the sum of $15,000—an increase of $4,000 over the amount fixed by the district court. The evidence of her builders was that she originally cost $18,000, and that, if she had been kept in good repair, she would have been worth two-thirds of that amount at the time of the collision. There was also testimony to the effect that her owner had, at the time of the collision, concluded a sale of one-half Argo for $7,500, and that it was to have been delivered and the money paid for this moiety on the day following that upon which she was lost, and upon her return to the city. This is better evidence of her actual value than the conflicting opinions of experts more or less friendly to the owner, who put her value at from $8,500 to $30,000." The Albert Dumois, 177 U. S. 240, 255, 44 L. Ed. 751.

24. Damages where ship has been abandoned.—The Schooner Catherine *v.* Dickinson, 17 How. 170, 15 L. Ed. 233. See ante, "Nautical Matters," I, B, 11.

25. Where ship has been raised and repaired.—The Schooner Catherine *v.* Dickinson, 17 How. 170, 175, 15 L. Ed. 233.

26. Propelling engines.—Hartranft *v.* Wiegman, 121 U. S. 609, 30 L. Ed. 1012.

27. Appraisements of goods fraudulently imported.—Buckley *v.* United States, 4 How. 251, 11 L. Ed. 961.

28. Insurance.—Home Ins. Co. *v.* Baltimore Warehouse Co., 93 U. S. 527, 23 L. Ed. 868. See, generally, the title INSURANCE.

29. Qualification of experts.—Chateaugay Ore. etc., Co. *v.* Blake, 144 U. S. 476, 484, 36 L. Ed. 510; Stillwell, etc., Mfg. Co. *v.* Phelps, 130 U. S. 520, 32 L. Ed. 1035;

D. Examination of Expert Witnesses.—1. Interrogation as to Other Matters than Opinion.—After a witness has once qualified himself as an expert and given his own professional opinion in reference to that which he has seen or heard, or upon hypothetical questions, then it is ordinarily opening the door to too wide an inquiry to interrogate him as to what other scientific men have said upon such matters, or in respect to the general teachings of science thereon.[30]

2. Manner in Which Medical Examination Made.—There is no error in permitting medical witnesses, who testify in behalf of the plaintiff, to be asked whether the examinations made by them "were made in a superficial or in a careful and thorough manner."[31]

3. Hypothetical Questions—a. *Value of.*—Where witnesses of proper skill and experience have formed their judgment from a personal examination of the subject of the controversy, their opinions are generally more worthy of confidence than those elicited by hypothetical questions, which may or may not state all the accidents and circumstances necessary to form a correct conclusion.[32]

b. *Length of.*—The length of hypothetical statements presented to a witness to ascertain his opinion upon any matter growing out of the facts supposed, will necessarily depend upon the simple or complicated character of the transactions recited, and the number of particulars which must be considered for the formation of the opinion desired. And this subject, like the extent to which the examination of a witness may be allowed, must, in a great degree, be left to the discretion of the court.[33]

c. *Medical Expert.*—A medical expert may be asked his opinion upon a case hypothetically stated, or upon a case where the facts are certain and found; but he will not be allowed to determine from the evidence what the facts are, and to give his opinion upon them.[34]

d. *Equipment of Engines.*—It is permissible to ask hypothetical questions to prove bad equipments of locomotive engines.[35]

E. Weight of Expert Testimony—Question for the Jury.—The ultimate weight to be given to the testimony of experts is a question to be determined by

Montana R. Co. *v.* Warren, 137 U. S. 348, 34 L. Ed. 681; Inland, etc., Coasting Co. *v.* Tolson, 139 U. S. 551, 35 L. Ed. 270; Spring Co. *v.* Edgar, 99 U. S. 645, 648, 25 L. Ed. 487.

It must appear, of course, that the witness is qualified to speak to the point of inquiry, whether it respects a patented invention, a question in chemistry, insurance, shipping, seamanship, foreign law, or of the habits of animals, whether ferœ naturœ or domestic. Spring Co. *v.* Edgar, 99 U. S. 645, 657, 25 L. Ed. 487.

30. Interrogation as to other matters than opinion.—Davis *v.* United States, 165 U. S. 373, 377, 41 L. Ed. 750.

31. Manner in which medical examination made.—Northern Pac. R. Co. *v.* Urlin, 158 U. S. 271, 273, 39 L. Ed. 977. See, generally, the title PHYSICIANS AND SURGEONS.

It is competent for witnesses, who are medical experts, to characterize the manner of the examination made by them. Northern Pac. R. Co. *v.* Urlin, 158 U. S. 271, 273, 39 L. Ed. 977.

32. Value of.—Morewood *v.* Enequist, 23 How. 491, 495, 16 L. Ed. 516.

When permissible.—Where one is charged with the crime of murder committed on board a ship and he wishes to prove that he was at the wheel at the time the murder was committed, it is permissible to ask a number of sailors in the form of hypothetical questions, what would be the effect upon the vessel if the wheelman had taken his hands off of the wheel, and what effect would be produced by lashing the wheel. Bram *v.* United States, 168 U. S. 532, 568, 42 L. Ed. 568.

33. Length of.—Forsythe *v.* Doolittle, 120 U. S. 73, 78, 30 L. Ed. 586.

34. Medical expert.—Dexter *v.* Hall, 15 Wall. 9, 21 L. Ed. 73. See, generally, the title PHYSICIANS AND SURGEONS.

35. Equipment of engines.—In an action to recover for the loss of cotton caused by fire alleged to be due from sparks from a locomotive, it is competent to ask an expert witness a hypothetical question as to whether an engine is properly constructed which sets out eight fires in going a distance of four miles, where there is evidence to the effect that it is impossible even with the use of the most effective spark arresters, to prevent the escape of sparks. Texas, etc., R. Co *v.* Watson, 190 U. S. 287, 290, 47 L. Ed. 1057.

the jury; and there is no rule of law which requires them to surrender their judgment, or to give a controlling influence to the opinions of scientific witnesses.[36]

II. Nonexpert Opinion.

A. Definition.—Opinion, in the law of evidence, is an inference of conclusion drawn by a witness from facts, some of which are known to him and others assumed, or drawn from facts which, though lending probability to the inference, do not evolve it by a process of absolutely necessary reasoning.[37]

B. Admissibility of Nonexpert Testimony—1. OPINION DEDUCED FROM UNDISCLOSED FACTS.—The opinion of a witness from facts he does not disclose is inadmissible.[38]

2. VALUE—a. *In General.*—One cannot testify in general terms what he estimates his damages to be, when he does not testify to the items of damage, or to facts upon which his opinion is based.[39]

b. *Of Land.*—In respect to the value of land the opinions of witnesses familiar with the territory and its surroundings are competent.[40]

c. *Rental Value of Property.*—A witness cannot testify as to the rental value of property where he has no knowledge of the marketable condition or rental value of such property as would render his opinion of any use to the jury beyond the merest guess or conjecture.[41]

3. EFFECT OF INTEMPERANCE.—The opinion of a witness as to the effect of

36. Weight of expert testimony—Question for the jury.—The Conqueror, 166 U. S. 110, 133, 41 L. Ed. 937; Spring Co. *v.* Edgar, 99 U. S. 645, 658, 25 L. Ed. 487.

The opinions of attorneys, as to the value of professional services rendered, are not to control the judgment of the jury so as to preclude them from exercising their own knowledge or ideas upon the value of such services. Head *v.* Hargraves, 105 U. S. 45, 47, 26 L. Ed. 1028.

37. Definition.—Black's Law Dict. 852.

38. Opinion deduced from undisclosed facts.—Raub *v.* Carpenter, 187 U. S. 159, 161, 47 L. Ed. 119.

A witness ought never to swear to inferences, without stating the train of reasoning by which his mind has been conducted to them. The Nereide, 9 Cranch 388, 416, 3 L. Ed. 769.

"Dr. George B. Heinecke, a practicing physician in Washington, and a grandnephew of deceased, testified that he had known deceased ever since he could recollect, and was accustomed to seeing him frequently; that he had seen him when recovering from attacks of epilepsy subsequently to the execution of the will and codicil; 'that testator had stated to him that he was a sufferer from urethal calculus; that on the 13th of March, 1896, he had seen the testator have a fainting spell;' 'that he had on one occasion seen testator laughing to himself; that on or about the 13th of February, 1899, during the blizzard, the testator acted peculiarly about the snow in his yard; did not know how it got in there, all of it, and went out there and tried to get it removed;' and witness stated the result of the autopsy and the cause of death. He was then asked the following question: 'Doctor, have you formed any opinion, from your uncle's general condition of health and the conditions disclosed by his brain at this investigation, and from all you know about him yourself, what his condition of mind was?'" Held, that no sufficient basis had been laid for that portion of the question "all that you know about him yourself." Raub *v.* Carpenter, 187 U. S. 159, 160, 161, 47 L. Ed. 119.

39. In general.—Dushane *v.* Benedict, 120 U. S. 630, 647, 30 L. Ed. 810.

40. Of land.—Montana R. Co. *v.* Warren, 137 U. S. 348, 353, 34 L. Ed. 681.

It is not necessary in order for a witness to testify as to the value of property that there should have been sales of the property in question, or similar property; after a witness has testified that he knows the property and its value, he may be called upon to state such value. Montana R. Co. *v.* Warren, 137 U. S. 348, 354, 34 L. Ed. 681.

41. Rental value of property.—New York, etc., Co. *v.* Fraser, 130 U. S. 611, 620, 32 L. Ed. 1031.

A witness who is acquainted with gold mills enough to know what work they can perform and what they can earn, is not competent to testify as to the fair rental value per month of a silver mill, where the silver mill in controversy is the only one he has ever seen. New York, etc., Co. *v.* Fraser, 130 U. S. 611, 620, 32 L. Ed. 1031.

"No error is shown in the exclusion of Geissner's testimony as to the rental value of a mill which he had never seen and knew nothing of." Stillwell, etc., Mfg. Co. *v.* Phelps, 130 U. S. 520, 527, 32 L. Ed. 1035.

intemperance upon an insured, four years prior to the time of the issuance of the policy, is inadmissible.[42]

4. Disease.—**Symptoms.**—In a suit to recover damages suffered by loss of cattle, the loss being caused by the communication of a disease, witnesses, though not experts, may testify as to the symptoms they observed, and that cattle so afflicted were ordinarily spoken of as having Texas fever.[43]

Smallpox.—The testimony of persons, who were not experts, was inadmissible to prove that certain infected rags caused the breaking out of smallpox.[44]

5. Insanity.—While the mere opinion of a nonprofessional witness, predicated upon facts detailed by others, is incompetent as evidence upon an issue of insanity, his judgment, based upon personal knowledge of the circumstances involved in such an inquiry, certainly is of value; because the natural and ordinary operations of the human intellect, and the appearance and conduct of insane persons, as contrasted with the appearance and conduct of persons of sound mind, are more or less understood and recognized by every one of ordinary intelligence who comes in contact with his species.[45] The extent to which such opinions should influence or control the judgment of the court or jury must depend upon the intelligence of the witness, as manifested by his examination, and upon his opportunities to ascertain all the circumstances that should properly affect any conclusion reached. It will also depend, in part, upon the decree of the mental unsoundness of the person whose condition is the subject of inquiry; for, his derangement may be so total and palpable that but slight observation is necessary to enable persons of ordinary understanding to form a reasonably accurate judgment as to his sanity or insanity; in other cases, the symptoms may be of such an occult character as to require the closest scrutiny and the highest skill to detect the existence of insanity.[46]

6. Death.—The opinion of a person's family that he is dead is not admissible to prove him dead in an action upon an insurance policy on his life.[47]

7. Insurance.—See ante, "Insanity," II, B, 4; "Death," II, B, 6.

8. Damages from Railroads.—Opinion evidence has been admitted in actions against railroads for damages.[48]

42. Effect of intemperance.—Northwestern Life Ins. Co. *v.* Muskegon Bank, 122 U. S. 501, 505, 30 L. Ed. 1100.

43. Disease—Symptoms.—Grayson *v.* Lynch, 163 U. S. 468, 479, 41 L. Ed. 230.

44. Smallpox.—Dushane *v.* Benedict, 120 U. S. 630, 647, 30 L. Ed. 810.

45. Insanity.—Connecticut Mut. Life Ins. Co. *v.* Lathrop, 111 U. S. 612, 619, 28 L. Ed. 536. See, generally, the title INSANITY.

The testimony of ordinary persons as to the conduct, manner, and appearance of an insured, who took his own life and to the impressions thereby made upon them, is competent to go to the jury upon the question of his insanity. Insurance Co. *v.* Rodel, 95 U. S. 232, 24 L. Ed. 433.

Where a person is on trial for murder, a nonexpert witness may testify as to such defendant's appearance and conduct the day before the killing, and may give his opinion formed at the time as to the defendant's mental condition, but he cannot, unless under special circumstances, testify as to his opinion of such mental condition formed after the event. Queenan *v.* Oklahoma, 190 U. S. 548, 549, 47 L. Ed. 1175.

In an action upon an insurance policy and the issue is as to the sanity of the insured who had killed himself, evidence of the impressions and opinions of nonprofessional witnesses is admissible to show insanity, where they were acquainted with the deceased, and described his conduct and appearance at or about, and shortly before his death, thus giving the facts upon which their opinions are based. Connecticut Mut. Life Ins. Co. *v.* Lathrop, 111 U. S. 612, 28 L. Ed. 536.

46. Connecticut Mut. Life Ins. Co. *v.* Lathrop, 111 U. S. 612, 619, 28 L. Ed. 536.

47. Death.—Fidelity Mut. Life Ass'n *v.* Mettler, 185 U. S. 308, 321, 46 L. Ed. 922.

48. Damages from railroads.—In an action for damages against a railroad company for injuries to an employee caused by defective appliances, the question of the admissibility of evidence is one within the reasonable discretion of the trial court, and the discretion is not abused by admitting witnesses who had had practical experience on railroads, and were familiar with structures and the character of appliances mentioned in the evidence. Gila Valley, etc., R. Co. *v.* Lyon, 203 U. S. 465, 475, 51 L. Ed. 276. See, generally, the titles NEGLIGENCE; RAILROADS.

In an action against a railroad for dam-

9. Rediscount of Note.—A witness who had been acting cashier in a bank for two months is competent, even if he had no prior experience, to testify as to whether a note was a rediscount or not.[49]

10. Financial Standing.—Where the question in issue is the knowledge of a person as to his financial condition, the opinions of witnesses as to such knowledge is inadmissible.[50] The opinion of the cashier of a bank is inadmissible to prove the financial standing of the president, who is charged with misapplying the funds of the bank.[51]

11. Results of Voluminous Facts and Examination of Books and Papers.—When it is necessary to prove the results of voluminous facts or of the examination of many books and papers, and the examination cannot be conveniently made in court, the results may be proved by the person who made the examination.[52]

C. Qualification of Witnesses.—In General.—The opinions of witnesses are constantly taken as to the result of their observations on a great variety of subjects. All that is required in such cases is that the witnesses should be able to properly make the observations,[53] the result of which they give, and the confidence bestowed on their conclusions will depend upon the extent and completeness of their examination, and the ability with which it is made.[54]

EXPERT WITNESSES.—See the title Expert and Opinion Evidence, ante, p. 200.

EXPIRE.—See note 1.

EXPLOSIONS AND EXPLOSIVES.—As to the liability of a carrier for damages caused by the explosion of nitroglycerine, which is in his care, see the title Carriers, vol. 3, p. 617. As to the effect of an explosion upon a fire insurance policy, see the title Insurance. As to liability of employer for injuries to employee, see the title Master and Servant. As to explosions on ship board, see the title Ships and Shipping.

ages to cotton caused by fire, the testimony of witnesses that they did not know of and saw no opportunity for the cotton to have caught fire except from the locomotive in question, is inadmissible, because the evidence was of a negative character and would not be relevant, and was in the nature of a conclusion of the witness to the effect that the fire had originated from the engine. Texas, etc., R. Co. *v.* Watson, 190 U. S. 287, 289, 47 L. Ed. 1057.

49. Rediscount of note.—Cochran *v.* United States, 157 U. S. 286, 292, 39 L. Ed 704.

50. Financial standing.—Agnew *v.* United States, 165 U. S. 36, 49, 41 L. Ed. 624.

51. Agnew *v.* United States, 165 U. S. 36, 48, 41 L. Ed. 624.

52. Results of voluminous facts and examination of books and papers.—Burton *v.* Driggs, 20 Wall. 125, 136, 22 L. Ed. 299.

53. Qualification of witnesses.—Hopt *v.* Utah, 120 U. S. 430, 437, 30 L. Ed. 708.

In an action to recover ores taken from a mine, the testimony of a witness is not admissible where he knew nothing about the quantity of ore taken out during the period alluded to; nor is it admissible because of a stipulation, if the stipulation is nowhere produced in the record. Patrick *v.* Graham, 132 U. S. 627, 631, 33 L. Ed. 460. See, generally, the title MINES AND MINERALS.

An employee is not competent to testify as to the daily capacity of an ore mill where the evidence shows that he was employed as a general manager who tended to the outside affairs of the business, and not to the details of the mining or practical workings of the machinery. Chateaugay Ore, etc., Co. *v.* Blake, 144 U. S. 476, 485, 36 L. Ed. 510.

54. Hopt *v.* Utah, 120 U. S. 430, 437, 30 L. Ed. 708.

It is difficult to lay down any exact rule in respect to the amount of knowledge a witness must possess; and the determination of this matter rests largely in the discretion of the trial judge. Montana R. Co. *v.* Warren, 137 U. S. 348, 353, 34 L. Ed. 681.

Where a witness testifies as to the identification of a document, his testimony is not inadmissible where he uses the words "I should say" when it is clear that those words, instead of being the expression of a conjecture, were simply a form of speech, and he proceeded to furnish the basis for his statement. White *v.* Van Horn, 159 U. S. 3, 11, 40 L. Ed. 55.

1. Expire.—An act of congress provided that where an invention has been previously patented in a foreign country, a patent granted in the United States shall

EXPORTATION.—See note 1.

EXPORTS AND IMPORTS.—See the titles INTERSTATE AND FOREIGN COMMERCE; REVENUE LAWS; TAXATION. The words "exports" and "imports" as used in that clause of the constitution which declares that "no state shall, without the consent of congress, lay imposts or duties on imports or exports," does not refer to articles carried from one state into another, but only to articles imported from foreign countries into the United States.[2] An import or expert is an article of merchandise, goods of some kind—property, "commodities." The terms do not include persons unless they are brought in as property—as slaves, unwilling or passive emigrants, like the importation referred to in the ninth section of the first article of the constitution.[3] Imports are things imported; they are the

be limited to **expire** at the same time of the foreign patent. It was held that the termination of a foreign patent by forfeiture did not terminate the United States patent. Pohl *v.* Anchor Brewing Co., 134 U. S. 381, 33 L. Ed. 953. See the title PATENTS.

1. Exportation.—In Turpin *v.* Burgess, 117 U. S. 504, 507, 29 L. Ed. 988, it is said: "But a general tax, laid on all property alike, and not levied on goods in course of **exportation**, nor because of their intended **exportation**, is not within the constitutional prohibition. How can the officers of the United States, or of the state, know that goods apparently part of the general mass, and not in course of **exportation**, will ever be exported? Will the mere word of the owner that they are intended for **exportation** make them exports? This cannot for a moment be contended. It would not be true, and would lead to the greatest frauds."

Period of exportation.—In Sampson *v.* Peaslee, 20 How. 571, 577, 15 L. Ed. 1022, it is said: "That the period of the **exportation** of merchandise is the time at which the value of any article is to be fixed by the appraisers. That in ordinary cases the date of the bill of lading may be regarded as the period of **exportation.**" See, generally, the title REVENUE LAWS.

2. Goods brought from one state to another.—Brown *v.* Houston, 114 U. S. 622, 628, 29 L. Ed. 257; Woodruff *v.* Parham, 8 Wall. 123, 19 L. Ed. 382; Hinson *v.* Lott, 8 Wall. 148, 19 L. Ed. 389; License Cases, 5 How. 504, 594, 12 L. Ed. 256; Pittsburg, etc., Coal Co. *v.* Louisiana, 156 U. S. 590, 39 L. Ed. 544; Patapsco Guano Co. *v.* North Carolina, 171 U. S. 345, 350, 43 L. Ed. 191; Austin *v.* Tennessee, 179 U. S. 343, 351, 45 L. Ed. 224; Dooley *v.* United States, 183 U. S. 151, 153, 46 L. Ed. 128; Pervear *v.* Com., 5 Wall. 475, 18 L. Ed. 608; Brown *v.* Maryland, 12 Wheat. 419, 6 L. Ed. 678; State Tax on Railway Gross Receipts, 15 Wall. 284, 21 L. Ed. 164; American Steel, etc., Co. *v.* Speed, 192 U. S. 500, 48 L. Ed. 538, 24 Sup. Ct. Rep. 365. See, also, Almy *v.* California, 24 How. 169, 16 L. Ed. 644. And see the titles INTERSTATE AND FOREIGN COMMERCE; TAXATION.

In Swan, etc., Co. *v.* United States, 190 U. S. 144, 146, 47 L. Ed. 984, it is said: "The fact that the words **export** and 'exportation' are, as we have indicated, generally used in the sense of transportation from this to a foreign country, makes against the contention that it is here used in a different sense."

3. Persons.—Passenger Cases, 7 How. 283, 535, 12 L. Ed. 702; New York *v.* Miln, 11 Pet. 102, 9 L. Ed. 648; New York *v.* Compagnie Generale Transatlantique, 107 U. S. 59, 27 L. Ed. 383, 2 Sup. Ct. Rep. 87.

In People *v.* Compagnie Generale Translantique, 107 U. S. 59, 61, 27 L. Ed. 383, the court says: "We know of nothing which can be **exported** from one country or **imported** in another that is not in some sense property—property in regard to which some one is owner, and is either the **importer** or the **exporter.** This cannot apply to a free man. Of him it is never said he **imports** himself, or his wife or his children. The language of § 9, art. 1, of the constitution, which is relied on by counsel, does not establish a different construction: 'The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.' There has never been any doubt that this clause had exclusive reference to persons of the African race. The two words 'migration' and 'importation' refer to the different conditions of this race as regards freedom and slavery. When the free black man came here, he migrated; when the slave came, he was **imported.** The latter was property, and was **imported** by his owner as other property, and a duty could be imposed on him as an **import.** We conclude that free human beings are not **imports** or **exports,** within the meaning of the constitution." See Gibbons *v.* Ogden, 9 Wheat. 1, 216, 6 L. Ed. 23; Groves *v.* Slaughter, 15 Pet. 449, 514, 10 L. Ed. 800.

A bill was filed in a state court stating that by reason of an existing strike a certain coal company threatened and was about to **import** into a certain town and county a large number of armed men, and prayed an injunction against such

articles themselves which are brought into the country.[3a] Goods imported do not lose their character as imports, and become incorporated into the mass of property of the state until they have passed from the control of the imported, or been broken up by him from their original cases.[4]

EXPOSITIONS.—See the title THEATRES AND SHOWS. As to appropriations therefor, see the titles CORPORATIONS, vol. 4, p. 798; UNITED STATES.

EX POST FACTO LAWS.—An ex post facto law is defined, when after an action indifferent in itself or lawful is committed, the legislature then for the first time declares it to have been a crime and inflicts punishment upon the person who committed it.[1]

EXPOSURE.—As to exposure to danger, see the titles ACCIDENT INSURANCE, vol. 1, p. 58; NEGLIGENCE. As to exposure of person, see the title OBSCENITY.

EXPRESS.—See note 2.

importation. The court held that the word **import** necessarily meant bringing into the county and town from outside their boundaries, but did not think, taking the whole bill together, that as there used its necessary signification was the bringing in from outside of the state, so as to give jurisdiction in a federal court. Arkansas *v.* Kansas, etc., Coal Co., 183 U. S. 185, 189, 46 L. Ed. 144.

3a. Brown *v.* Maryland, 12 Wheat. 419, 437, 6 L. Ed. 678. A duty "on **imports**, then, is not merely a duty on the act of importation, but is a duty on the thing **imported.**" Brown *v.* Maryland, 12 Wheat. 419, 437, 6 L. Ed. 678.

In Brown *v.* Maryland, 12 Wheat. 419, 445, 6 L. Ed. 678, it is said: "As, to **export**, it is said, means only to carry goods out of the country; so, to **import**, means only to bring them into it." See, also, Woodruff *v.* Parham, 8 Wall. 123, 19 L. Ed. 382.

4. Low *v.* Austin, 13 Wall. 29, 20 L. Ed. 517. See the title INTERSTATE AND FOREIGN COMMERCE.

1. Ex post facto laws.—Prize Cases, 2 Black 635, 698, 17 L. Ed. 459. For a complete treatment of this subject, see the title CONSTITUTIONAL LAW, vol. 4, pp. 515, 529. As to retrospective laws generally, see the title CONSTITUTIONAL LAW, vol. 4, p. 432.

In Orr *v.* Gilman, 183 U. S. 278, 285, 46 L. Ed. 196, it is said: "The debates in the federal convention upon the constitution show that the terms **ex post facto laws**, were understood in a restricted sense, relating to criminal cases only, and that the description of Blackstone of such laws was referred to for their meaning. 3 Mad. Pap. 1399, 1450, 1579. This signification was adopted in this court shortly after its organization, in opinions carefully prepared, and has been repeatedly announced since that time." See, also, the title CONSTITUTIONAL LAW, vol. 4, pp. 433, 517.

In In Re Sawyer, 124 U. S. 202, 219, 31 L. Ed. 402, it was held that an ordinance and proceedings under it to remove a city official were in the nature of civil as distinguished from criminal proceedings, and that such ordinances and proceedings were not within the provision of the United States constitution against **ex post facto laws.**

2. Express.—Where a statute authorized a town to borrow money to construct a railroad, the money to be paid over to such railroad company as might be **expressed** by the written assents of two-thirds of the resident taxpayers of said town, it was held that the statute did not require that the taxpayers should **express** (that is, designate) the company by its name. Any mode of description that designated it was sufficient. Scipio *v.* Wright, 101 U. S. 665, 670, 25 L. Ed. 1037. See, generally, the title MUNICIPAL, COUNTY, STATE AND FEDERAL AID.

Express business.—An **express** business involves the idea of regularity, as to route or time, or both. Retzer *v.* Wood, 109 U. S. 187, 27 L. Ed. 900. Accordingly, it was held, when an act of congress emposed a tax on persons carrying on **express** business, this did not apply to a carrier without a regular route.

Expressed oils.—In the act of congress of March, 1883, providing that the duties on all preparations known as "**expressed** oils," not specially numerated or provided for in the act, should be 25 per cent. ad valorem, the words "**expressed** oil" were held to include olive oils, both salad and lamp. Hartranft *v.* Oliver, 125 U. S. 525, 527, 31 L. Ed. 813.

EXPRESS COMPANIES.

CROSS REFERENCES.

See the titles CARRIERS, vol. 3, p. 556; INTERSTATE AND FOREIGN COMMERCE; INTOXICATING LIQUORS; REVENUE LAWS; TAXATION.

As to the recovery of treasury notes of the United States which have been stolen from an express company, see the title BILLS, NOTES AND CHECKS, vol. 3, p. 257. As to express companies as carriers, see the title CARRIERS, vol. 3, p. 556. As to liability of express company for property lost by robbery, see the title CARRIERS, vol. 3, p. 556. As to liability of an express company for damages caused by the explosion of nitroglycerine which was in its care, see the title CARRIERS, vol. 3, p. 556. As to effect upon interstate commerce of licensing express companies, see the title INTERSTATE AND FOREIGN COMMERCE. As to questions of taxation upon express companies, see the title TAXATION.

"Express Business."—An "express business" involves the idea of regularity, as to route or time, or both.[1]

Grant of Privilege to Do Business.—A state statute imposing taxes upon express companies does not grant a privilege of doing express business.[2]

Statutory Discrimination.—Where a statute defines express companies to be such "persons or corporations who carry on the business of transportation on contracts for hire with railroad or steamboat companies," a tax on such companies does not unjustly discriminate against the express companies defined by the statute, and favor other companies or persons that may, in connection with their primary or original business, engage in express business, or that may carry on a separate express business, owning their own means of transportation.[3]

By Railroads.—It is not the duty of railroad companies to furnish express facilities to all alike who demand them.[4]

EXPRESS CONSIDERATION.—See the title CONTRACTS, vol. 5, p. 563.
EXPRESS CONTRACT.—See the title CONTRACTS, vol. 4, p. 568.
EXPRESS COVENANTS.—See the title COVENANTS, vol. 5, p. 5.

1. **"Express business."**—Retzer *v.* Wood, 109 U. S. 185, 187, 27 L. Ed. 900.

The idea of regularity, as to route or time, or both, is involved in the words "express business," under § 104 of the act of June 30th, 1864, ch. 173, 13 Stat. 276, and those words do not cover what is done by a person who carries goods solely on call and at special request, and does not run regular trips or over regular routes. Retzer *v.* Wood, 109 U. S. 185, 27 L. Ed. 900.

2. **Grant of privilege to do business.**—Adams Express Co. *v.* Ohio State Auditor, 166 U. S. 185, 218, 41 L. Ed. 965.

3. **Statutory discrimination.**—Pacific Express Co. *v.* Seibert, 142 U. S. 339, 353, 35 L. Ed. 1035. See, generally, the title TAXATION.

4. **Discrimination by railroads.**—Express Cases, 117 U. S. 1, 27, 29 L. Ed. 791. See, generally, the title RAILROADS.

Railroad companies are not charged by law with the duty of carrying all express companies in the way that express carriers when taken are usually carried. Express Cases, 117 U. S. 1, 26, 29 L. Ed. 791.

"So long as the public are served to their reasonable satisfaction, it is a matter of no importance who serves them. The railroad company performs its whole duty to the public at large and to each individual when it affords the public all reasonable express accommodations. If this is done the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose. The public require the carriage, but the company may choose its own appropriate means of carriage, always provided they are such as to insure reasonable promptness and security." Express Cases, 117 U. S. 1, 23, 29 L. Ed. 791.

In some of the states, statutes have been passed which, either in express terms or by judicial interpretation, require railroad companies to furnish equal facilities to all express companies, Gen. Laws N. H. 1878, ch. 163, § 2; Rev. Stat. Maine, 1883, 494, ch. 51, § 134; but these are of comparative recent origin, and thus far seen not to have been generally adopted. Express Cases, 117 U. S. 1, 21, 29 L. Ed. 791.

EXPRESSLY.—While the adverb "expressly," in its primary meaning, denotes precision of statement, as opposed to ambiguity, implication, or inference, and is equivalent to "in an express manner," or "in direct terms," it is also commonly used to designate purpose, and as equivalent to "especially," or "particularly," or "for a distinct purpose or object." In Webster's Dictionary, for instance, the definition of "expressly" is: "In an express manner; in direct terms; with distinct purpose; particularly; as, a book written expressly for the young."[1]

EXPRESS MALICE.—See the title HOMICIDE.

EXPRESS PROMISE.—As to stopping running of statute of limitations by, see the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION.

EXPRESS TRUST.—See the title TRUSTS AND TRUSTEES.

EXPRESS WARRANTY.—See the title WARRANTY.

EXPULSION.—See the titles ASSOCIATIONS, vol. 2, p. 633; BENEFICIAL AND BENEVOLENT ASSOCIATIONS, vol. 3, p. 211; EXCHANGES, ante, p. 77; LANDLORD AND TENANT; RELIGIOUS SOCIETIES; STOCK AND STOCKHOLDERS. As to expulsion of passengers, see the title CARRIERS, vol. 3, p. 575. As to expulsion of aliens, see the titles ALIENS, vol. 1, p. 210; CHINESE EXCLUSION ACTS, vol. 3, p. 769.

EX SHIP.—See note 2.

EXTEND.—See note 3.

EXTENSION.—See the titles COPYRIGHT, vol. 4, p. 613; PATENTS. See, also, the title BILLS, NOTES AND CHECKS, vol. 3, p. 257.

EXTENSION OF TIME.—As discharge of guarantor or surety, see the titles GUARANTY; PRINCIPAL AND SURETY. See also, the title WAIVER, and references made therefrom.

EXTERNAL.—See note 4.

EXTINGUISHMENT.—See the titles CONTRACTS, vol. 4, p. 578, et seq.; PAYMENT. See, also, the titles MERGER; NOVATION.

1. Magone *v.* Heller, 150 U. S. 70, 74, 37 L. Ed. 1001.

Where a clause of the tariff act of 1883 provided for duty upon suphate of potash, eo nomine, and another clause exempted from duty "all substances **expressly** used for manure; the term "**expressly** used for manure," it was said, was equivalent to "used **expressly**" or "particularly" or "especially" for manure, and if it were found as a fact that the imported article was so used, it was exempt from duty. Magone *v.* Heller, 150 U. S. 70, 74, 37 L. Ed. 1001; Chew Hing Lung *v.* Wise, 176 U. S. 156, 161, 44 L. Ed. 412. See the title REVENUE LAWS.

2. **Ex ship.**—A contract was for the sale of goods at a certain price **ex ship.** The court said: "The words **ex ship** are not restricted to any particular ship; and by the usage of merchants, as shown in this case, simply denote that the property in the goods shall pass to the buyer upon their leaving the ship's tackle, and that he shall be liable for all subsequent charges of landing. They do not constitute a condition of the contract, but are inserted for the benefit of the seller. See Neill *v.* Whitworth, 18 C. B. (N. S.) 435, and L. R. 1. C. P. 684." Harrison *v.* Fortlage, 161 U. S. 58, 64, 40 L. Ed. 616.

3. **Extend.**—In the case of Martin *v.* Hunter, 1 Wheat. 304, 375, 4 L. Ed. 97, the court in construing the second section of article 3 of the constitution of the United States said: "The words are, 'shall **extend** to;' now that which **extends** to, does not necessarily include in, so that the circle may enlarge, until it reaches the objects that limit it, and yet not take them in. But the plain and obvious sense and meaning of the word 'shall,' in this sentence, is in the future sense, and has nothing imperative in it." See the title PATENTS.

4. **External and visible sign.**—The clause in a certificate of an accident association, that benefits shall not extend to any bodily injury of which there shall be no "**external** and visible sign," is not to be confined to broken limbs or bruises on the surface of the body, but if an internal injury produces, for example, a pale and sickly look in the face, causing vomiting or retching, if, in short, it sends forth to the observation of the eye, in the struggle of nature, any signs of the injury —then those are "**external** and visible signs," provided they are the direct result of the injury. United States Mut. Accident Ass'n *v.* Barry, 131 U. S. 100, 111, 33 L. Ed. 60. See the title ACCIDENT INSURANCE, vol. 1, p. 58.

External means.—Accident Ins. Co. *v.* Crandal, 120 U. S. 527, 531, 30 L. Ed. 740. See the title ACCIDENT INSURANCE, vol. 1, p. 59.

EXTORTION.

CROSS REFERENCES.

See the titles DURESS, vol. 5, p. 682; FRAUD AND DECEIT.

As to concurrent jurisdiction of state and federal court, see the title COURTS, vol. 4, p. 861.

Sending Threatening Letters.—It has been held that the sending of threatening letters by a consul with a view of extorting money is indictable in a circuit court.[1]

Threatening to Accuse of Crime.—The offense of extortion by threats to accuse a person of a violation of any part of the internal revenue law is made a crime by virtue of the federal statute.[2]

Civil Surgeons.—Civil surgeons appointed by the commissioner of pensions under § 4777 of the Revised Statutes are not officers of the United States, and, therefore, are not indictable under § 12 of the act of 1825 (4 Stat. 118), for extortion in taking fees from pensioners.[3]

Chinese Inspectors.—A Chinese inspector guilty of extortion under color of his office can be prosecuted and subjected to fine and imprisonment under § 5481, Rev. Stat., which provides that: "Every officer of the United States who is guilty of extortion under color of his office shall be punished."[4] Prosecutions against a Chinese inspector, for extortion, cannot be sustained under § 3169, Rev. Stat.; nor can they be sustained under § 23 of the act of February 8, 1875, because such statutes refer to offenses committed by officers or agents acting under authority of revenue laws.[5]

EXTRA ALLOWANCE.—See the titles ARMY AND NAVY, vol. 2, p. 516, et seq.; DISTRICT AND PROSECUTING ATTORNEYS, vol. 5, p. 400, et seq.; POSTAL LAWS; PUBLIC OFFICERS; UNITED STATES. See, also, the title COSTS, vol. 4, p. 802. See, also, references under EXTRA WORK.

1. **Sending threatening letters.**—United States *v.* Ravara, 2 Dall. (U. S. C. C.) 297, 1 L. Ed. 388.

2. **Threatening to accuse of crime.**—Sexton *v.* California, 189 U. S. 319, 323, 47 L. Ed. 833.

3. **Civil surgeons.**—United States *v.* Germaine, 99 U. S. 508, 25 L. Ed. 482.

4. Williams *v.* United States, 168 U. S. 382, 388, 42 L. Ed. 509.

5. **Chinese inspectors.**—Williams *v.* United States, 168 U. S. 382, 42 L. Ed. 509.

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CROSS REFERENCES.

As to the extradition of deserters from the navy, see the titles ARMY AND NAVY, vol. 2, p. 494; SEAMEN.

In regard to the effect of extradition upon a surety's liability on a bail bond, see the title BAIL AND RECOGNIZANCE, vol. 2, p. 765. As to questions regarding fugitive slaves, see the title SLAVERY AND INVOLUNTARY SERVITUDE.

I. Definitions and Distinctions.

A. Definitions.—Extradition may be sufficiently defined to be the surrender by one nation to another of an individual accused or convicted of an offense outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and to punish him, demands the surrender.[1]

B. Distinctions—1. DISTINGUISHED FROM "DEPORTATION" AND "TRANSPORTATION."—Strictly speaking, "transportation," "extradition" and "deportation," although each has the effect of removing a person from the country, are different things, and have different purposes. "Transportation" is by way of punishment of one convicted of an offense against the laws of the country. "Extradition" is the surrender to another country of one accused of an offense against its laws, there to be tried, and, if found guilty, punished. "Deportation" is the removal of an alien out of the country, simply because his presence is deemed inconsistent with the public welfare, and without any punishment

1. Definition.—Terlinden v. Ames, 184 U. S. 270, 289, 46 L. Ed. 534.
"Extradition" is the surrender to another country of one accused of an offense against its laws, there to be tried, and, if found guilty, punished. Fong Yue Ting v. United States, 149 U. S. 698, 709, 37 L. Ed. 905.

being imposed or contemplated, either under the laws of the country out of which he is sent, or under those of the country to which he is taken.[2]

2. Distinction between International and Interstate Extradition.—See post, "Trial on Another Charge," IV.

II. International.

A. In General.—The surrender of fugitives from justice is a matter of conventional arrangement between states, as no such obligation is imposed by the laws of nations.[3]

B. Exclusiveness of Federal Authority.—Where an authority is granted to the federal government, to which a similar authority in the states would be absolutely and totally contradictory and repugnant, there the authority to the federal government is exclusive; therefore, a state cannot enter into extradition treaties nor make laws or agreements for the detention and return of fugitives from justice from foreign countries, as such power is repugnant to the power granted to the United States, and cannot be constitutionally exercised by the states.[4]

C. Extradition Treaties—1. Construction of.—In the construction and

2. Distinguished from "deportation" and "transportation."—Fong Yue Ting *v.* United States, 149 U. S. 698, 709, 37 L. Ed. 905. See, generally, the titles ALIENS, vol. 1, p. 210; CHINESE EXCLUSION ACTS, vol. 3, p. 769.

3. In general.—In re Metzger, 5 How. 176, 188, 12 L. Ed. 104.

It is only in modern times that the nations of the earth have imposed upon themselves the obligation of delivering up fugitives from justice to the states where their crimes were committed, for trial and punishment. This has been done generally by treaties made by one independent government with another. Prior to these treaties, and apart from them, it may be stated as the general result of the writers upon international law, that there was no well-defined obligation on one country to deliver up such fugitives to another, and though such delivery was often made, it was upon the principle of comity, and within the discretion of the government whose action was invoked; and it has never been recognized as among those obligations of one government towards another which rest upon established principles of international law. United States *v.* Rauscher, 119 U. S. 407, 411, 30 L. Ed. 425.

It has been said, in Holmes *v.* Jennison, that it is the policy of the federal government, in the absence of extradition treaties, to refuse to surrender fugitives from justice or to demand from a foreign government any one who has fled from this country in order to escape from the punishment due to his crimes. Holmes *v.* Jennison, 14 Pet. 540, 573, 10 L. Ed. 579.

4. Exclusiveness of federal authority.—Holmes *v.* Jennison, 14 Pet. 540, 573, 10 L. Ed. 579.

"Whether in the United States, in the absence of any treaty on the subject with a foreign nation from whose justice a fugitive may be found in one of the states, and in the absence of any act of congress upon the subject, a state can, through its own judiciary or executive, surrender him for trial to such foreign nation, is a question which has been under consideration by the courts of this country without any very conclusive result," but "at this time of day, and after the repeated examinations which have been made by this court into the powers of the federal government to deal with all such international questions exclusively, it can hardly be admitted that, even in the absence of treaties or acts of congress on the subject, the extradition of a fugitive from justice can become the subject of negotiation between a state of this Union and a foreign government." United States *v.* Rauscher, 119 U. S. 407, 412, 414, 30 L. Ed. 425.

This question arose in Holmes *v.* Jennison. H. was indicted in Canada for murder, and fled to the state of Vermont, where he was confined under a warrant issued by the government of Vermont. He petitioned to the supreme court of Vermont for a writ of habeas corpus, and on hearing he was remanded by the state court; he then prosecuted a writ of error to the supreme court of the United States. The court was equally divided upon the question whether a state can deliver up an individual found within its territory to a foreign government, and the writ of error was dismissed. In this case there was no extradition treaty under which the United States could have surrendered H. Holmes *v.* Jennison, 14 Pet. 540, 10 L. Ed. 579.

In cases where a state seeks to have a person extradited from a foreign country, it must carry on the negotiations through the federal government, even though it is a law of the state that has been violated. United States *v.* Rauscher, 119 U. S. 407, 30 L. Ed. 425.

carrying out of extradition treaties, the ordinary technicalities of criminal proceedings are applicable only to a limited extent.[5]

2. Right to Asylum under Treaties.—Extradition treaties made by the United States with foreign countries do not entitle a party fleeing from one country to the other, to an asylum in the country to which he has fled. These treaties, so far as they regulate the right of asylum at all, are intended to limit this right in the case of one who has proved to be a criminal fleeing from justice, so that, on proper demand and proceedings had therein, the government of the country of the asylum shall deliver him up to the country where the crime was committed.[6]

3. Extraditable Offenses—a. *Essentials.*—The general principle of international law is that in all cases of extradition the act done on account of which extradition is demanded must be considered a crime by both countries; and such principle is embodied in a treaty which provides that the offense must be "made criminal by the laws of both countries."[7]

b. *Political Offenses.*—It has been the policy of all governments to grant an asylum to persons who have fled from their homes on account of political disturbances, and who might be there amenable to laws framed with regard to such subjects, and to the personal allegiance of the party. In many of the treaties of extradition between the civilized nations of the world, there is an express exclusion of the right to demand the extradition of offenders against such laws, and in none of them is this class of offenses mentioned as being the foundation of extradition proceedings.[8]

4. Protection Afforded by Treaty.—When a party is duly surrendered to a state under a treaty, he is clothed with the protection which the treaty gives him, and if a state denies him such rights, he can appeal to the federal government. But if he is kidnapped and brought to a state in disregard of any treaty, abductors not professing to act under any foreign authority, then, he cannot appeal to the federal government, as he is clothed with no rights which a proceeding under a treaty could have given him, and there is no duty that this county owes to the country from which he was taken, nor do the constitution or laws of the United States guarantee him any protection.[9]

D. Statutory Provisions—1. Extradition to Country under Control of United States.—The act of congress of June 6, 1900, amending § 5270, Revised Statutes, provides for extradition from the United States to any foreign country or territory, or any part thereof that is occupied by or under the control of the United States.[10]

5. Construction of.—Grin *v.* Shine, 187 U. S. 181, 184, 47 L. Ed. 130.

6. Asylum under treaties.—Ker *v.* Illinois, 119 U. S. 436, 442, 30 L. Ed. 421.

7. Essentials.—Wright *v.* Henkel, 190 U. S. 40, 58, 47 L. Ed. 948; Treaty with England, 1889.

Where fraudulent acts of a corporate director are made criminal by the laws of England, and one guilty of such acts flees to New York, he may be extradited under the treaty of 1889, which provides for the extradition of corporate directors committing fraud "made punishable by the laws of both countries," although the statutes of the two countries defining the offense are not absolutely identical. Wright *v.* Henkel, 190 U. S. 40, 47 L. Ed. 948.

Where a person forges theater tickets in Mexico in violation of its laws, and flees to the United States, he may be extradited under the treaty of 1862 entered into between the two countries. Benson *v.* McMahon, 127 U. S. 457, 32 L. Ed. 234.

In the treaty of 1862 between the United States and Mexico, the crime of "forgery" is not to be restricted in its meaning or scope by the common law. Benson *v.* McMahon, 127 U. S. 457, 466, 32 L. Ed. 234.

Under the treaty entered into between Prussia and the United States in 1858, a person may be extradited from the United States if he commits a crime in Prussia, such a forgery, which is contrary to the laws of the German Empire. Terlinden *v.* Ames, 184 U. S. 270, 289, 46 L. Ed. 534.

8. Political offenses.—United States *v.* Rauscher, 119 U. S. 407, 420, 30 L. Ed. 425.

9. Abduction.—Ker *v.* Illinois, 119 U. S. 436, 443, 30 L. Ed. 421. See post, "In Cases of Voluntary, Irregular or Forcible Appearance," III, G, 4.

10. Extradition to country under control of United States.—31 Stat. 656, ch. 793.

The island of Cuba is included within

2. Jurisdiction of Commissioner—a. *Necessity for Special Authorization.*—Under § 5270, Revised Statutes, the commissioner must be specially authorized to act in extradition cases, but he is not without jurisdiction to act simply because at the time the warrant was issued for the prisoner's detention, he had not been specially authorized; it is sufficient if he is specially authorized at the time he assumes to act.[11]

b. *Necessity of Requisition from Demanding Government.*—It is not necessary that a requisition from the demanding government be produced before the commissioner can act.[12]

c. *Nature of Proceeding before Commissioner.*—The proceeding before a commissioner is not to be regarded as in the nature of a final trial by which the prisoner can be convicted or acquitted of the crime charged against him, but rather of the character of those preliminary examinations which take place every day in this country before an examining or committing magistrate for the purpose of determining whether a case is made out which will justify the holding of the accused, either by imprisonment or under bail, to ultimately answer to an indictment, or other proceeding, in which he shall be finally tried upon the charge made against him.[13]

d. *Right of Commissioner to Grant a Continuance.*—In extradition proceedings the commissioner may grant a continuance of the examination, and is not controlled in his discretion by the laws of the state.[14]

3. Bail.—While bail should not ordinarily be granted in cases of foreign extradition, it has not been held that the circuit courts may not in any case, and whatever the special circumstances, extend that relief.[15]

4. Complaint—a. *Who May Make Complaint.*—The complaint may be made by any person acting under the authority of the foreign government having knowledge of the facts, or, in the absence of such person, by the official representative of the foreign government based upon depositions in his possession.[16]

b. *Oath.*—Section 5270, Revised Statutes, requires that a warrant of arrest must issue upon a complaint made under oath; it does not require that the oath shall be taken before a commissioner authorized to act in extradition proceedings, or even before the judge or commissioner who issues the warrant.[17]

c. *Requisites.*—In an extradition proceedings the complaint need not set

the meaning of the act of June 6, 1900. Neely *v.* Henkel, 180 U. S. 109, 48 L. Ed. 448.

11. Necessity for special authorization.—Grin *v.* Shine, 187 U. S. 181, 186, 47 L. Ed. 130.

A United States commissioner has, under the extradition treaty with England of 1842, the power and jurisdiction to issue a warrant for the arrest of a fugitive without the previous mandate from the executive department. In re Kaine, 14 How. 103, 111, 14 L. Ed. 345.

12. Requisition from demanding government.—Grin *v.* Shine, 187 U. S. 181, 194, 47 L. Ed. 130.

13. Nature of proceeding before commissioner.—Benson *v.* McMahon, 127 U. S. 457, 463, 32 L. Ed. 234.

14. Rice *v.* Ames, 180 U. S. 371, 376, 377, 45 L. Ed. 577. And this rule applies under the treaty with Great Britain, which provides that the extradition of fugitives "shall be carried out in the United States and in Her Majesty's dominions respectively, in conformity with the laws regulating extradition for the time being in force in the surrendering states," as this evidently contemplates the laws of the United States regulating extradition, and has no reference whatever to the laws of the particular state within which the proceedings are taken.

15. Bail.—Wright *v.* Henkel, 190 U. S. 40, 63, 47 L. Ed. 948. See, generally, the title BAIL AND RECOGNIZANCE, vol. 2, p. 765.

Not only is there no statute providing for admission to bail in cases of foreign extradition, but § 5270 of the Revised Statutes is inconsistent with its allowance after committal, for it is there provided that if he finds the evidence sufficient, the commissioner or judge "shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made." Wright *v.* Henkel, 190 U. S. 40, 62, 47 L. Ed. 948.

16. Who may make complaint.—Grin *v.* Shine, 187 U. S. 181, 193, 47 L. Ed. 130.

17. Oath.—Grin *v.* Shine, 187 U. S. 181, 186, 47 L. Ed. 130.

Grin *v.* Shine, 187 U. S. 181, 193, 47 L. Ed. 130. No evidence is required that a Russian consul had authority to make the complaint, as all that is required by § 5270 is that a complaint be made under oath.

forth the crime with the particularity of an indictment; it is sufficient, if it fairly apprises the party of the crime of which he is charged.[18]

5. Evidence—a. *To Establish Official Character of Foreign Magistrate.*—To establish the official character of a foreign magistrate before whom depositions were taken, a prima facie case is made under the act of 1848, when certified copies are produced, which are sworn to by the party producing them.[19]

b. *Foreign Magistrate's Warrant of Arrest.*—It is not necessary, under the extradition treaty with Russia, to produce in extradition proceedings, a copy of the warrant of arrest issued by a Russian magistrate, as such procedure has been dispensed with by § 5270, Revised Statutes, which is applicable to all governments with which the United States have treaties of extradition.[20]

c. *Authentication Requirements of the Act of* 1882.—Section 5 of the act of August 3, 1882, which provides for the authentication of papers received as evidence upon the hearing of an extradition case, applies only to papers or copies thereof, which are offered in evidence by the prosecution to establish the criminality of the person apprehended, and does not apply to documents or depositions offered on the part of the accused.[21]

d. *Sufficiency of Evidence.*—It has been held that for the purpose of the determination of the guilt of a person charged with crime, in extradition proceedings, it is sufficient if only a prima facie case is made out.[22]

6. Issue of Warrant of Arrest.—A commissioner specially appointed by a court of the United States under and in execution of statutes enacted to give effect to treaty stipulations for the apprehension and delivery of offenders, has no power to issue a warrant for the arrest of an alleged criminal which may be executed by a marshal of the United States, within his district, in a state other than the one in which the commissioner has his office. And a person, arrested under such a warrant, cannot be lawfully taken beyond the state, in which he

18. Requisites.—Grin *v.* Shine, 187 U. S. 181, 189, 47 L. Ed. 130.

The complaint is not defective, in extradition proceedings charging embezzlement, because it does not use the word "fraudulently," the allegation being "that the accused wrongfully, unlawfully and feloniously appropriated said money." Grin *v.* Shine, 187 U. S. 181, 189, 47 L. Ed. 130.

A complaint in extradition proceedings sufficiently charges the crime of embezzlement under the Col. Pen. Code, § 508, although it alleges that the property came into the possession of the accused "in his capacity of clerk," instead of following the language of the statute by charging that it was "by virtue of his employment as such clerk." Grin *v.* Shine, 187 U. S. 181, 47 L. Ed. 130.

19. To establish official character of foreign magistrate.—In re Kaine, 14 How. 103, 115, 116, 14 L. Ed. 345.

20. Foreign magistrate's warrant of arrest.—Grin *v.* Shine, 187 U. S. 181, 191, 47 L. Ed. 130.

The requirement of the extradition treaty with Russia of 1893, that "the application for extradition shall be accompanied by an authenticated copy of the warrant of arrest or of some other equivalent judicial document issued by a judge or magistrate" of the demanding country, is sufficiently complied with by the production of an order purporting to be signed and sealed by an examining magistrate of Russia, if it is evidently designed to secure the apprehension of the accused and his production before an examining magistrate, even though it is not in the form of arrest used in the United States. Grin *v.* Shine, 187 U. S. 181, 47 L. Ed. 130.

21. Authentication requirements of the act of 1882.—In re Oteiza, 136 U. S. 330, 336, 34 L. Ed. 464.

The certificate of a Russian ambassador that the depositions and other documents which appear in the record "are properly and legally authenticated so as to entitle them to be received and admitted as evidence for similar purposes by the tribunals of Russia," is a literal conformation with § 5 of the act of August 3, 1882, 22 Stat. 216, and is not defective because of the addition of the words "as evidence." Grin *v.* Shine, 187 U. S. 181, 193, 47 L. Ed. 130.

22. Sufficiency of evidence.—Grin *v.* Shine, 187 U. S. 181, 47 L. Ed. 130.

Where it appears in extradition proceedings brought in California, against a Russian, on a charge of embezzlement that a check was delivered to him with instructions to draw the money from the bank, take it to a railway station and forward it to another city, such facts show that he obtained possession of both the check and the money, honestly, and with the consent of his principal, and if he subsequently converted it to his own use, a prima facie case is made, and the fact whether there was an original intent to

was found, and delivered in another state before the officer who issued the warrant of arrest, without any preliminary examination in the former state as to the criminality of the charge against him.[23]

To Whom Warrant Should Be Made Returnable.—It may be said that technically the warrant, under § 5270, Revised Statutes, should be made returnable before the magistrate issuing it, but where it is made returnable before another officer, having the same power and jurisdiction to act, it is not fairly open to criticism.[24]

7. Review of Proceedings by Habeas Corpus.—**Cannot Perform Office of Writ of Error.**—A writ of habeas corpus cannot perform the office of a writ of error, and in extradition proceedings, if the committing magistrate has jurisdiction of the subject matter and of the accused, and the offense charged is within the terms of the treaty of extradition, and the magistrate, in arriving at a decision to hold the accused, has before him complete legal evidence on which to exercise his judgment as to whether the facts are sufficient to establish the criminality of the accused for the purposes of extradition, such decision cannot be reviewed by a circuit court or by this court, on habeas corpus, either originally or by appeal.[25] The court issuing the writ may, however, inquire and adjudge whether the commissioner acquired jurisdiction of the matter, by conforming to the requirements of the treaty and the statute; whether he exceeded his jurisdiction; and whether he had any legal or competent evidence of facts before him, on which to exercise a judgment as to the criminality of the accused.[26]

Objection Not Made before Commissioner.—Where no objection is made before a commissioner fully vested with authority to act, that the judge made his warrant returnable before such commissioner, the objection cannot be made available for the first time on habeas corpus, although § 5270, Rev. Stat., tech-

steal is a question for the Russian court to determine, it is sufficient for the purposes of the California proceeding to make out a prima facie case. Grin *v.* Shine, 187 U. S. 181, 47 L. Ed. 130.

23. Issue of warrant of arrest.—In Pettit *v.* Walshe, 194 U. S. 205, 48 L. Ed. 938, where a complaint was made before a commissioner in New York charging L. with murder committed in Great Britain, and the commissioner issued a warrant addressed "to any marshal of the United States, to the deputies of any such marshal, or any or either of them," and a marshal of the United States for the district of Indiana found and arrested the accused in that state, it was held that under the treaty with England which provides the accused shall be surrendered "upon such evidence of criminality as according to the laws of the place where the fugitive or person so charged shall be found," would justify his apprehension and commitment for trial, if the crime or offense had there been committed; L. could not be lawfully taken from Indiana and delivered for examination before the New York commissioner until he had had a preliminary examination in Indiana, and the question of his criminality tried upon sufficient evidence as to justify his apprehension and commitment under the laws of Indiana had the murder been committed in such state, although it is provided that the accused be brought before the commissioner issuing the warrant, by the act of 1848, and § 5270, Rev. Stat.

Under the treaty with France, made in 1843, a fugitive from France may be arrested without the aid of legislation. In re Metzger, 5 How. 176, 188, 12 L. Ed. 104.

24. Grin *v.* Shine, 187 U. S. 181, 187, 47 L. Ed. 130.

25. Cannot perform office of writ of error.—Ornelas *v.* Ruiz, 161 U. S. 502, 508, 40 L. Ed. 787; In re Oteiza, 136 U. S. 330, 34 L. Ed. 464; Benson *v.* McMahon, 127 U. S. 457, 32 L. Ed. 234; Fong Yue Ting *v.* United States, 149 U. S. 698, 714, 37 L. Ed. 905; Bryant *v.* United States, 167 U. S. 104, 105, 42 L. Ed. 94; Terlinden *v.* Ames, 184 U. S. 270, 46 L. Ed. 534.

Where a district judge, at his chambers, decided that there was sufficient cause for the surrender of a person claimed by the French government and committed him to custody to await the order of the President of the United States, the federal supreme court has no jurisdiction to issue a habeas corpus for the purpose of reviewing that decision. In re Metzger, 5 How. 176, 12 L. Ed. 104.

26. Terlinden *v.* Ames, 184 U. S. 270, 278, 46 L. Ed. 534.

"We think there was legal evidence against the prisoner upon which the commissioner was authorized to act, and that is sufficient for the purposes of this case. If it were true that three cheques were missing from the cheque books of Morrison & Marshall to which the prisoner had access, and no corresponding memoranda were made on the stubs; that three

nically seems to require that the warrant should be made returnable to the officer by whom it is issued.[27]

E. Trial on Another Charge.—See post, "Trial on Another Charge," IV.

III. Interstate.

A. The Constitutional Provision—1. NATURE OF.—The constitutional provision relating to fugitives from justice, as the history of its adoption will show, is in the nature of a treaty stipulation entered into for the purpose of securing a prompt and efficient administration of the criminal laws of the several states—an object of the first concern to the people of the entire country, and which each state is bound, in fidelity to the constitution, to recognize. A faithful, vigorous enforcement of that stipulation is vital to the harmony and welfare of the states. And while a state should take care, within the limits of the law, that the rights of its people are protected against illegal action, the judicial authorities of the Union should equally take care that the provisions of the constitution be not so narrowly interpreted as to enable offenders against the laws of a state to find a permanent asylum in the territory of another state.[28]

2. HISTORY OF.—The necessity of this policy of mutual support, in bringing offenders to justice, without any exception as to the character and nature of the crime, seems to have been first recognized and acted on by the American colonies; for we find by Winthrop's History of Massachusetts, vol. 2, pages 121 and 126, that as early as 1643, by articles of confederation between the plantations under the government of the different colonies, the plantations pledged themselves to each other, to help apprehend and return fugitives from justice. When by the Declaration of Independence, these colonies had become separate and independent sovereignties they formed a confederation for mutual support in which similar provisions were introduced. And later, as they were about to form a still closer union by the present constitution, but still preserving their sovereignty, they introduced in the constitution a provision to extradite fugitives guilty of every offense known to the law of the state from which the party had fled.[29]

3. TERMS OF.—"A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime."[30]

"Charge" with Crime.—A complaint entered before a committing magistrate having power under the laws of the demanding state to examine and bind for trial in a higher court, is sufficient to "charge" a person with crime within the meaning of the constitution and laws of the United States providing for the extradition of fugitives from justice.[31]

B. Acts of Congress—1. NECESSITY OF.—This duty of providing by law the regulations necessary to carry this compact into execution, from the nature of the duty and the object in view, was manifestly devolved upon congress; for if it was left to the states, each state might require different proof to authenticate the judicial proceeding upon which the demand was founded; and as the duty of the governor of the state where the fugitive was found is, in such cases,

cheques were presented to the Commercial Bank by a bank at which the appellant kept a personal account, and this account showed a credit of three cheques, which upon the following day were presented and paid by the Commercial Bank, and that the appellant had no authority to sign cheques for Morrison & Marshall, the inference is at least a reasonable one that these cheques were forged by the appellant." Bryant *v.* United States, 167 U. S. 104, 107, 42 L. Ed. 94.

27. **Objection not made before commissioner.**—Grin *v.* Shine, 187 U. S. 181, 188, 47 L. Ed. 130. See ante, "Issue of Warrant of Arrest." II, D, 6.

28. **Nature of.**—Appleyard *v.* Massachusetts, 203 U. S. 222, 227, 51 L. Ed. 161.

29. **History of.**—Kentucky *v.* Dennison, 24 How. 66, 100, 101, 102, 16 L. Ed. 717.

30. **Terms of.**—U. S. Constitution, Article 4, § 2.

31. **"Charge" with crime.**—In The Matter of Strauss, 197 U. S. 324, 49 L. Ed. 774.

merely ministerial, without the right to exercise either executive or judicial discretion, he could not lawfully issue a warrant to arrest an individual without a law of the state or of congress to authorize it.[32]

2. TERMS OF.—"Whenever the executive authority of any state or territory demands any person as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the state or territory making such demand, shall be paid by such state or territory."[33]

C. Extraditable Crimes.—The words "treason, felony or other crime," in the second clause of the second section of the fourth article of the constitution of the United States, include every offense forbidden and made punishable by the laws of the state where the offense is committed.[34] And such offenses may be made the foundation of a requisition.[35]

As Applied to Persons Found in Territories.—Although the constitutional provision in question does not, in terms, refer to fugitives from the justice of any state, who may be found in one of the territories of the United States, the act of congress has equal application to that class of cases.[36]

D. Extraditable Persons—1. FUGITIVES FROM SERVICE.—See, generally, the titles ARMY AND NAVY, vol. 2, p. 494; SEAMEN; SLAVERY AND INVOLUNTARY SERVITUDE.

2. FUGITIVES FROM JUSTICE—a. *"Fugitive" Defined.*—To be a fugitive from justice in the sense of the act of congress, it is not necessary that the party charged should have left the state in which the crime is alleged to have been committed, after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun, but simply that having within a state committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offense, he has left its jurisdiction and is found within the territory of another.[37]

32. Necessity of acts of congress.—Kentucky *v.* Dennison, 24 How. 66, 104, 16 L. Ed. 717.

"These difficulties presented themselves as early as 1791, in a demand made by the governor of Pennsylvania upon the governor of Virginia, and both of them admitted the propriety of bringing the subject before the president, who immediately submitted the matter to the consideration of congress. And this led to the act of 1793. * * * All difficulty as to the mode of authenticating the judicial proceeding was removed by the article in the constitution, which declares, 'that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings, of every other state; and the congress may by general laws prescribe the manner in which acts, records, and proceedings, shall be proved, and the effect thereof.' And without doubt the provision of which we are now speaking—that is, for the delivery of a fugitive, which requires official communications between states, and the authentication of official documents—was in the minds of the framers of the constitution, and had its influence in inducing them to give this power to congress." Kentucky *v.* Dennison, 24 How. 66, 104, 16 L. Ed. 717.

33. Terms of.—Rev. Stat., § 5278.

34. Extraditable crimes.—Kentucky *v.* Dennison, 24 How. 66, 16 L. Ed. 717; Ex parte Reggel, 114 U. S. 642, 650, 29 L. Ed. 250; Taylor *v.* Taintor, 16 Wall. 366, 375, 21 L. Ed. 287; Lascelles *v.* Georgia, 148 U. S. 537, 542, 37 L. Ed. 549.

35. Taylor *v.* Taintor, 16 Wall. 366, 370, 21 L. Ed. 287.

36. Persons found in territory.—Ex parte Reggel, 114 U. S. 642, 653, 29 L. Ed. 250.

37. "Fugitive" defined.—Roberts *v.*

b. *Ignorance That Crime Was Committed.*—A person leaving a state in ignorance that he had committed a crime therein, may be a fugitive from justice within the meaning of the constitution and laws of the United States.[38]

c. *Actual Presence.*—It has never been held that the statute covered a case where the party was not in the state at the time when the act is alleged to have been committed. The plain meaning of the act requires such presence, and it was not intended to include, as a fugitive from the justice of a state, one who had not been in the state at the time when, if ever, the offense was committed, and who had not, therefore in fact, fled therefrom.[39] A subsequent going there and coming away is not flight.[40]

Proof of Presence.—The person accused is entitled, under the act of congress, to insist upon proof that he was within the demanding state at the time he is alleged to have committed the crime charged, and subsequently withdrew from her jurisdiction, so that he could not be reached by her criminal process.[41]

d. *Right to Asylum.*—The laws of the United States do not recognize any right of asylum, on the part of a fugitive from justice in any state to which he has fled.[42]

3. Intruders and Lawless Bands from Another State.—The surrender of fugitives to the states whose laws have been violated, is the only aid provided by the laws of the United States for the punishment of depredations and violence committed in one state by intruders and lawless bands from another state.[43]

E. Power and Duty of Governor—1. Governor Demanding Extradition of Fugitive.—**Source of Power.**—The constitution confers power upon the chief executive of a state to demand the return of a fugitive from the state to which he has fled.[44]

2. Governor of Whom Extradition of Fugitive Is Demanded—a. *In General.*—Upon the executive of the state in which the accused is found rests the responsibility of determining, in some legal mode, whether he is a fugitive from the justice of the demanding state. And for this purpose he may make it a condition precedent to the surrender of the accused that it be shown to him, by competent proof, that the accused is, in fact, a fugitive from the justice of the demanding state.[45] There is also an obligation upon the governor of the surrendering state to deliver the person demanded without any reference to the character of the crime charged, or to the policy or laws of the state to which

Reilly, 116 U. S. 80, 97, 29 L. Ed. 544; Appleyard *v.* Massachusetts, 203 U. S. 222, 229, 51 L. Ed. 161.

38. Ignorance that crime was committed.—Appleyard *v.* Massachusetts, 203 U. S. 222, 227, 51 L. Ed. 161.

"But the appellant contended below, as he does here, that he had no belief when leaving New York at any time that he had violated its criminal laws, and therefore, within the meaning of the constitution and laws of the United States, he could not be deemed a fugitive from its justice. This contention cannot be sustained; indeed, it could not be sustained without materially impairing the efficacy of the constitutional and statutory provisions relating to fugitives from justice. An alleged fugitive may believe that he has not committed any crime against the laws of the state in which he is indicted, and yet, according to the laws of such state, as administered by its judicial tribunals, he may have done so, and his belief, or want of belief, may be without foundation in law." Appleyard *v.* Massachusetts, 203 U. S. 222, 226, 51 L. Ed. 161.

39. Actual presence.—Hyatt *v.* People, 188 U. S. 691, 713, 47 L. Ed. 657.

40. Hyatt *v.* People, 188 U. S. 691, 719, 47 L. Ed. 657.

When a person was not in the state at the time the crime was committed, but eight days afterwards goes there on business and leaves when the business is completed, he is not a fugitive from justice within the meaning of § 5278, Rev. Stat. Hyatt *v.* People, 188 U. S. 691, 47 L. Ed. 657.

41. Proof of presence.—Ex parte Reggel, 114 U. S. 642, 651, 29 L. Ed. 250.

42. Right to asylum.—Mahon *v.* Justice, 127 U. S. 700, 715, 32 L. Ed. 283.

43. Intruders and lawless bands from another state.—Mahon *v.* Justice, 127 U. S. 700, 705, 32 L. Ed. 283.

44. Source of demanding governor's power.—Kentucky *v.* Dennison, 24 How. 66, 109, 110, 16 L. Ed. 717.

45. Ex parte Reggel, 114 U. S. 642, 652, 29 L. Ed. 250, reaffirmed in Dodge *v.* Ellis, 195 U. S. 626, 49 L. Ed. 350.

the fugitive has fled.[46]

b. *Statutory Provisions.*—The act of congress, Rev. Stat., § 5278, makes it the duty of the executive authority of the state to which such person has fled to cause the arrest of the alleged fugitive from justice, whenever the executive authority of any state demands such person as a fugitive from justice, and produces a copy of an indictment found, or affidavit made, before a magistrate of any state, charging the person demanded with having committed a crime therein, certified as authentic by the governor or chief magistrate of the state from whence the person so charged has fled.[47]

c. *When Governor Refuses to Act.*—It is the duty of the governor of whom extradition of a fugitive is demanded, to return the fugitive over to the demanding state, but if he refuses to do so, there is no power either through the judicial department or any other department to compel him.[48]

d. *Nature of Governor's Act.*—When the governor surrenders the fugitive to the demanding state, his act is the act of the state which he represents, and it cannot require, after such surrender, the appearance of the fugitive before its tribunals.[49]

e. *Capacity in Which Governor Acts.*—The judicial acts which are necessary to authorize the demand are plainly specified in the act of congress; and the certificate of the executive authority is made conclusive as to their verity when presented to the executive of the state where the fugitive is found. He has no right to look behind them, or to question them, or to look into the character of the crime specified in this judicial proceeding; the duty which he is to perform is merely ministerial.[50]

f. *Evidence before Governor*—(1) *Questions of Law and Fact to Be Proved.*—Before a governor of a state can lawfully comply with the demand to deliver a fugitive, it must appear, first, that the person demanded is substantially charged with a crime against the laws of the state from whose justice he is alleged to have fled, by an indictment or an affidavit, certified as authentic by the governor of the state making the demand; and, second, that the person demanded is a fugitive from the justice of the state the executive authority of which makes the demand.[51] The first is a question of law and the second a question of fact.[52]

Right to Be Heard before Governor.—The person demanded has no constitutional right to be heard before the governor on either question, and the statute provides for none.[53]

(2) *Evidence of Fugitivity.*—A governor may surrender a fugitive when the evidence before him makes out a prima facie case of the fugitive's guilt,[54] and

46. Kentucky *v.* Dennison, 24 How. 66, 103, 16 L. Ed. 717.

47. Statutory provisions.—Roberts *v.* Reilly, 116 U. S. 80, 95, 29 L. Ed. 544.

48. Refusal of governor to act.—Kentucky *v.* Dennison, 24 How. 66, 109, 110, 16 L. Ed. 717; Taylor *v.* Taintor, 16 Wall. 366, 21 L. Ed. 287; Robb *v.* Connolly, 111 U. S. 624, 635, 28 L. Ed. 542.

49. Nature of governor's act.—Taylor *v.* Taintor, 16 Wall. 366, 370, 21 L. Ed. 287.

50. Capacity in which governor acts.—Kentucky *v.* Dennison, 24 How. 66, 106, 16 L. Ed. 717. The question of whether the indictment sufficiently charges the crime is a judicial question for the courts of the demanding states to determine, and not the governor of the surrendering state. Any other interpretation would lead to the conclusion that the mere requisition by the executive of the demanding state, accompanied by the copy of an indictment, or an affidavit before a magistrate, certified by him to be authentic, charging the accused with crime committed within her limits, imposes upon the executive of the state or territory where the accused is found, the duty of surrendering him, although he may be satisfied, from incontestable proof, that the accused had, in fact, never been in the demanding state, and, therefore, could not be said to have fled from its justice. Ex parte Reggel, 114 U. S. 642, 652, 29 L. Ed. 250.

51. Questions of law and fact.—Roberts *v.* Reilly, 116 U. S. 80, 95, 29 L. Ed. 544; Hyatt *v.* People, 188 U. S. 691, 47 L. Ed. 657; Ex parte Reggel, 114 U. S. 642, 652, 29 L. Ed. 250.

52. Hyatt *v.* People, 188 U. S. 691, 47 L. Ed. 657.

53. Right to hearing before governor.—Munsey *v.* Clough, 196 U. S. 364, 372, 49 L. Ed. 515.

54. Evidence of fugitivity.—Ex parte Reggel, 114 U. S. 642, 652, 29 L. Ed. 250.

he need not demand proof of the fugitivity of a person other than that shown by the requisition papers.[55]

g. *Conclusiveness of Governor's Decision.*—When the requisition proceedings before a governor are regular, his decision is conclusive, and cannot be reviewed.[56]

F. Where Accused Is in Custody under Laws of Surrendering State.—Where a demand is properly made by the governor of one state upon the governor of another, the duty to surrender is not absolute and unqualified, but depends upon the circumstances of the case, and if the laws of the latter state have been put in force against the fugitive, and he is imprisoned there, the demands of those laws may first be satisfied.[57]

G. Habeas Corpus—1. Right of Accused to Invoke Aid.—Whenever the executive of the state, upon whom a demand has been made, by virtue of his warrant, causes the arrest for delivery of a person charged as a fugitive from the justice of another state, the prisoner is held in custody only under color of authority derived from the constitution and laws of the United States, and is entitled to invoke the judgment of the judicial tribunals, whether of the state or the United States, by the writ of habeas corpus, upon the lawfulness of his arrest and imprisonment.[58]

2. Power of State Courts.—Subject to the exclusive and paramount authority of the national government, by its own judicial tribunals, to determine whether persons held in custody by authority of the courts of the United States, or by the commissioners of such courts, or by officers of the general government, acting under its laws, are so held in conformity with law, the states have the right, by their own courts, or by the judges thereof, to inquire into the grounds upon which any person, within their respective territorial limits, is restrained of his liberty, and to discharge him, if it be ascertained that such restraint is illegal; and this, notwithstanding such illegality may arise from a violation of the constitution or the laws of the United States.[59] A warrant of extradition of the governor of a state, issued upon the requisition of the governor of another state, accompanied by a copy of an indictment, is prima facia evidence, at least, that the accused had been indicted and was a fugitive from justice; and, when the court in which the indictment was found has jurisdiction of the offense, is sufficient to make it the duty of the courts of the United States to decline interposition by writ of habeas corpus, and to leave the question of the lawfulness of the detention of the prisoner, in the state in which he was indicted, to be inquired into and determined, in the first instance, by the courts of the state, which are empowered and obliged, equally with the courts of the United States, to recognize and uphold the supremacy of the constitution and the laws of the United States.[60]

3. Review of Governor's Decision.—**Presumptions.**—The presumption is,

55. Pettibone *v.* Nichols, 203 U. S. 192, 205, 51 L. Ed. 148; Moyer *v.* Nichols, 203 U. S. 221, 51 L. Ed. 160.

56. Conclusiveness of governor's decision.—Taylor *v.* Taintor, 16 Wall. 366, 374, 21 L. Ed. 287.

57. In custody under laws of surrendering state.—Taylor *v.* Taintor, 16 Wall. 366, 371, 21 L. Ed. 287.

58. Right to invoke aid.—Roberts *v.* Reilly, 116 U. S. 80, 94, 29 L. Ed. 544.

In extradition, the warrant issued by the governor is but prima facie sufficient to hold the accused, and it is open to him in habeas corpus, to show by admissions, or by other conclusive evidence, that the charge upon which extradition is demanded assumes the absence of the accused person from the state at the time the crime was, if ever, committed. Hyatt *v.* People, 188 U. S. 691, 711, 47 L. Ed. 657.

59. Power of state courts.—Robb *v.* Connolly, 111 U. S. 624, 639, 28 L. Ed. 542.

60. Whitten *v.* Tomlinson, 160 U. S. 231, 245, 40 L. Ed. 406; Robb *v.* Connolly, 111 U. S. 624, 28 L. Ed. 542; Ex parte Reggel, 114 U. S. 642, 29 L. Ed. 250; Roberts *v.* Reilly, 116 U. S. 80, 29 L. Ed. 544; Cook *v.* Hart, 146 U. S. 183, 36 L. Ed. 934; Pearce *v.* Texas, 155 U. S. 311, 39 L. Ed. 164.

that the governor insisted upon the production of whatever he deemed necessary or important to inform him upon the subject.[61]

How Far Decision May Be Reviewed.—How far his decision may be reviewed judicially in proceedings in habeas corpus, or whether it is not conclusive, are questions not settled by harmonious judicial decisions, nor by any authorative judgment of the supreme court. It is conceded that the determination of the fact by the executive of the state in issuing his warrant of arrest, upon a demand made on that ground, whether the writ contains a recital of an express finding to that effect or not, must be regarded as sufficient to justify the removal until the presumption in its favor is overthown by contrary proof.[62]

When Absence from State Is Conceded.—When it is conceded, or when it is so conclusively proved, that no question can be made that the person was not within the demanding state when the crime is said to have been committed, and his arrest is sought on the ground only of a constructive presence at that time, in the demanding state, then the court will discharge the defendant. But the court will not discharge a defendant arrested under the governor's warrant where there is merely contradictory evidence on the subject of presence in or absence from the state, as habeas corpus is not the proper proceeding to try the question of alibi, or any question as to the guilt or innocence of the accused.[63]

4. In Cases of Involuntary, Irregular or Forcible Appearance.—**As Affecting Jurisdiction of Court.**—The jurisdiction of the court in which the indictment is found is not impaired by the manner in which the accused is brought before it.[64]

By Fraud and Connivance between Governors.—One who has been arrested and deported from a state by the fraud and connivance of the governors of the surrendering and demanding states, so arranged and carried out as to deprive him of an opportunity to prove, before the governor of the surrendering state, that he was not a fugitive from justice, as well as opportunity to appeal to some court in such state to prevent his illegal deportation from its territory, cannot be discharged on habeas corpus by the federal court, as the constitution or laws of the United States are not violated by such acts.[65]

By Kidnapping of Abduction.—There is no comity between the states by which a person held upon an indictment for a criminal offense in one state can be turned over to the authorities of another, though abducted from the latter.[66] And he may be kidnapped or unlawfully abducted from the state or country of refuge, and be, thereafter, tried in the state to which he is forcibly carried, without violating any right or immunity secured to him by the constitution and laws of the United States.[67] A person indicted for a felony in one state, forcibly abducted from another state and brought to the state where he was indicted by parties acting without warrant or authority of law, is not entitled under the constitution or laws of the United States to release from detention under the indict-

61. Presumptions.—Roberts *v.* Reilly, 116 U. S. 80, 96, 29 L. Ed. 544.

62. How far it may be reviewed.—Roberts *v.* Reilly, 116 U. S. 80, 95, 29 L. Ed. 544.

When absence is conceded.—Munsey *v.* Clough, 196 U. S. 364, 374, 49 L. Ed. 515.

63. When it is conceded that the party charged was not in the state at the time when it is alleged in the indictment that the crimes were committed, and there is no proof to show that the crimes were in truth committed on some other day than the day alleged in the indictment, nor that the dates therein named were erroneously stated, it is sufficient for the party charged to show that he was not in the state at the times named, in order to prove that he was not in the state when the crimes were, if ever, committed. Hyatt *v.* People, 188 U. S. 691, 712, 47 L. Ed. 657.

64. As affecting jurisdiction of court.—Mahon *v.* Justice, 127 U. S. 700, 708, 32 L. Ed. 283; Cook *v.* Hart, 146 U. S. 183, 36 L. Ed. 934.

65. By fraud and connivance.—Pettibone *v.* Nichols, 203 U. S. 192, 205, 51 L. Ed. 148; Moyer *v.* Nichols, 203 U. S. 221, 51 L. Ed. 160.

66. By kidnapping or abduction.—Mahon *v.* Justice, 127 U. S. 700, 706, 32 L. Ed. 283. See ante, "Protection Afforded by Treaty," II, C, 4.

67. Lascelles *v.* Georgia, 148 U. S. 537, 545, 37 L. Ed. 549.

ment by reason of such forcible and unlawful abduction.[68]

H. Procedure—1. The Indictment.—**Authentication.**—Where the indictment is certified by the governor of the demanding state to be authentic and to be duly authenticated, it is all that is required by the act of congress, and certified copies of the laws of the demanding state may be dispensed with in such case.[69] And the certification of authentication of the extradition papers is sufficient, without the governor's certifying to the genuineness of such papers.[70]

Sufficiency of.—Each state has the right to establish the forms of pleadings and process to be observed in her own courts, in both civil and criminal cases, subject only to those provisions of the constitution of the United States involving the protection of life, liberty and property in all the states of the Union; therefore, the indictment that accompanies the requisition need not conform to the technical rules of criminal pleading. It is sufficient if it conforms to the requirements of the laws of the demanding state,[71] such as being framed in the language of the statute with the ordinary averments of the time and place, and with such a description as will appraise an intelligent man of the nature of the accusation.[72]

Functions of Commissioner.—An extradition commissioner is not presumed to be acquainted with the niceties of criminal pleading. His functions are practically the same as those of an examining magistrate in an ordinary criminal case.[73] The extent to which he may inquire into the validity of an indictment put in evidence before him, as proof of probable cause of guilt, has never been definitely settled, but it has been held generally that technical objections should not be considered, and that the legal sufficiency of the indictment is only to be determined by the court in which it is found.[74]

68. Mahon *v.* Justice, 127 U. S. 700, 706, 32 L. Ed. 283; Cook *v.* Hart, 146 U. S. 183, 36 L. Ed. 934.

On the 9th of February, 1888, the governor of West Virginia, on behalf of that state, presented to the district court of the United States for the district of Kentucky a petition, representing that during the month of September, 1887, a requisition was made upon him as governor aforesaid, by the governor of Kentucky, for Plyant Mahon, alleged to have committed murder in the latter state, and to have fled from its justice, and to be then at large in West Virginia; that pending correspondence between the two governors, and the consideration of legal questions growing out of the requisition, and during the month of December, 1887, or January, 1888, the said Plyant Mahon, while residing in West Virginia, was, in violation of her laws, and of the constitution and laws of the United States, and without warrant or other legal process, arrested by a body of armed men from Kentucky, and by force and against his will, conveyed out of the state of West Virginia into the county of Pike, in the state of Kentucky, and there confined in the common jail of the county. Held, that he was not entitled to discharge on a writ of habeas corpus from the circuit court of the United States. Mahon *v.* Justice, 127 U. S. 700, 32 L. Ed. 283.

69. Authentication.—Roberts *v.* Reilly, 116 U. S. 80, 96, 29 L. Ed. 544.

70. Ex parte Reggel, 114 U. S. 642, 29 L. Ed. 250.

71. Sufficiency of.—Ex parte Reggel, 114 U. S. 642, 651, 29 L. Ed. 250; Pearce *v.* Texas, 155 U. S. 311, 39 L. Ed. 164; Roberts *v.* Reilly, 116 U. S. 80, 29 L. Ed. 544.

Where a person was arrested in Texas upon the requisition of the governor of Alabama, and sought his discharge by a writ of habeas corpus on the ground that the statute under which the indictment was drawn was unconstitutional, the Texas court held that such question was for the decision of the Alabama court, and this court held that such decision did not deny any right secured by the constitution and laws of the United States. Pearce *v.* Texas, 155 U. S. 311, 39 L. Ed. 164.

72. Benson *v.* Henkel, 198 U. S. 1, 11, 49 L. Ed. 919.

73. Functions of commissioner.—Benson *v.* Henkel, 198 U. S. 1, 11, 49 L. Ed. 919.

74. Benson *v.* Henkel, 198 U. S. 1, 10, 49 L. Ed. 919; Ex parte Reggel, 114 U. S. 642, 650, 29 L. Ed. 250; Roberts *v.* Reilly, 116 U. S. 80, 96, 29 L. Ed. 544; Horner *v.* United States, No. 2, 143 U. S. 570, 577, 36 L. Ed. 266; Greene *v.* Henkel, 183 U. S. 249, 260, 46 L. Ed. 177; Beavers *v.* Henkel, 194 U. S. 73, 87, 48 L. Ed. 882.

To hold it to be the duty of the commissioner to determine the validity of every indictment as a pleading, when offered only as evidence, is to put in his hands a dangerous power, which might be subject to serious abuse. If, for instance, he were moved by personal considerations, popular clamor or insufficient knowledge of the law to discharge the ac-

2. Defenses.—It is no defense that the facts charged constitute a crime against the laws of the asylum state, for such state may waive the exercise of its jurisdiction by surrendering the fugitive.[75]

3. Review after Surrender.—After a party has been surrendered and is on trial, it is not a proper subject of inquiry to examine into the details of the extradition proceedings.[76]

I. Agent to Whom Accused Is Surrendered.—Is Not an Officer of the United States.—A person sent by the demanding state to receive the prisoner from the surrendering state, is not an officer of the United States, but is simply an agent of the former state, invested with authority to receive in her behalf, an alleged fugitive from the justice of that state.[77]

Duties.—No obligation is imposed by the constitution or laws of the United States upon the agent of a state to so time the arrest of the fugitive and so conduct his deportation from the state where found, as to afford him a convenient opportunity, before some judicial tribunal sitting in such state, to test the question whether he was a fugitive from justice and as such liable, under the act of congress, to be conveyed to the demanding state for trial there.[78]

IV. Trial on Another Charge.

A. In International Cases.—When a party is surrendered under international extradition proceedings, he cannot be tried for any other offense than the one with which he is charged in the extradition proceedings and for which he was delivered up, and if not tried for that, or after trial and acquittal, he must be given a reasonable time to leave the country before he is arrested upon the charge of any other crime committed previous to his extradition.[79] And this rule holds in a case where a person is extradited from England, although the trial and conviction is upon the same evidence that was produced before the English committing magistrate.[80]

cused by reason of the insufficiency of the indictment, it might turn out that the indictment was perfectly valid and that the accused should have been held. But the evil once done is, or may be, irremediable, and the commissioner, in setting himself up as a court of last resort to determine the validity of the indictment, is liable to do a gross injustice. Benson *v.* Henkel, 196 U. S. 1, 12, 49 L. Ed. 919.

75. Defenses.—Roberts *v.* Reilly, 116 U. S. 80, 96, 29 L. Ed. 544, where one charged with larceny set up the defense that the facts showed him to be guilty of a crime in the state where he was held.

76. Review after surrender.—Ker *v.* Illinois, 119 U. S. 436, 441, 30 L. Ed. 421.

When the governor of one state voluntarily surrenders a fugitive from the justice of another state to answer for his alleged offenses, it is hardly a proper subject of inquiry on the trial of the case to examine into the details of the proceedings by which the demand was made by the one state and the manner in which it was responded to by the other. Ker *v.* Illinois, 119 U. S. 436, 441, 30 L. Ed. 421.

77. As officer of the United States.—Robb *v.* Connolly, 111 U. S. 624, 28 L. Ed. 542.

It is true that the authority of the agent of the demanding state to bring the fugitive within its territorial limits, is expressly conferred by the statutes of the United States, and, therefore, while so transporting him, he is, in a certain sense, in the exercise of an authority derived from the United States. But these circumstances do not constitute him an officer of the United States, within the meaning of former decisions. He is not appointed by the United States, and owes no duty to the national government, for a violation of which he may be punished by its tribunals or removed from office. His authority, in the first instance, comes from the state in which the fugitive stands charged with crime. He is, in every substantial sense, her agent, as well in receiving custody of the fugitive, as in transporting him to the state under whose commission he is acting. What he does, in execution of that authority, is to the end that the violation of the laws of his state may be punished. The fugitive is arrested and transported for an offense against her laws, not for an offense against the United States. Robb *v.* Connolly, 111 U. S. 624, 635, 28 L. Ed. 542.

78. Duties.—Pettibone *v.* Nichols, 203 U. S 192, 205, 51 L. Ed. 148.

79. Trial on another charge in international cases.—United States *v.* Rauscher, 119 U. S. 407, 425, 30 L. Ed. 425; Ker *v.* Illinois, 119 U. S. 436, 442, 30 L. Ed. 421; Mahon *v.* Justice, 127 U. S. 700, 716, 32 L. Ed. 283.

80. United States *v.* Rauscher, 119 U. S. 407, 30 L. Ed. 425.

Where a person was charged with hav-

Where Convicted and Sentenced Prior to Requisition.—And where a person has been convicted and sentenced prior to the requisition for extradition, and such requisition has been refused on the grounds that the offense charged was not extraditable, after which an offense is charged in another requisition that is extraditable, and the accused is surrendered accordingly, while he may be tried upon the new offense charged, he cannot be punished for the offense first charged and upon which he was convicted, as it would be the same as trying him for an offense other than that for which he was extradited.[81]

Trial upon Counts Charging Different Offenses.—So long as the prisoner is tried upon the facts which appeared in evidence before the commissioner, and upon the charges or one of the charges for which he is surrendered, it is immaterial whether the indictment against him contains counts charging the different offenses alleged against him.[82]

Voluntary Return.—When a treaty provides that the person extradited shall be allowed to return after his trial for the offense for which he was extradited, to his own country, before he can be tried for a crime committed prior to his extradition, it is held that where one who has been given his liberty on bail, goes to his own country, and subsequently voluntarily returns to the country where he was indicted, he does not lose or waive the protection of such treaty by his voluntary return.[83]

B. In Interstate Cases.—A fugitive from justice who has been surrendered by one state of the Union to another state thereof upon requisition, charging him with commission of a specific crime, has, under the constitution and laws of the United States, no right, privilege or immunity to be exempt from indictment and trial in the state to which he is returned, for any other or different offense than that designated and described in the requisition proceedings, under which he was demanded by and restored to such state, without first having an opportunity to return to the state from which he was extradited.[84]

ing committed murder on an American boat on the high seas, and fled to England to escape punishment, and was returned under extradition to the United States, in which country he was tried and convicted of inflicting cruel and unusual punishment, it was held that the court erred, and that he could appeal to the supreme court or obtain release on habeas corpus, although he was convicted upon the same evidence that had been produced before the English committing magistrate. United States *v.* Rauscher, 119 U. S. 407, 30 L. Ed. 425.

Where a person was charged with having committed murder on an American boat on the high seas, and fled to England to escape punishment, but was returned under extradition to the United States, in which country he was tried for a crime other than the one for which he was extradited, it was held that the court erred, and that he could appeal to the supreme court or obtain release on habeas corpus. United States *v.* Rauscher, 119 U. S. 407, 30 L. Ed. 425.

81. **Sentence prior to requisition.**—Johnson *v.* Browne, 205 U. S. 309, 51 L. Ed. 816.

82. **Counts charging different offenses.**—Bryant *v.* United States, 167 U. S. 104, 108, 42 L. Ed. 94, for example, when a fugitive is charged with forgery, embezzlement and larceny, the government need not elect for which of these he shall be tried, nor need he be tried for all of these.

83. **Voluntary return.**—In Cosgrove *v.* Winney, 174 U. S. 64, 43 L. Ed. 897; Treaty with England, 1890.

Article 3 of the extradition treaty of 1889, with Great Britain, leaves out the words "or be punished," in the provision that no person surrendered "shall be triable or be tried for any crime or offense, committed prior to his extradition, other than the offense for which he was surrendered, until he shall have had an opportunity of returning to the country from which he was surrendered," but such omission does not give the United States the right to punish a person for an offense upon which he was convicted prior to his extradition and for which he was not extradited. To hold otherwise would be to ignore the manifest scope and object of the treaty of 1842, to which the treaty of 1889 is supplementary, and also would be contrary to the obvious meaning of §§ 5272 and 5275, Rev. Stat. Johnson *v.* Browne, 205 U. S. 309, 51 L. Ed. 816.

84. **Trial on another charge in interstate cases.**—Lascelles *v.* Georgia, 148 U. S. 537, 37 L. Ed. 549.

"To apply the rule of international or foreign extradition, as announced in United States *v.* Rauscher, 119 U. S. 407, 30 L. Ed. 425, to interstate rendition, involves the confusion of two essentially

EXTRA-DOTAL PROPERTY.—Extra-dotal property, otherwise called paraphernal property, is that which forms no part of the dowry.[1]

EXTRA HAZARDOUS.—See the title INSURANCE.

EXTRAORDINARY.—See note 2.

EXTRAORDINARY CARE OR DILIGENCE.—See the title NEGLIGENCE.

EXTRAORDINARY REMEDIES.—See the titles HABEAS CORPUS; INJUNCTIONS; MANDAMUS; NE EXEAT; PROHIBITION; QUO WARRANTO; SPECIFIC PERFORMANCE.

EXTRA PAY.—See the title ARMY AND NAVY, vol. 2, p. 514.

EXTRA QUATUOR MARIA.—See BEYOND THE SEAS. And see the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION.

EXTRATERRITORIAL.—See, generally, the titles COURTS, vol. 4, p. 861; INTERNATIONAL LAW; JURISDICTION. As to foreign corporations, see the title FOREIGN CORPORATIONS.

EXTRA WORK.—See the title WORKING CONTRACTS. See, also, the references under EXTRA ALLOWANCES, ante, p. 214. As to compromise of claim, see the title COMPROMISE AND SETTLEMENT, vol. 3, p. 992.

EXTRINSIC EVIDENCE.—See the titles PAROL EVIDENCE; WILLS.

FABRIC.—See note 3.

different things, which rest upon entirely different principles. In the former the extradition depends upon treaty contract or stipulation, which rests upon good faith, and in respect to which the sovereign upon whom the demand is made can exercise discretion, as well as investigate the charge on which the surrender is demanded, there being no rule of comity under and by virtue of which independent nations are required or expected to withhold from fugitives within their jurisdiction the right of asylum. In the matter of interstate rendition, however, there is the binding force and obligation, not of contract, but of the supreme law of the land, which imposes no conditions or limitations upon the jurisdiction and authority of the state to which the fugitive is returned." Lascelles *v.* Georgia, 148 U. S. 537, 545, 37 L. Ed. 549.

1. Fleitas *v.* Richardson, 147 U. S. 538, 553, 37 L. Ed. 272; Nalle *v.* Young, 160 U. S. 624, 639, 40 L. Ed. 560. See, generally, the titles HUSBAND AND WIFE; SEPARATE ESTATE OF MARRIED WOMEN.

2. **Extraordinary accident.**—The bursting of a river through its natural banks or through artificial dikes must generally be regarded as an accident or cas fortuit, ordinary or **extraordinary**, according to the frequency or infrequency with which it takes place in the tract of country in question. In Louisiana, the breaking of the Mississippi through the levees occurs so often that it is held not to be an **extraordinary** accident; but that does not take it out of the general class of accidents or unforeseen events, cas fortuits. The breaking of a crevasse in the Louisiana levees by the waters of the Mississippi River, causing a plantation to be overflowed, must therefore be considered as a cas fortuit, a fortuitous or unforeseen event, within the meaning and scope of articles 2697 and 2699, La. Code, entitling the lessee, if thereby the plantation is wholly or partly destroyed, or is rendered unfit for the purpose for which it was leased, to have the lease annulled; although it is not a cas fortuit extraordinaire, an **extraordinary** as well as an unforeseen accident, within the meaning of article 2743 so as to justify an abatement of rent if the crop only is destroyed. Viterbo *v.* Friedlander, 120 U. S. 707, 733, 30 L. Ed. 776. See, generally, the title LANDLORD AND TENANT.

Extraordinary marine risk.—A vessel was hired by the government, and it was stipulated in the charter party that in the event the vessel, while executing the orders of the government, should be destroyed or damaged by being compelled to run any **extraordinary** marine risk, the owners should be indemnified. In complying with the orders of the harbor master, the vessel struck a sunken anchor and sank. It was held that it was an **extraordinary** marine risk within the meaning of the charter party; that the term **extraordinary** was there used to distinguish an unusual risk which the vessel might be compelled to run by order of the government, from those risks which would be covered by an ordinary marine policy and which might be expected to arise from the service in which the vessel was engaged; it was an ordinary risk which any vessel must run that enters a harbor, and is one which every marine policy covers. Leary *v.* United States, 14 Wall. 607, 612, 20 L. Ed. 756.

3. **Fabric.**—See Hartranft *v.* Meyer, 135 U. S. 237, 34 L. Ed. 110. And see generally, the title REVENUE LAWS.

FACTORS AND COMMISSION MERCHANTS.

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As to whether factor who has made advances on property is owner of abandoned or captured property, see the title ABANDONED AND CAPTURED PROPERTY, vol. 1, p. 6. As to recovery by factor for services rendered, see the title ASSUMPSIT, vol. 2, p. 653. As to attachment of goods consigned to be sold, see the title ATTACHMENT AND GARNISHMENT, vol. 2, p. 675. As to passage of title by factor by endorsement of bill of lading, see the title BILL OF LADING, vol. 3, p. 240. As to necessity for acceptance of bill drawn by factor to render principal liable, see the title BILLS, NOTES AND CHECKS, vol. 3, p. 285. As to duty of factor, upon whom bills have been drawn, to apply funds in hands to payment of bill having an accommodation drawer, see the title BILLS, NOTES AND CHECKS, vol. 3, p. 344. As to the validity of a transfer of goods by a corporation to a commission merchant for advances made by him, see the title CORPORATIONS, vol. 4, p. 742. As to unlawful combinations of commission merchants, see the title MONOPOLIES AND CORPORATE TRUSTS. As to communications to factors being privileged, see the title PRIVILEGED COMMUNICATIONS. As to effect of assignment by owner of goods in transitu consigned to another, see the title SALES. As to right of set-off in an action by factor, see the title SET-OFF, RECOUPMENT AND COUNTERCLAIM. As to warehouse receipts used by factor as security, see the title WAREHOUSES AND WAREHOUSEMEN. As to rights under warehouse receipts to property on which advancements have been made, see the title WAREHOUSES AND WAREHOUSEMEN.

I. Definition, Distinction and Nature.

Definition.—A factor or commission merchant is an agent to whom goods are intrusted by the principal to be sold.[1] And a shipper who purchases goods on his own credit, or with his own funds, is not acting in the ordinary capacity of a factor.[2]

Distinction between Factors and Broker.—See the title BROKERS, vol. 3, p. 532.

Nature.—A factor who receives the money of his principal, is not a fiduciary within the meaning of the United States bankruptcy act of 1841.[3]

II. Authority, Duties and Liabilities of Factor.

A. Authority—1. EXTENT OF AUTHORITY TO SELL.—Where a consignment has been made generally without any specific orders as to the time or mode of sale, and the factor makes advances or incurs liabilities on the footing of such consignment, then the legal presumption is, that the factor is intended to be clothed with the ordinary rights of factors to sell, in the exercise of a sound dis-

1. **Definition of factor.**—Hopkirk *v.* Bell, 3 Cranch 454, 2 L. Ed. 497; United States *v.* Villalonga, 23 Wall. 35, 42, 23 L. Ed. 64.

An agent for collecting of debts merely is not a factor within the meaning of the 13th section of the act of limitations of Virginia which provides "that all suits hereafter brought in the name or names of any person or persons residing beyond the seas, or out of this country, for the recovery of any debt due for goods actually sold and delivered here, by his or their factor or factors, shall be commenced and prosecuted within the time appointed and limited by this act for bringing the like suits, and not after, notwithstanding the saving hereinbefore contained, to persons beyond the seas, at the times their causes of action accrued." Hopkirk *v.* Bell, 3 Cranch 454, 2 L. Ed. 497.

2. **One purchasing goods in own name not a facto.**—The Frances, 9 Cranch 181, 183, 189, 3 L. Ed. 698.

3. **Factor as a fiduciary.**—Chapman *v.* Forsyth, 2 How. 202, 207, 11 L. Ed. 236.

cretion, at such time and in such mode as the usage of trade and his general duty require.[4]

2. Power to Delegate Authority.—A factor cannot delegate his employment to another, so as to raise a privity between that other and his principal.[5]

3. Authority to Bind Principal to Insure.—A promise by a merchant's factor, that he would write to his principal to have property insured, does not bind the principal to insure.[6]

4. Authority to Pledge—a. *In General.*—By the common law, a factor or agent, who has power to sell the produce of his principal, has no power to affect the property by tortiously pledging it as a security or satisfaction for a debt of his own, to in any way affect the rights of the principal,[7] and it is of no consequence that the pledgee is ignorant of the factor's not being the owner.[8] But such a pledge is good as against the factor.[9] Also, if the factor has a lien upon the goods, he may pledge them to the amount of his lien.[10]

b. *The Factors' Acts.*—It being recognized that this rigid rule imposed hardship upon pledgees and purchasers of such property, acts were passed in England and some of the United States, known as "The Factors' Acts," giving validity to contracts for pledge or sale of principal's goods, provided the pledgee or pur-

4. Extent of authority to sell.—Feild *v.* Farrington, 10 Wall. 141, 149, 19 L. Ed. 923; Brown *v.* McGran, 14 Pet. 479, 494, 10 L. Ed. 550. See, also, Brander *v.* Phillips, 16 Pet. 121, 10 L. Ed. 909.

5. Cannot delegate authority.—Warner *v.* Martin, 11 How. 209, 223, 13 L. Ed. 667.

So a transfer by way of sale, by a clerk of property trusted to his principal as a factor, cannot pass the title or right in it from the real owner. Warner *v.* Martin, 11 How. 209, 223, 13 L. Ed. 667.

"The utmost relaxation of the rule, potestas delegata non potest delegare, in respect to mercantile persons, is, that a consignee or agent for the sale of merchandise may employ a broker for the purpose, when such is the usual course of business. Warner *v.* Martin, 11 How. 209, 223, 13 L. Ed. 667.

Or where the usual course of the management of the principal's concerns in the employment of a subagent has been pursued for a length of time, and been recognized by the owners of property, they will be taken to have adopted the acts of the subagent as the acts of the agent himself. Warner *v.* Martin, 11 How. 209, 223, 13 L. Ed. 667.

The reason of the rule in all these mercantile agencies is, that it is a trust and confidence reposed in the ability and integrity of the person authorized. Warner *v.* Martin, 11 How. 209, 223, 13 L. Ed. 667.

6. Cannot by promise bind principal to insure.—Randolph *v.* Ware, 3 Cranch 503, 2 L. Ed. 512.

7. Cannot pledge goods of principal.—Warner *v.* Martin, 11 How. 209, 13 L. Ed. 667.

"By the common law, a factor * * * for sale has no power to pledge, whether the owner has intrusted him with the possession of the goods themselves, or with the symbol of them, as by consigning them to him by a bill of lading in which he is consignee or indorsee." Allen *v.* St. Louis Bank, 120 U. S. 20, 32, 30 L. Ed. 573. See, also, Warner *v.* Martin, 11 How. 209, 224, 13 L. Ed. 667.

Missouri law.—"Factors have no power, by the law of Missouri, to make a pledge of the goods of their principals by a transfer, without indorsement in writing, of the bills of lading or warehouse receipts." Allen *v.* St. Louis Bank, 120 U. S. 20, 39, 30 L. Ed. 573.

Louisiana.—"Before the act of 1876 it was settled by numerous decisions in Louisiana, that a factor could not pledge for his own debts the property of his principal." Insurance Co. *v.* Kiger, 103 U. S. 352, 355, 26 L. Ed. 433.

8. Makes no difference that pledgee did not know the factor was not the owner.—When goods are so pledged or disposed of, the principal may recover them back by an action of trover against the pawnee, without tendering to the factor what may be due to him, and without any tender to the pawnee of the sum for which the goods were pledged; or without any demand of such goods; and it is no excuse that the pawnee was wholly ignorant that he who held the goods held them as a mere agent or factor, unless, indeed, where the principal has held forth the agent as the principal. Warner *v.* Martin, 11 How. 209, 225, 13 L. Ed. 667.

9. Binding as against factor.—Where the consignee had advanced no money on the goods consigned to them, a verbal mortgage or pledge of the goods accompanied by delivery to a third party is good against the factors to whom the consignment was made, irrespective of any question of notice. Means *v.* Bank, 146 U. S. 620, 628, 36 L. Ed. 1107.

10. May pledge to amount of lien.—In this case, the principal must tender the amount of the lien due to the factor, before he can be entitled to recover back the goods so pledged. Warner *v.* Martin, 11 How. 209, 225, 13 L. Ed. 667.

chaser had no notice, that the person intrusted was not the actual and bona fide owner of the goods.[11]

5. Authority to Transfer Goods in Payment of Factor's Debts.—**Sale to Creditor of Factor.**—A factor cannot sell the merchandise of his principal to a creditor of the factor in payment of an antecedent debt.[12]

6. Ratification of Unauthorized Acts.—If the principal after knowledge that his orders have been violated by his agent, receives merchandise purchased for him, contrary to orders, and sells the same, without signifying any intention of disavowing the acts of the agent, an inference in favor of the ratification of the acts of the agent may fairly be drawn by the jury; but if the merchandise was received by the principal, under a just confidence that his orders to his agent had been faithfully executed, such an inference would be, in a high degree, unreasonable.[13] Also where a factor has failed to make a sale of goods because of a dull market, and writes to his consignor of his failure to sell, and the consignor purposely refuses to answer the letter, it will be presumed that he ratified the act of the factor, so far as his letter informed him, and he will be regarded as having consented to whatever delay occurred in effecting a sale, even though the delay was contrary to his directions.[14]

B. Duties and Liabilities—1. Instructions to Factor—a. *Must Obey Instructions of Principal.*—While a person is not obliged to accept a consignment

11. "The factors' acts."—Allen *v.* St. Louis Bank, 120 U. S. 20, 33, 30 L. Ed. 573.

The obvious meaning of the New York Factors' Act of 1830, c. 179, is that the factor or other agent who has been intrusted with certain documentary evidence of title, or with the possession and ostensible ownership of the property, shall be deemed the true owner, so far as may be necessary to protect those who have dealt with him "upon the faith thereof;" that is, upon the faith, induced by the usual indicia of title, that he was the true owner of the property. Allen *v.* St. Louis Bank, 120 U. S. 20, 34, 30 L. Ed. 573.

12. Cannot sell to creditor of factor in payment of antecedent debt.—Warner *v.* Martin, 11 How. 209, 13 L. Ed. 667.

13. Ratification of unauthorized acts.—Bell *v.* Cunningham, 3 Pet. 69, 7 L. Ed. 606.

H. and others, merchants in Baltimore, consigned a vessel and cargo to W. and others, merchants in Amsterdam, with instructions to them respecting her ulterior destination, which showed that on the failure of getting a freight to Batavia, or of selling the vessel at a price limited, she was to proceed to St. Petersburg, and there take in a return cargo of Russian goods for the United States, but with instructions to the master committing to him the management of the ulterior voyage. No freight to Batavia could be obtained, and the vessel could not be sold for the price limited, at Amsterdam, and W. and others purchased, in Amsterdam, with the concurrence of the master, a return cargo of Russian goods, partly with the money of H., and others, and partly with money advanced by themselves. On the return of the vessel to Baltimore, H. and others objected to the purchase of this cargo in Amsterdam, as being contrary to express orders, and gave notice to W. and others, of their determination to hold them responsible for all losses sustained in consequence of this breach of instructions; but received the goods and sold them. W. and others brought an assumpsit against H. and others, to recover from them the moneys advanced. Held, that whether the plaintiffs could, or could not, be made responsible in any form of action which might be devised, for the possible loss resulting from the breaking up of the intended voyage to St. Petersburg, the defendants were not entitled to a deduction from the plaintiffs' demand, for the amount of such loss. Willinks *v.* Hollingsworth, 6 Wheat. 240, 5 L. Ed. 251.

14. By refusing to answer letter of factor.—Field *v.* Farrington, 10 Wall. 141, 19 L. Ed. 923.

The effect of the refusal by the consignor to reply to a letter informing him that they had not sold his goods, as the market had been dull and on the decline every day since he left them; that the goods would not then sell for more than so much (a decline from former prices); that they would be compelled to sell unless he made other shipments, or remitted in cash as a margin, the money market being tight; that they had held on thus far to meet his views, but that the declining tendency of the market induced them to write, and asking to hear from him on his receipt of their letter, within a reasonable time after he received it, was to raise a presumption that he approved of what his factors had done, so far as their letter informed him; and in the absence of anything to rebut that presumption, he was to be regarded as having consented to whatever delay had occurred in effecting a sale, even though the

of goods, yet, if he does accept it, he is answerable, like every other agent or factor, for a breach of the positive orders of his principal.[15]

b. *Instructions as to Price.*—If a factor is instructed to purchase at a certain price, and a purchase is made for a price exceeding the limit prescribed by the principal, he may repudiate the purchase, and no title will pass to him.[16]

c. *Ratification of Acts Contrary to Instructions.*—See ante, "Ratification of Unauthorized Acts," II, A, 6.

d. *Qualification to General Rule*—(1) *Advances by Factor.*—Though it is true that factors are generally bound to obey all orders of their principals respecting the time and mode of sale, yet when they have made large advances or incurred expenses on account of the consignment, the principal cannot by any subsequent orders control their right to sell at such a time as in the exercise of a sound discretion, and in accordance with the usage of trade, they may deem best to secure indemnity to themselves, and to promote the interests of the consignor, they acting, of course, in good faith and with reasonable skill.[17]

(2) *Obeying Subsequent Orders of General Agent.*—If foreign merchants send out, by their general agent, written orders to their factor in this country, to purchase tobacco upon their account, but to ship it in the name of the factor, and by those orders, the factor is referred to the verbal communications of the general agent, who undertakes to order tobacco to be shipped in the name of another person, and declares he has authority from the foreign merchants thus to control and vary their orders; the factor is justified in obeying the new orders of the general agent, though contrary to the first written orders.[18]

2. Duty to Insure Goods.—It is a recognized usage, if not the duty of factors, to insure goods consigned to them.[19]

3. Duty as to Sale.—It is a continuing obligation of factors authorized to sell goods, to exercise good faith, and sell within a reasonable time, considering the circumstances; and at the best prices that can be obtained. If a delay in selling is unreasonable, if it is in violation of the factor's duties, they, rather than the principal, should bear the loss that results from it.[20]

delay was contrary to his directions. Field *v.* Farrington, 10 Wall. 141, 19 L. Ed. 923.

15. Must obey orders of principal.—Walker *v.* Smith, 4 Dall. 389, 390, 1 L. Ed. 878; Field *v.* Farrington, 10 Wall. 141, 19 L. Ed. 923.

16. Principal may repudiate purchase.—If the factors bought coffee at a price exceeding the limit prescribed by the principals and the latter, upon learning the fact, no matter when that was, or what the circumstances, repudiated the purchase, the title of the factors thereupon became absolute, and none passed to the principals for whom the purchase was made. The Sally Magee, 3 Wall. 451, 457, 18 L. Ed. 197.

17. Principal cannot give instructions which will affect factor's indemnity for advances.—Field *v.* Farrington, 10 Wall. 141, 149, 19 L. Ed. 923. See post, "Right of Factor to Sell for Purpose of Reimbursement," III, A, 2.

18. Factor may obey subsequent orders of general agent of principal.—Manella *v.* Barry, 3 Cranch 415, 2 L. Ed. 484.

19. Factor's duty to insure.—Peyton *v.* Heinekin, 131 U. S., appx. ci, cii, 20 L. Ed. 679.

20. Duty in regard to sale.—Field *v.* Farrington, 10 Wall. 141, 151, 19 L. Ed. 923.

Must sell within a reasonable time.—The receipt by the consignor and nonacknowledgment of a letter informing him that they had not sold his goods, as the market had been dull and on the decline every day since he left them; that the goods would not then sell for more than so much (a decline from former prices); that they would be compelled to sell unless he made other shipments, or remitted in cash as a margin, the money market being tight; that they had held on thus far to meet his views, but that the declining tendency of the market induced them to write, and asking to hear from him on his receipt of their letter; would not, however, relieve the factors from a continuing obligation to sell within a reasonable time, all the circumstances of the case being considered; and at the best prices that could be obtained. Field *v.* Farrington, 10 Wall. 141, 19 L. Ed. 923.

Where a factor held goods because of a decline in the market and wrote to him for instructions, it was held that, though the letter was never acknowledged, it was a question which should have been submitted to the jury, whether a ten months delay to sell in view of a market falling the whole time was in the exercise of sound discretion, good faith, and reasonable diligence; and that an instruction that the consignor should bear all losses sus-

4. Duty and Right as to Proceeds—a. *Right to Proceeds of Sale.*—Wherever the proceeds of a sale of property of the principal can be specifically distinguished from the property of the factor, it has been uniformly determined that the right of the former shall prevail over the possessions of the latter.[21]

b. *Remitting Proceeds.*—The mode of remitting by a general bill, payable to one merchant, with separate drafts in favor of each of the other merchants who are interested in the amount of the bill, is a good and lawful execution of the trust and authority of a factor, employed by several distinct and unconnected merchants, resident abroad. It is essential, however, to such a remittance, that notice should be given to the parties. In case of a partial loss it must be borne, as a general average, by all concerned.[22]

5. Liability.—A principal consigned goods to a commission merchant and wrote to him that he would hold him responsible for them. The commission merchant transferred the goods to another person under an order by a person who had been authorized by the principal to make arrangement with the commission merchant for the acceptance of the consignment of goods. It was held that the commission merchant was responsible for the goods after the receipt of the letter stating that he was held responsible for them.[23]

III. Duty and Liability of Principal.

A. Reimbursement of Factor for Advances and Expenditures—1. In General.—Upon the sale of goods consigned to a factor he is entitled to reimbursement, out of the proceeds of the sale, for any advancements or expenditures.[24]

2. Right of Factor to Sell for Purpose of Reimbursement.—A factor who has made advances or incurs liability upon goods consigned to him, may be regarded, in a limited sense, to the extent of his advances, as the owner,[25] and

tained after his refusal to answer the factors' letter without excepting such portion of the loss as might have been caused by the factor's fault, was error. This, notwithstanding that the court charged that, as a general principle, the factors were found to use due diligence, care, and skill in the sale of the goods, and to obey instructions given to them by the consignors in regard to the sale, this charge not having been given by way of qualification to the specific instructions previously given. Field *v.* Farrington, 10 Wall. 141, 19 L. Ed. 923.

21. If distinguishable from property of factor, principal's right is superior.—Price *v.* Ralston, 2 Dall. 60, 67, 1 L. Ed. 289.

If a factor sells the goods consigned to him, receives the money due upon the sales, and mixes it, indiscriminately, with his own cash, there cannot, from the nature of the thing, be any subsequent distinguishment, any specific appropriation of property. But if the factor sells on credit, and does not afterwards actually receive the money; or if, having received the money, he vests the amount in other effects, for the use of the principal; or if, upon the sale, he takes notes in his own name, for the price of the goods—in all these instances, the property of the principal is clearly separated from the factor's; and being thus distinguished, and distinguishable, it must, upon the principles of law and equity, be appropriated, upon the factor's bankruptcy, to the individual use of the principal; it cannot be applied by the commissioners to the benefit of the general creditors. Price *v.* Ralston, 2 Dall. 60, 67, 1 L. Ed. 289.

A bond taken by a factor in payment for goods sold by him is so specifically distinguished from the property of the factor, that the right of the principal has all priority. Price *v.* Ralston, 2 Dall. 60, 1 L. Ed. 289.

22. Remitting proceeds.—Schenekhouse *v.* Gibbs, 4 Dall. 136, 1 L. Ed. 773.

23. Liability.—Berthold *v.* Goldsmith, 24 How. 536, 540, 16 L. Ed. 762.

24. Factor has right to reimbursement out of proceeds of sale.—Field *v.* Farrington, 10 Wall. 141, 149, 19 L. Ed. 923; United States *v.* Villalonga, 23 Wall. 35, 42, 23 L. Ed. 64; Brander *v.* Phillips, 16 Pet. 121, 10 L. Ed. 909; Brown *v.* McGran, 14 Pet. 479, 495, 10 L. Ed. 550.

25. Factors making advances treated as owner to a limited extent.—United States *v.* Villalonga, 23 Wall. 35, 42, 23 L. Ed. 64.

Under the statute of New York, of April 16, 1830 (Laws of 1830, c. 179, p. 203), a factor who has advanced money on goods for the principal has a right to treat the goods as his own so long as his negotiable acceptances, of which the principal had had the benefit, were outstanding, not taken up by it, and his lien on the goods was unsatisfied. Fourth Nat. Bank *v.* American Mills Co., 137 U. S. 234, 238, 34 L. Ed. 655.

Where goods are shipped to factor for

if there be no special agreement, he may sell the property, in the exercise of a sound discretion, according to general usage, and reimburse himself out of the proceeds of the sale,[26] but however, he is accountable to his consignor for any surplus.[27] But the consignor may at any time before sale reclaim the possession upon paying the advances made, with interest and expenses.[28]

B. Reimbursement of Factor for Insurance.—As it is a duty of factors by recognized usage to insure their principals' goods, they are entitled to reimbursement for insurance on goods consigned to them.[29]

IV. Title and Right of Property.

It has been held that where goods are consigned to a commission merchant with the intention that he shall sell them and pay a draft drawn against them, the title and right of property vests in the commission merchant as soon as the goods are delivered to the common carrier.[30] But upon a shipment of goods, to be sold on joint account of the consignee and shipper, or of the latter alone, at the option of the consignee, the right of property does not vest in the consignee, until he has made his election, under the option given him.[31]

V. Lien of Factor.

A. Existence and Extent of Lien—1. EXISTENCE.—The lien of a factor depends upon legal principles, founded on equitable considerations, and can be held valid on no other grounds.[32] Such lien is only protected by the factor's possession.[33]

use of another.—See post, "Existence," V, A, 1.

26. Factor may sell and reimburse himself out of proceeds of sale.—Brander *v.* Phillips, 16 Pet. 121, 10 L. Ed. 909; Brown *v.* McGran, 14 Pet. 479, 495, 10 L. Ed. 550; United States *v.* Villalonga, 23 Wall. 35, 42, 23 L. Ed. 64; Fourth Nat. Bank *v.* American Mills Co., 137 U. S. 234, 238, 34 L. Ed. 655.

Must be no agreement to the contrary.—If, a factor makes advances, or incurs liabilities on account of a consignment, by which he acquires a special property therein; then the factor has a right to sell so much of the consignment as may be necessary to reimburse such advances or meet such liabilities; unless there be some existing agreement between himself and the consignor, which controls or varies this right. But if, contemporaneously with the consignment and advances or liabilities, there are orders given by the consignor, which are assented to by the factor, that the goods shall not be sold until a fixed time, in such a case, the consignment is presumed to be received by the factor subject to such orders; and he is not at liberty to sell the goods to reimburse his advances or liabilities, until after that time has elapsed. Brown *v.* McGran, 14 Pet. 479, 495, 10 L. Ed. 550.

27. Liable to consignor for surplus.—United States *v.* Villalonga, 23 Wall. 35, 42, 23 L. Ed. 64.

28. Consignor may reclaim goods any time before sold.—United States *v.* Villalonga, 23 Wall. 35, 42, 23 L. Ed. 64.

The owner of goods in the hands of a factor may, at any time before his factor has sold them, reclaim the possession upon paying the advances made, with interest and expenses. He has not lost his ownership by committing the custody of the goods to a factor and by receiving advances upon them. United States *v.* Villalonga, 23 Wall. 35, 42, 23 L. Ed. 64.

29. Factors have right to reimbursement for insurance on goods consigned to them.—Peyton *v.* Heinehin, 131 U. S., appx. ci, cii, 20 L. Ed. 679.

30. When title and right of property vests in factor.—Halliday *v.* Hamilton, 11 Wall. 560, 564, 20 L. Ed. 214.

A party consigned 1250 sacks of corn to a commission merchant with the intention that he should sell it and pay a draft drawn against it. It was held that as soon as the corn was deposited with the common carrier, who was the bailee for the purpose, the title to it and right of property in it was changed and vested in the commission merchant to whom it was to be delivered. Halliday *v.* Hamilton, 11 Wall. 560, 564, 20 L. Ed. 214.

31. Right of property does not vest if factor elects under the option given him.—The Venus, 8 Cranch 253, 3 L. Ed. 353.

32. Lien founded on equitable considerations.—Brander *v.* Phillips, 16 Pet. 121, 131, 10 L. Ed. 909.

Lien for advances made.—A factor, notwithstanding he may have made advances upon the property consigned to him, has but a limited right. That right is sometimes called a special property, but it is never regarded as a general ownership. At most, it is no more than ownership of a lien or charge upon the property. Such is unquestionably the doctrine of the common law. United States *v.* Villalonga, 23 Wall. 35, 42, 23 L. Ed. 64. See ante, "Reimbursement of Factor for Advances and Expenditures," III, A.

33. Lien is only protected by posses-

Where Goods Are Shipped to Factor for Use of Another.—Where goods are shipped to a factor, the shipper taking a receipt stating that the goods are to be delivered to the factor, for the use of a third person, such person takes the legal title and the factor cannot claim a lien on the goods for advances made by him.[34]

Right of Consignor of Goods to Countermand Consignment to Prevent Assignee's Lien from Attaching.—Where goods are sent upon the account and risk of the shipper, the delivery to the master is a delivery to him, as agent of the shipper, not of the consignee; and it is competent for the consignor, at any time before actual delivery to the consignee, to countermand it, and thus to prevent the consignee's lien, for advance made by him, from attaching.[35]

2. EXTENT.—The lien of the factor for advances and liabilities incurred extends not only to the property consigned, but, when sold, to the proceeds in the hands of the vendee, and the securities therefor, in the hands of the factor.[36]

B. Priority of Lien.—It has been held that the privilege given a factor who makes advances to a planter is inferior to the privilege of a landlord for his rent.[37] And in bankruptcy proceedings a factor's lien occupies no better ground than would a mortgage, pledge, or power to confess judgment, given at the same time and for the same purpose.[38]

C. Foreclosure of Lien.—A transfer of goods by a principal to a factor, as absolute owner, in discharge of advances made to the principal, is in effect a foreclosure of the lien on the goods held by the factor for the advances made.[39]

VI. Principal's Right against Third Persons.

May Follow Property or Its Proceeds.—As to the factor's power to bind his principal by a disposition of his goods, the common-law rule is that to acquire a good title to the employer's property by purchasing it from his agent, such purchase must have been either in market overt and without knowledge of the seller's representative capacity, or from an agent acting according to his instructions, or from one acting in the usual course of his employment, and whom the buyer did not know to be transgressing his instructions, or that he had not such notice as the law deems equivalent to raise that presumption. The reason of this is clear, for unless the transaction took place bona fide in the market overt, an agent selling without express authority must, that his acts may be supported, have sold under an implied one. But an implied one thereby always empowers the person authorized to act in the usual course of his employment; consequently, if he sells in an unusual mode, he could have no implied authority to support his act, and, as he had no express one, his sale, of course,

sion.—United States *v.* Villalonga, 23 Wall. 35, 42, 23 L. Ed. 64.

In the Code of Georgia of 1861, while a factor's lien is recognized and declared to extend to all balances on general account, and to attach to the proceeds of sale of goods consigned as well as to the goods themselves, there is nothing that declares he has anything more than a lien protected by his possession. United States *v.* Villalonga, 23 Wall. 35, 42, 23 L. Ed. 64.

34. Where goods are shipped to factor for use of another.—Grove *v.* Brien, 8 How. 429, 12 L. Ed. 1142.

35. Consignor may countermand consignee's lien from attaching.—The Frances, 8 Cranch 418, 3 L. Ed. 609.

36. Lien extends to goods, proceeds of sale, and securities therefor.—Brander *v.* Phillips, 16 Pet. 121, 10 L. Ed. 909; United States *v.* Villalonga, 23 Wall. 35, 42, 23 L. Ed. 64.

37. Priority of lien.—Saloy *v.* Bloch, 136 U. S. 338, 344, 34 L. Ed. 668.

In Louisiana the privilege or pledge of the landlord for his rent is superior to the privilege given by the civil code to the factor who advances money or necessary supplies to the planter; and, by the proviso of the act of 1874, it is still made superior to the pledge which that law authorizes the planter to make to the factor for his advances. Saloy *v.* Bloch, 136 U. S. 338, 344, 34 L. Ed. 668.

38. In bankruptcy proceedings.—Nudd *v.* Burrows, 91 U. S. 426, 440, 23 L. Ed. 286.

39. Foreclosure of lien.—Fourth Nat. Bank *v.* American Mills Co., 137 U. S. 234, 34 L. Ed. 655.

A factor, to whom a consignment of goods was made, made advances to his principal. The principal, a corporation in discharge of the debt, transferred the goods to the factor, as absolute owner. The factor then sold the goods to his

falls to the ground.[40] And where a party takes from a factor, in payment of his debt, moneys which he knows equitably belong to the factor's consignor and principal, justice forbids the upholding of such a transaction and demands that the party receiving the moneys must account to the principal for the same.[41]

May Recover from Factor's Assignee in Bankruptcy.—A bond taken by a factor in payment for goods sold by him will not pass to the assignees in bankruptcy, on the factor's subsequent bankruptcy. In such case the principal may maintain an action to recover the bond from the assignee.[42]

"The Factors' Acts."—See ante, "The Factors' Acts," II, A, 4, b.

Actions against Third Persons.—See post, "Against Third Persons," VII, A, 2.

VII. Actions.

A. By Principal—1. Against Factor.—When Right of Action Accrues.—Where goods are sold by a factor, and his principal drew bills of exchange upon him, which were duly accepted for the full amount of the proceeds, and all the bills were negotiated to third persons, no right of action exists in favor of the principal against the factor until after the bills have become due and dishonored and taken up by the principal.[43]

Right of One of Several Principals to Maintain Action.—If two joint

wife; she resold them and received the proceeds. A creditor of the principal and factor sued them and the wife for the proceeds. It was held that the lien for the advances was foreclosed by the transfer, and the creditor was not entitled to the relief prayed for. Fourth Nat. Bank *v.* American Mills Co., 137 U. S. 234, 34 L. Ed. 655.

As to the validity of such transfers by corporations, see the title CORPORATIONS, vol. 4, p. 742.

40. Principal may follow property or its proceeds in hands of third persons other than bona fide purchasers.—Warner *v.* Martin, 11 How. 209, 227, 13 L. Ed. 667; Allen *v.* St. Louis Bank, 120 U. S. 20, 40, 30 L. Ed. 573. See Price *v.* Ralston, 2 Dall. 60, 67, 1 L. Ed. 289.

As to the doctrine that market overt does not exist in the United States, see the title MARKETS.

A buyer who, at the time of a sale by a factor, knows nothing of the relation between the factor with whom he deals and the principal by whom that factor has been employed, is protected by the law, in case of a misadventure occurring by the default of the factor, and it is admitted that the risk which a principal runs, through the inadvertence or misconduct of his agent may be avoided, by the purchaser having notice, at any time before the completion of the purchase or delivery of the goods, of the agent's commission. Among the instances which the law terms notice enough for such a purpose is the insolvency of the factor known to the buyer. Warner *v.* Martin, 11 How. 209, 222, 13 L. Ed. 667.

If a factor, holding property in trust for his principal, transfers it to a bank which has notice of the capacity in which he holds it, the principal may assert his right in the property against the bank, either by independent suit, or by way of defense to an action by the bank against him. Allen *v.* St. Louis Bank, 120 U. S. 20, 40, 30 L. Ed. 573. See, also, National Bank *v.* Insurance Co., 104 U. S. 54, 26 L. Ed. 693.

41. Union Stock Yards Bank *v.* Gillispie, 137 U. S. 411, 419, 34 L. Ed. 724.

Where a merchant, in order to secure himself from loss, took merchandise from a factor, with a knowledge that the factor was about to fail, the principal who consigned that merchandise to the factor may avoid the sale, and reclaim his goods, or hold the merchant accountable for them. And where the purchase was made from the factor's clerk, who had been left by the factor in charge of the business, this was an additional reason for avoiding the sale; because a factor cannot delegate his authority without the assent of the principal. Warner *v.* Martin, 11 How. 209, 13 L. Ed. 667.

"When a contract is proposed between factors, or between a factor and any other creditor, to pass property for an antecedent debt, it is not a sale in the legal sense of that word or in any sense in which it is used in reference to the commission which a factor has to sell." Warner *v.* Martin, 11 How. 209, 226, 13 L. Ed. 667.

42. May recover from factor's assignee in bankruptcy.—Price *v.* Ralston, 2 Dall. 60, 1 L. Ed. 289.

43. Where factor accepts bills of exchange drawn upon him.—Black *v.* Zacharie, 3 How. 483, 510, 11 L. Ed. 690.

A cargo of sugar and molasses was sold by B. on account of Z. & Co. and Z. & Co. drew bills of exchange upon B. which were accepted by the latter for the full amount of the proceeds and all these bills had been negotiated to third persons. It was held that there was no right of action by Z. & Co. against B. until after those bills had become due and dishonored and

owners of merchandise consign it to a merchant for sale, and inform him that each owns one moiety; and if they give separate and variant instructions, each for his own moiety; one of the consignors alone may maintain a separate action against the consignee, for a violation of his separate instructions.[44]

Measure of Damages.—If a factor has instructions to sell goods on a certain day, but sells on a day prior to date, the damages to which the principal is entitled to will be regulated by the price on the day he were instructed to sell.[45]

2. Against Third Persons.—**Right on Contract in Name of Factor.**—A written contract made by a factor in his own name for the sale of goods for his principal will bind the principal, and he may sue thereon as if he was a party named in the contract, for it is in fact a contract of the principal.[46]

B. Actions against Principal.—A written contract made by a factor, in his own name, for the purchase of goods for his principal, will bind the principal, and he may be sued thereon exactly as if he were named in it, for it is treated as the contract of the principal as well as of the agent.[47]

The statute of limitations does not apply to accounts still remaining unliquidated and unsettled between a principal and his factor, concerning the sales of merchandise made by the plaintiff, as agent and factor for the defendant.[48]

C. By Factor against Third Person.—Injuries to the possession of goods in the factor's hands may be redressed by an action in the factor's name, and further it may be assumed that upon contracts of sale by him, he may sue.[49]

FAILING TO COMPLY.—See note 1.
FAILURE.—See note 2.

were taken up by Z. & Co. Black *v.* Zacharie, 3 How. 483, 510, 11 L. Ed. 690.

44. One of several principals may bring action.—Hall *v.* Leigh, 8 Cranch 50, 3 L. Ed. 484.

45. Measure of damages in action against factor.—Brown *v.* McGran, 14 Pet. 479, 10 L. Ed. 550. See the title DAMAGES, vol. 5, p. 157.

If a sale of cotton in Liverpool, by a factor, has been made on a particular day tortiously, and against the orders of the owner, the owner has a right to claim damages for the value of the cotton on the day the sale was made, as for a tortious conversion; if the sale of the cotton by the factor was authorized on a subsequent day, and the cotton had been sold against orders, before that day, the damages to which the owner would be entitled would be regulated by the price of cotton on that day; but the rate of damages is not to be obtained from the prices of cotton at any time between the day when the cotton was sold, against the orders of the owner, and the day on which the sale was authorized by him. Brown *v.* McGran, 14 Pet. 479, 10 L. Ed. 550.

46. May maintain action on contract in name of factor.—Higgins *v.* McCrea, 116 U. S. 671, 680, 29 L. Ed. 764.

47. Principal may be sued upon contract made by factor.—Higgins *v.* McCrea, 116 U. S. 671, 680, 29 L. Ed. 764.

48. Statute of limitation does not apply to unliquidated accounts.—Stiles *v.* Donaldson, 2 Dall. 264, 1 L. Ed. 375.

49. Factor may bring action against third person.—United States *v.* Villalonga, 23 Wall. 35, 42, 23 L. Ed. 64.

1. Failing to comply.—A devise or bequest is often made dependent on the beneficiary refusing on **failing to comply** with certain conditions. When used in this connection, the words "refusing to comply," may, in general, have the same operation of law as the words **failing to comply** would have; and where the condition to be performed depends on the will of the devisee, his failure to perform it is equivalent to a refusal. But where the condition does not depend on his will, but on the will of those over whom he can have no control, there is a manifest distinction between "refusing" and **failing to comply** with it. The first is an act of the will, the second may be an act of inevitable necessity. Taylor *v.* Mason, 9 Wheat. 326, 344, 6 L. Ed. 101. See, generally, the title WILLS.

2. Failure.—In Godfrey *v.* Terry, 97 U. S. 171, 178, 24 L. Ed. 944, the court says: "What is meant by '**failure** of the bank' in the clause of its charter which makes the stockholders liable? If a partnership engaged in any mercantile or manufacturing business fails to meet, and pay when demanded, its current business paper as it falls due, that firm is said, in popular language, to have **failed.** And unless it compromises with its creditors, or makes arrangement for extension of time, it has **failed** in all senses of the word. If it continues to dishonor its paper, it has **failed.** If any business man or business firm does the same thing, they are, by the express terms of every bankrupt law, bankrupts. * * * Why is it not so with regard to a bank? If there be any difference, it should be in favor of the

FAILURE OF CONSIDERATION.—See the titles BILLS, NOTES AND CHECKS, vol. 3, p. 281; DEEDS, vol. 5, p. 245. See, also, references under title CONTRACTS, vol. 4, p. 567.

FAITH.—As to meaning of the term "Good Faith," see GOOD FAITH. As to the meaning of the term "full faith and credit," as used in the constitution and statutes of the United States, relating to judgments of sister states, see the title FOREIGN JUDGMENTS, RECORDS AND JUDICIAL PROCEEDINGS. See note 1.

FAITH AND CREDIT.—See the title FOREIGN JUDGMENTS, RECORDS AND JUDICIAL PROCEEDINGS.

FALSE.—See the title FORGERY AND COUNTERFEITING. The term "false bank note" is understood to mean a forged paper in the similitude of a bank note, or that which on its face appears to be such a note.[2]

FALSE ENTRY.—See the title BANKS AND BANKING, vol. 3, p. 116.

FALSE IMPRISONMENT.

CROSS REFERENCES.

See the titles ARMY AND NAVY, vol. 2, p. 521; ARREST, vol. 2, p. 541; MALICIOUS PROSECUTION.

Arrest on Irregular Warrant or without Warrant.—The warrant must name or describe the person to be arrested. If it does not, the officer making the arrest is liable to an action for false imprisonment.[2a]

Recovery by a Traitor.—The fact that a man was himself a traitor against the United States, does not necessarily prevent his recovering damages against other traitors, for having maliciously arrested and imprisoned him before a so-

rule which brings into action the remedies for bank failures." See the title BANKS AND BANKING, vol. 3, p. 122.

1. **Faith.**—Where a statute provides that a factor or agent, not having the documentary evidence of title, but intrusted with the possession of any merchandise for the purpose of sale, or as a security for any advances to be made or obtained thereon, shall be deemed to be the true owner thereof, so far as to give validity to any contract made by him with any other person for the sale or disposition of the merchandise, for any advances made by such other person "upon the faith thereof," the words "on the faith thereof" are not to be referred to "merchandise," or to its symbols, but to the words "shall be deemed to be the true owner thereof." The obvious meaning is, that the factor or other agent who has been intrusted with certain documentary evidence of title, or with the possession and ostensible ownership of the property, shall be deemed the true owner, so far as may be necessary to protect those who have dealt with him "upon the faith thereof;" that is, upon the faith, induced by the usual indicia of title, that he was the true owner of the property. Allen *v.* St. Louis Bank, 120 U. S. 20, 33, 30 L. Ed. 573. See the title FACTORS AND COMMISSION MERCHANTS, ante, p. 232.

2. United States *v.* Howell, 11 Wall. 432, 436, 20 L. Ed. 195.

2a. West *v.* Cabell, 153 U. S. 78, 86, 38 L. Ed. 643.

By the laws of the state of Texas, the warrant must specify the name of the person whose arrest is ordered, if it be known; if not known, then some reasonably definite description must be given of him. West *v.* Cabell, 153 U. S. 78, 87, 38 L. Ed. 643.

Where a warrant provided for the arrest of "James West," and the marshal arrested "Vandy M. West," it was held that he and the sureties on his bond were liable. West *v.* Cabell, 153 U. S. 78, 85, 38 L. Ed. 643.

"Likewise, a warrant of arrest in a civil action, which does not name or describe the person to be arrested, is no justification of the officer." West *v.* Cabell, 153 U. S. 78, 85, 38 L. Ed. 643.

The private intention of a magistrate is not a sufficient substitute for the constitutional requirement of a particular description in the warrant. West *v.* Cabell, 153 U. S. 78, 88, 38 L. Ed. 643.

Without warrant.—Where one is arrested for horse stealing upon grounds giving a probable cause, his imprisonment is not unlawful though it lasted for seven days and no warrant had been issued, where the minutes of the proceedings before the magistrate show that he was so detained as the necessary consequence of his own request for delay, and the neglect on his part to offer any satisfactory security for his appearance at the time appointed for the examination. Wheeler *v.* Nesbitt, 24 How. 544, 553, 16 L. Ed. 765.

called court of the Confederate States, for being a traitor to these; the alleged treason having consisted in his giving aid to the troops of the United States while engaged in suppressing the rebellion.[3]

Imprisonment by a Court without Jurisdiction.—Where a court has no jurisdiction over the subject matter, but tries and assumes it; or where an inferior court has jurisdiction over the subject matter, but is bound to adopt certain rules in its proceedings, from which it deviates, whereby the proceedings are rendered coram non judice, trespass for false imprisonment is the proper remedy, where the liberty of the citizen has been restrained by process of the court, or by the execution of its judgment.[3a]

Liability of Members of the House of Representatives.—Members of the house of representatives who did not in any manner assist in the arrest or imprisonment of a person whom they had ordered punished for contempt of their authority, nor order or direct the same, except by their votes and by their participation as members in proceedings of the house, are not liable in an action for false imprisonment.[4]

Liability of Sergeant at Arms.—Where a sergeant at arms, in compliance with a void order of the house, imprisons a person for contempt of the house, the imprisonment is illegal since he is liable to an action for false imprisonment.[5]

Acting under Authority of Another.—Whenever one justifies an act which in itself constitutes at common law a wrong, upon the process, order, or authority of another, he must set forth substantially and in a traversable form the process, order, or authority relied upon, and no mere averment of its legal effect, without other statement, will answer.[6]

FALSELY.—See note 1.

FALSE PERSONATION.—As to false personation of grantee in a deed, see McIntire *v.* Pryor, 161 U. S. 38, 43 L. Ed. 606.

FALSE PRETENSES AND CHEATS.—As to coexistence of act and intent, see the title CRIMINAL LAW, vol. 5, p. 43. As to using the mails for purposes of false pretenses, see the title POSTAL LAWS.

3. Hickman *v.* Jones, 9 Wall. 197, 19 L. Ed. 551.

3a. Dynes *v.* Hoover, 20 How. 65, 80, 15 L. Ed. 838.

4. Kilbourn *v.* Thompson, 103 U. S. 168, 200, 26 L. Ed. 377.

5. Kilbourn *v.* Thompson, 103 U. S. 168, 26 L. Ed. 377.

6. Accordingly, where certain military officers of the United States, being sued for the arrest and imprisonment of a person in Vermont, not connected with the military service of the United States, alleged in their pleas that the arrest and imprisonment were made under the authority and by the order of the president, whose orders as commander in chief of the armies of the United States, by the rules and regulations of the army, they were bound to obey, without setting forth any order, general or special, of the president directing or approving of the acts in question, it was held that the pleas were defective and insufficient. Bean *v.* Beckwith, 18 Wall. 510, 21 L. Ed. 849.

Evidence in mitigation of damages.—A., who was an officer of the army, and acting as a provost-marshal in Vermont, arrested B., during the Civil War, on the charge of aiding and abetting deserters from the army. At the time of making the arrest, A. had no warrant, but was acting under orders of his commanding officer, based upon a report made to him by A. B. having brought an action for false imprisonment against A., the latter, for the purpose of satisfying the jury of the misconduct of B., and in support of his own testimony as to the state of facts which he at the time of making the arrest believed in good faith to exist, offered to show, by evidence which was not known to him at the time of B.'s release from imprisonment, that the latter had, during the war, been engaged in procuring men to enlist in the army, and to desert after they had obtained their bounty; but the court, on the ground that the offered evidence did not become known to A. until after the commencement of the suit, excluded it. Held, that the evidence was admissible in mitigation of damages. Beckwith *v.* Bean, 98 U. S. 266, 25 L. Ed. 124.

1. **Falsely.**—Where a publication declared on as a libel is prima facie privileged, the circumstances which would render it illegal, the malice which prompted it, must be expressly averred. In describing the act complained of, the word "maliciously" is not indispensable to characterize it; the law is satisfied with words of equivalent power and import; thus, for instance, the word **falsely** has been held to be sufficiently expressive of

FALSE REPRESENTATIONS.—See the title FRAUD AND DECEIT.

FALSUS IN UNO, FALSUS IN OMNIBUS.—See the title EVIDENCE, vol. 5, p. 1004.

FAMILY SETTLEMENTS.—See the title COMPROMISE AND SETTLEMENT, vol. 3, p. 980.

FARES.—See the title CARRIERS, vol. 3, p. 570.

FARM.—The words "estate," in a will, standing alone, and unqualified by other words, is sufficient to pass the whole of the testator's interest; but words which import nothing more than a specification of the thing devised, as "all my lands," "all my farms," and the like, have never been construed to pass more than an estate for life, even when aided by an introductory clause, declaring an intention to dispose of all his estate.[1]

FAST DAY.—See the title SUNDAYS AND HOLIDAYS.

FAVOR.—As to the meaning of the word favor as used in the judiciary act of 1879, see the title APPEAL AND ERROR, vol. 1, p. 703.

FEAR.—"The fear which the law recognizes as an excuse for the perpetration of an offense, must proceed from an immediate and actual danger, threatening the very life of the party. The apprehension of any loss of property, by waste or fire; or even an apprehension of a slight or remote injury to the person, furnish no excuse."[2]

FEDERAL COURTS.—See the titles COURTS, vol. 4, p. 888, and references given; REMOVAL OF CAUSES.

FEDERAL QUESTION.—See the titles APPEAL AND ERROR, vol. 1, p. 633; COURTS, vol. 4, p. 904; REMOVAL OF CAUSES.

FEDERAL SECURITIES.—See the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.

FEE CONDITIONAL.—See the title ESTATES, vol. 5, p. 910.

FEES.—See the titles CLERKS OF COURTS, vol. 3, p. 849; PUBLIC OFFICERS; UNITED STATES COMMISSIONERS; UNITED STATES MARSHALS. And see COMMISSIONS, vol. 3, p. 950. See note 3.

FEE SIMPLE.—See the title ESTATES, vol. 5, p. 906.

FEE TAIL.—See the title ESTATES, vol. 5, p. 909.

FEIGNED ISSUES.—See the title EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL, ante, p. 1.

malicious intent. White *v.* Nichols, 3 How. 266, 284, 11 L. Ed. 591. See the title LIBEL AND SLANDER.

1. Lambert *v.* Paine, 3 Cranch 97, 131, 2 L. Ed. 377. See the titles ESTATES, vol. 5, p. 904; WILLS.

2. United States *v.* Vigol, 2 Dall. 346, 347, 1 L. Ed. 409. See the titles ASSAULT AND BATTERY, vol. 2, p. 547; HOMICIDE.

3. Fees.—In § 839, U. S. Rev. Stat., providing that clerks of the district courts shall make a written return to the attorney general of all the fees and emoluments of their office, of every name and character, the word fees does not include fees for naturalization proceedings, as they do not accrue to the clerks by reason of their official capacity, but are for work that may as well be done by them when out of office as when in. It is that which is done by them that they could not do if out of office that has an official color and significance and brings it within the compass of the language of the statute. United States *v.* Hill, 120 U. S. 169, 181, 30 L. Ed. 627. See the title CLERKS OF COURT, vol. 3, p. 854.

FELLOW SERVANTS.

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CROSS REFERENCES.

See the titles CONSTITUTIONAL LAW, vol. 4, p. 1; COURTS, vol. 4, p. 861; MASTER AND SERVANT; NEGLIGENCE.

As to constitutionality of statutes abolishing or modifying the fellow-servant law, see the titles CONSTITUTIONAL LAW, vol. 4, p. 1; DUE PROCESS OF LAW, vol. 5, p. 499; IMPAIRMENT OF OBLIGATION OF CONTRACTS.

I. Statement of Fellow-Servant Rule and Reason Therefor.

A. Statement of Rule.—At common law a master who has used due care in the selection of servants and furnished them with proper means to perform the work, is exempt from liability for injuries to a servant caused by the negligence of another servant engaged in a common employment.[1]

B. Basis and Reason of Rule.—The obvious reason for this exemption is that the ordinary risks incident to the employment, of which the negligence of fellow servants is one, are, or in law supposed to be, taken into consideration by the servant when he engages in the service, and that his compensation is arranged accordingly.[2] He cannot in reason complain if he suffers from a risk

1. **Statement of rule.**—Northern Pac. R. Co. *v.* Herbert, 116 U. S. 642, 647, 29 L. Ed. 755; Hough *v.* Railway Co., 100 U. S. 213, 215, 25 L. Ed. 612; Randall *v.* Baltimore, etc., R. Co., 109 U. S. 478, 27 L. Ed. 1003; Armour *v.* Hahn, 111 U. S. 313, 319, 28 L. Ed. 400; Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 37 L. Ed. 772; Missouri Pac. R. Co. *v.* Mackey, 127 U. S. 205, 207, 32 L. Ed. 107; Railroad Co. *v.* Fort, 17 Wall. 553, 21 L. Ed. 739; New England R. Co. *v.* Conroy, 175 U. S. 323, 335, 44 L. Ed. 181, overruling Chicago, etc., R. Co. *v.* Ross, 112 U. S. 377, 28 L. Ed. 787; Fletcher *v.* Baltimore, etc., R. Co., 168 U. S. 135, 138, 42 L. Ed. 411; Philadelphia, etc., R. Co. *v.* Derby, 14 How. 468, 484, 14 L. Ed. 502. See, also, Packet Co. *v.* McCue, 17 Wall. 508, 513, 21 L. Ed. 705; Missouri Pac. R. Co. *v.* Mackey, 127 U. S. 205, 207, 32 L. Ed. 107; Minneapolis, etc., R. Co. *v.* Herrick, 127 U. S. 210, 32 L. Ed. 109.

"One who enters the service of another takes upon himself the ordinary risks of the negligent acts of his fellow servants in the course of the employment." Northern Pac. R. Co. *v.* Poirier, 167 U. S. 48, 54, 42 L. Ed. 72; Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 384, 37 L. Ed. 772; Randall *v.* Baltimore, etc., R. Co., 109 U. S. 478, 483, 27 L. Ed. 1003; Gardner *v.* Michigan Cent. R. Co., 150 U. S. 349, 359, 37 L. Ed. 1107; Hough *v.* Railway Co., 100 U. S. 213, 25 L. Ed. 612; New England R. Co. *v.* Conroy, 175 U. S. 323, 327, 44 L. Ed. 181; Quebec Steamship Co. *v.* Merchant, 133 U. S. 375, 33 L. Ed. 656.

2. Chicago, etc., R. Co. *v.* Ross, 112 U. S. 377, 383, 28 L. Ed. 787; Northern Pac. R. Co. *v.* Herbert, 116 U. S. 642, 647, 29 L. Ed. 755; Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 384, 37 L. Ed. 772; Hough *v.* Railway Co., 100 U. S. 213, 25 L. Ed. 612. See Railroad Co. *v.* Fort, 17 Wall. 553, 557, 21 L. Ed. 739.

Where fellow servants are engaged in a common employment, each in undertaking the service, assumes the risk that the other may fail in that care and vigilance which are essential to his safety, and if he should suffer, he cannot recover from his employer. Northern Pac. R. Co. *v.* Herbert, 116 U. S. 642, 647, 29 L. Ed. 755; Chicago, etc., R. Co. *v.* Ross, 112 U. S. 377, 28 L. Ed. 787; Hough *v.* Railway Co., 100 U. S. 213, 25 L. Ed. 612; Railroad Co. *v.* Fort, 17 Wall. 553, 21 L. Ed. 739; Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 388, 37 L. Ed. 772.

"There is implied in his contract of service in such cases, that he takes upon himself risks arising from the negligence of his fellow servants, while in the same employment, provided always the master is not negligent in their selection or retention, or in furnishing adequate materials and means for the work; and that if injuries then befall him from such negligence, the master is not liable." Chicago, etc., R. Co. *v.* Ross, 112 U. S. 377, 383, 28 L. Ed. 787. See post, "Safe Place to Work, Safe Tools, Machinery, Appliances, etc.," III, A, 4, b, (2); "Negligence in Selecting or Retaining Servants," III, A, 4, b, (3).

"It is implied in the contract between the parties that the servant risks the dangers which ordinarily attend or are incident to the business in which he volun-

which he has voluntarily assumed, and for the assumption of which he is paid.[3] When the employer has been personally free from blame and the injury results from the fault or misconduct of a fellow servant, it would seem reasonable that the wrongdoer should be alone responsible, and that one who is innocent should not be called upon to pay damages. And such is the general rule.[4]

Public Policy.—There is also another reason often assigned for this exemption—that of a supposed public policy. It is assumed that the exemption operates as a stimulant to diligence and caution on the part of the servant for his own safety as well as that of his master. Much potency is ascribed to this assumed fact by reference to those cases where diligence and caution on the part of servants constitute the chief protection against accidents. But it may be doubted whether the exemption has the effect thus claimed for it.[5]

II. History and Origin of Doctrine.

The doctrine was first announced in this country by the Supreme Court of South Carolina in 1841, in Murray *v.* S. C. Railroad Co., 1 McMullan 385, and was affirmed by the supreme court of Massachusetts the following year in Farwell *v.* Boston and Worcester Railroad Co., 4 Met. 49.[6]

In England the doctrine of the master's exemption from liability was first distinctly announced in 1850 by the court of exchequer in Hutchinson *v.* York, Newcastle & Berwick Railway Co., 5 Exch. R. 343. Priestley *v.* Foster, 3 M. & W. 1, which was decided in 1837, is often cited as the first case declaring the doctrine, but it did not directly involve the question as to the liability of a master to a servant for the negligence of a fellow servant.[7]

III. Operation of Doctrine.

A. At Common Law—1. General Rule.—The fellow-servant doctrine applies where the person injured, and the one by whose negligence or incompetency the injury is caused, are fellow servants in the same common employment, and acting under the same immediate direction.[8] There are well-defined exceptions to the rule.[9]

2. As to Corporations and Their Employees.—As corporations can act only through superintending officers, the negligences of those officers, with respect to other servants, are the negligences of the corporation; and as to such officers and servants the fellow-servant doctrine applies.[10]

tarily engages for compensation, among which are the carelessness of his fellow servants with whose habits, conduct, and capacity he has in the course of his duty an opportunity to become acquainted, and against whose neglect and incompetency he may himself take precautions." Gardner *v.* Michigan Cent R. Co., 150 U. S. 349, 359, 37 L. Ed. 1107; Hough *v.* Railway Co., 100 U. S. 213, 25 L. Ed. 612.

3. Chicago, etc., R. Co. *v.* Ross, 112 U. S. 377, 383, 28 L. Ed. 787; Northern Pac. R. Co. *v.* Herbert, 116 U. S. 642, 647, 29 L. Ed. 755; Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 384, 37 L. Ed. 772.

4. Northern Pac. R. Co. *v.* Dixon, 194 U. S. 338, 342, 48 L. Ed. 1006.

5. **Public policy.**—Chicago, etc., R. Co. *v.* Ross, 112 U. S. 377, 382, 28 L. Ed. 787.

In Chicago, etc., R. Co. *v.* Ross, 112 U. S. 377, 382, 28 L. Ed. 787, Mr. Justice Field said as to this reason: "We have never known parties more willing to subject themselves to dangers of life or limb because, if losing the one, or suffering in the other, damages could be recovered by their representatives or themselves for the loss or injury. The dread of personal injury has always proved sufficient to bring into exercise the vigilance and activity of the servant."

"This rule proceeds on the theory * * * that considerations of public policy require the enforcement of the rule." Railroad Co. *v.* Fort, 17 Wall. 553, 557, 21 L. Ed. 739.

6. Chicago, etc., R. Co. *v.* Ross, 112 U. S. 377, 383, 28 L. Ed. 787.

7. **In England.**—Chicago, etc., R. Co. *v.* Ross, 112 U. S. 377, 386, 28 L. Ed. 787.

8. Missouri Pac. R. Co. *v.* Mackey, 127 U. S. 205, 208, 32 L. Ed. 107; Chicago, etc., R. Co. *v.* Ross, 112 U. S. 377, 389, 28 L. Ed. 787; Minneapolis, etc., R. Co. *v.* Herrick, 127 U. S. 210, 32 L. Ed. 109.

9. Hough *v.* Railway Co., 100 U. S. 213, 25 L. Ed. 612; New England R. Co. *v.* Conroy, 175 U. S. 323, 335, 44 L. Ed. 181; Gardner *v.* Michigan Cent. R. Co., 150 U. S. 349, 359, 37 L. Ed. 1107. See pos., "Negligence in Discharge of Positive or Nonassignable Duties of Master," III, *A*, 4, b.

10. Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 382, 37 L. Ed. 772; Chicago, etc.,

3. Minors.—See post, "Risks Not within Contract of Service," III, A, 9.

4. With Respect to Character of Negligent Act—a. *In General.*—The question whether or not the master is liable to his employee for the negligent act of a coemployee, turns rather on the character of the act than on the relations of the employees to each other. If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master; but if it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is held liable therefor.[11]

b. *Negligence in Discharge of Positive or Nonassignable Duties of Master*—(1) *In General.*—Among the established exceptions to the general rule as to the nonliability of the common employer to one employee for the negligence of a coemployee in the same service, is one which arises from the obligation of the master, whether a natural person or a corporate body, not to expose the servant, when conducting the master's business, to perils or hazards against which he may be guarded by proper diligence upon the part of the master.[12] An employer cannot transfer or delegate to a servant a duty required of him for the safety and protection of his servants, so as to exonerate himself from liability for injuries caused to another servant by its neglect or omission.[13] The contract of service implies that in regard to these matters the employer will make adequate provision that no danger shall ensue to the servant.[14] If, instead of personally performing his nonassignable duties or those which he personally owes to his employees, the master engages another to do them for him, he is liable for the neglect of that other, which, in such case, is not the neglect of a fellow servant, no matter what his position as to other matters, but is the neglect of the master to do those things which it is the duty of the master to perform as such.[15]

(2) *Safe Place to Work, Safe Tools, Machinery, Appliances, etc.*—(a) *In General.*—A master must furnish a reasonably safe place for his servant to work,[16] and provide reasonably safe tools, appliances and machinery for the

R. Co. *v.* Ross, 112 U. S. 377, 390, 28 L. Ed. 787.

11. Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 387, 37 L. Ed. 772; New England R. Co. *v.* Conroy, 175 U. S. 323, 345, 44 L. Ed. 181.

12. Hough *v.* Railway Co., 100 U. S. 213, 25 L. Ed. 612; Wabash R. Co. *v.* McDaniels, 107 U. S. 454, 459, 27 L. Ed. 605; Gardner *v.* Michigan Cent. R. Co., 150 U. S. 349, 359, 37 L. Ed. 1107.

13. Northern Pac. R. Co. *v.* Herbert, 116 U. S. 642, 647, 29 L. Ed. 755.

14. Northern Pac. R. Co. *v.* Herbert, 116 U. S. 642, 648, 29 L. Ed. 755.

15. Northern Pac. R. Co. *v.* Peterson, 162 U. S. 346, 353, 40 L. Ed. 994, reaffirmed in Northern Pac. R. Co. *v.* Charless, 162 U. S. 359, 40 L. Ed. 999; New England R. Co. *v.* Conroy, 175 U. S. 323, 338, 44 L. Ed. 181.

A master is liable to a servant for injuries caused by the negligence of a coservant in the performance of a positive duty imposed upon the master, and amounting to a personal wrong. The servant has a right to look to the master for the discharge of that duty, and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employee, or the latter's right to insist that reasonable precaution shall be taken to secure safety in these respects. Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 386, 37 L. Ed. 772.

A servant who is intrusted with the performance of one of the master's personal duties is, so far as that duty is concerned, the representative of the master; his negligence in its performance is the master's negligence, and imposes a liability upon him, to the same extent as for his own negligence in the same particular. Northern Pac. R. Co. *v.* Herbert, 116 U. S. 642, 652, 29 L. Ed. 755.

An employer is liable to an employee who is injured as a result of the negligent act of a foreman in the performance of a personal duty of the employer. Martin *v.* Atchison, etc., R. Co., 166 U. S. 399, 41 L. Ed. 1051.

An employer is liable to a servant for the negligence of a fellow servant, when the other servant occupies such a relation to the injured party, or to the employment, in the course of which his injury was received, as to make the negligence of such servant the negligence of the employer. Quebec Steamship Co. *v.* Merchant, 133 U. S. 375, 33 L. Ed. 656; New England R. Co. *v.* Conroy, 175 U. S. 323, 335, 44 L. Ed. 181.

16. Santa Fe Pac. R. Co. *v.* Holmes, 202 U. S. 438, 442, 50 L. Ed. 1094; Hough *v.* Railway Co., 100 U. S. 213, 25 L. Ed. 612; Northern Pac. R. Co. *v.* Herbert, 116 U. S. 642, 29 L. Ed. 755; Baltimore, etc., R.

accomplishment of the work necessary to be done,[17] and the risk the servant assumes of the negligence of a fellow servant does not exempt from that duty.[18] If instead of personally performing these duties the master engages another to do it for him, he is liable for the neglect of that other, which, in such case, is not the neglect of a fellow servant, no matter what his position as to other matters, but is the neglect of the master to do that which it is the duty of the master to perform as such.[19] It matters not to the employee by whom that safety is secured, or the reasonable precautions therefor taken.[20] He has a right to look to the master for the discharge of that duty, and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employee, or the latter's right to insist that reasonable precaution shall be taken to secure safety in these respects. Therefore it will be seen that the question turns rather on the character of the act than on the relations of the employees to each other.[21]

Co. *v.* Baugh, 149 U. S. 368, 386, 37 L. Ed. 772; New England R. Co. *v.* Conroy, 175 U. S. 323, 343, 44 L. Ed. 181. See the title MASTER AND SERVANT.

"A master must furnish a safe place for his servant to work in, and the risk the servant assumes of the negligence of a fellow servant does not exempt from that duty." Santa Fe Pac. R. Co. *v.* Holmes, 202 U. S. 438, 442, 50 L. Ed. 1094.

17. Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 386, 37 L. Ed. 772; New England R. Co. *v.* Conroy, 175 U. S. 323, 343, 44 L. Ed. 181. See the title MASTER AND SERVANT.

18. Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 386, 37 L. Ed. 772; New England R. Co. *v.* Conroy, 175 U. S. 323, 343, 44 L. Ed. 181; Hough *v.* Railway Co., 100 U. S. 213, 25 L. Ed. 612; Northern Pac. R. Co. *v.* Herbert, 116 U. S. 642, 29 L. Ed. 755.

19. Northern Pac. R. Co. *v.* Peterson, 162 U. S. 346, 353, 40 L. Ed. 994, reaffirmed in Northern Pac. R. Co. *v.* Charless, 162 U. S. 359, 40 L. Ed. 999; New England R. Co. *v.* Conroy, 175 U. S. 323, 338, 44 L. Ed. 181; Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 386, 37 L. Ed. 772; Chicago, etc., R. Co. *v.* Ross, 112 U. S. 377, 383, 28 L. Ed. 787; Hough *v.* Railway Co., 100 U. S. 213, 25 L. Ed. 612; Gardner *v.* Michigan Cent. R. Co., 150 U. S. 349, 359, 37 L. Ed. 1107; Union Pac. R. Co. *v.* Daniels, 152 U. S. 684, 688, 38 L. Ed. 597.

20. Union Pac. R. Co. *v.* Daniels, 152 U. S. 684, 689, 38 L. Ed. 597; Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 386, 37 L. Ed. 772; New England R. Co. *v.* Conroy, 175 U. S. 323, 343, 44 L. Ed. 181.

An employer cannot delegate to a servant the duty to furnish sufficient and safe materials, machinery, or other means by which the service is to be performed, so as to exempt himself from liability for injuries caused to another servant by the neglect of such duty. Northern Pac. R. Co. *v.* Herbert, 116 U. S. 642, 647, 29 L. Ed. 755; New England R. Co. *v.* Conroy, 175 U. S. 323, 334, 44 L. Ed. 181.

A servant to whom the duty is delegated is a vice principal for whose negligence in its performance the master is liable to the same extent as for his own negligence in the same particular. Northern Pac. R. Co. *v.* Herbert, 116 U. S. 642, 648, 29 L. Ed. 755.

The appointment of an agent to provide and maintain in a suitable condition the machinery and apparatus to be used by the other employees, is not a performance of the master's duty in this respect but he is liable for the failure of the agent to do so. Northern Pac. R. Co. *v.* Herbert, 116 U. S. 642, 648, 29 L. Ed. 755; Hough *v.* Railway Co., 100 U. S. 213, 25 L. Ed. 612; Union Pac. R. Co. *v.* Daniels, 152 U. S. 684, 688, 38 L. Ed. 597.

The master cannot escape liability for an injury to a servant caused by failure to provide the servant with safe appliances, upon the ground that a particular act of negligence was that of a fellow servant. Hough *v.* Railway Co., 100 U. S. 213, 25 L. Ed. 612.

The obligation of the master to exercise reasonable care in furnishing suitable and safe machinery and appliances and keeping them in repair, is a personal obligation of which he cannot rid himself by delegating it to an agent to perform. Hough *v.* Railway Co., 100 U. S. 213, 25 L. Ed. 612.

In Hough *v.* Railway Co., 100 U. S. 213, 25 L. Ed. 612, the injury was the result of defective appliances. Gardner *v.* Michigan Cent. R. Co., 150 U. S. 349, 359, 37 L. Ed. 1107.

21. Union Pac. R. Co. *v.* Daniels, 152 U. S. 684, 689, 38 L. Ed. 597; Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 386, 37 L. Ed. 772; New England R. Co. *v.* Conroy, 175 U. S. 323, 343, 44 L. Ed. 181.

The liability does not depend in any manner upon the grade of service of a coemployee, but upon the character of the act itself, and a breach of the positive obligation of the master. Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 388, 37 L. Ed. 772; Hough *v.* Railway Co., 100 U. S. 213, 25 L. Ed. 612; Northern Pac. R. Co. *v.* Herbert, 116 U. S. 642, 29 L. Ed. 755.

The duty is a continuing one and must be exercised whenever circumstances demand it.[22]

Degree of Care Required of Master.—While the employer is bound to provide a safe place and safe machinery, appliances, etc., in which and with which the employee is to work, and while this is a positive duty resting upon him and one which he may not avoid by turning it over to some employee, it is also true that there is no guaranty by the employer that place and machinery, etc., shall be absolutely safe.[23] The degree of care to be exercised by the master is ordinary care. He is bound to take reasonable care and make reasonable effort to secure safety,[24] and the greater the risk which attends the work to be done and the machinery to be used, the more imperative is the obligation resting upon him.[25] Reasonable care becomes then a demand of higher supremacy, yet in all cases it is a question of the reasonableness of the care—reasonableness depending upon the danger attending the place or the machinery. The rule in respect to machinery is the same as that in respect to place.[26]

(b) *Inspection and Repairs.*—An employer cannot delegate to a servant the duty to keep the materials, appliances, machinery, or other means by which the service is to be performed, in repair and order, so as to exempt himself from liability for injuries caused to another servant by its neglect or omission.[27]

Railroads.—Notwithstanding a railroad corporation may be controlled by competent, watchful and prudent directors, and care and caution are exercised in the selection of subordinates at the head of the several branches of its service, its obligation still remains to provide and maintain in a suitable condition the machinery and apparatus to be used by its employees.[28] The duty of a railroad

22. Continuing duty.—Santa Fe Pac. R. Co. *v.* Holmes, 202 U. S. 438, 442, 50 L. Ed. 1094.

23. Hough *v.* Railway Co., 100 U. S. 213, 218, 25 L. Ed. 612; Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 386, 37 L. Ed. 772; Baltimore, etc., R. Co. *v.* Mackey, 157 U. S. 72, 87, 39 L. Ed. 624; Texas, etc., R. Co. *v.* Archibald, 170 U. S. 665, 669, 42 L. Ed. 1188; Patton *v.* Texas, etc., R. Co., 179 U. S. 658, 664, 45 L. Ed. 361.

"That positive duty does not go to the extent of a guarantee of safety." Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 386, 37 L. Ed. 772; Union Pac. R. Co. *v.* Daniels, 152 U. S. 684, 689, 38 L. Ed. 597; New England R. Co. *v.* Conroy, 175 U. S. 323, 343, 44 L. Ed. 181.

"The master is not to be held as guaranteeing or warranting the absolute safety under all circumstances or the perfection of the machinery or apparatus which may be provided for the use of employees." Gardner *v.* Michigan Cent. R. Co., 150 U. S. 349, 359, 37 L. Ed. 1107; Hough *v.* Railway Co., 100 U. S. 213, 25 L. Ed. 612.

24. Patton *v.* Texas, etc., R. Co., 179 U. S. 658, 664, 45 L. Ed. 361; Washington, etc., R. Co. *v.* McDade, 135 U. S. 554, 570, 34 L. Ed. 235; Gardner *v.* Michigan Cent. R. Co., 150 U. S. 349, 359, 37 L. Ed. 1107; Hough *v.* Railway Co., 100 U. S. 213, 25 L. Ed. 612; Union Pac. R. Co. *v.* Daniels, 152 U. S. 684, 689, 38 L. Ed. 597; Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 386, 37 L. Ed. 772; New England R. Co. *v.* Conroy, 175 U. S. 323, 343, 44 L. Ed. 181; Wabash R. Co. *v.* McDaniels, 107 U. S. 454, 27 L. Ed. 605.

He is bound to exercise the care which the exigency reasonably demands in furnishing such as is adequate and suitable, and in keeping and maintaining them in such condition as to be reasonably safe for use. Gardner *v.* Michigan Cent. R. Co., 150 U. S. 349, 359, 37 L. Ed. 1107; Hough *v.* Railway Co., 100 U. S. 213, 25 L. Ed. 612.

25. Patton *v.* Texas, etc., R. Co., 179 U. S. 658, 664, 45 L. Ed. 361.

26. Patton *v.* Texas, etc., R. Co., 179 U. S. 658, 664, 45 L. Ed. 361. See Washington, etc., R. Co. *v.* McDade, 135 U. S. 554, 570, 34 L. Ed. 235.

27. Northern Pac. R. Co. *v.* Herbert, 116 U. S. 642, 647, 29 L. Ed. 755.

A master is liable for injuries resulting from the neglect of servants whose duty it is to repair the appliances of the business when those servants know or ought to know by the exercise of reasonable care of the defects in such appliances. Texas, etc., R. Co. *v.* Barrett, 166 U. S. 617, 41 L. Ed. 1136.

The master must exercise reasonable care in keeping machinery and appliances for carrying on the business for which he employs the servant, including the duty of making inspections, tests and examinations at the proper intervals; and he cannot in the respect of such matters interpose as a defense to an action by a servant, who has been injured, without fault on his part, the neglect of another servant to perform that duty. Union Pac. R. Co. *v.* Daniels, 152 U. S. 684, 688, 38 L. Ed. 597.

28. Railroads.—Hough *v.* Railway Co.,

company in that respect to its employees is discharged when, but only when, its agents, whose business it is to supply such instrumentalities, exercise due care as well in their purchase originally, as in keeping and maintaining them in such condition as to be reasonably and adequately safe for use by employees;[29] and the company cannot, in respect of such matters, interpose between it and the servant, who has been injured without fault on his part, the personal responsibility of an agent, who, in exercising the master's authority, has violated the duty he owes, as well to the servant as to the corporation.[30]

The duty of a railroad company to exercise reasonable care to furnish trains in a safe and proper condition for the use of its employees, is not performed by exercising reasonable care to select and retain only competent and diligent inspectors; but it is liable if such inspectors in fact failed to discover defects which a reasonable examination would have disclosed.[31]

100 U. S. 213, 218, 25 L. Ed. 612; Northern Pac. R. Co. *v.* Herbert, 116 U. S. 642, 648, 29 L. Ed. 755. See to the same effect, Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 386, 37 L. Ed. 772; Union Pac. R. Co. *v.* Daniels, 152 U. S. 684, 688, 38 L. Ed. 597.

29. Hough *v.* Railway Co., 100 U. S. 213, 218, 25 L. Ed. 612; Union Pac. R. Co. *v.* Daniels, 152 U. S. 684, 688, 38 L. Ed. 597. See to the same effect, Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 386, 37 L. Ed. 772; Northern Pac. R. Co. *v.* Herbert, 116 U. S. 642, 29 L. Ed. 755.

The obligation of a railroad company, in providing and maintaining, in suitable condition, machinery and apparatus to be used by its employees, is the more important, and the degree of diligence in its performance the greater, in proportion to the dangers which may be encountered; and "its duty in that respect to its employees is discharged when, but only when, its agents, whose business it is to supply such instrumentalities, exercise due care as well in their purchase originally as in keeping and maintaining them in such condition as to be reasonably and adequately safe for use by employees." Hough *v.* Railway Co., 100 U. S. 213, 25 L. Ed. 612; Wabash R. Co. *v.* McDaniels, 107 U. S. 454, 459, 27 L. Ed. 605.

30. Hough *v.* Railway Co., 100 U. S. 213, 218, 25 L. Ed. 612; Northern Pac. R. Co. *v.* Herbert, 116 U. S. 642, 29 L. Ed. 755; Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 386, 37 L. Ed. 772; Union Pac. R. Co. *v.* Daniels, 152 U. S. 684, 688, 38 L. Ed. 597.

31. Duty to furnish safe trains.—Union Pac. R. Co. *v.* Daniels, 152 U. S. 684, 688, 38 L. Ed. 597.

Car inspectors and repairers.—A car inspector and repairer is charged with one of the nonassignable duties of the railroad company, and is a vice principal, for whose negligence the company is liable to its other servants. Northern Pac. R. Co. *v.* Herbert, 116 U. S. 642, 29 L. Ed. 755.

In the case of Hough *v.* Railway Co., 100 U. S. 213, 218, 25 L. Ed. 612, "the engine of the railroad, coming in contact with an animal, was thrown from the track over an embankment, whereby the whistle fastened to the boiler was forced out, thus permitting hot water and steam to escape, which so scalded the engineer as to cause his death. The engine was thrown from the track because the cow-catcher or pilot was defective; and the whistle was forced out because it was insecurely fastened. These defects were owing to the negligence of the company's master mechanic and the foreman of the round house, to whom was committed the exclusive management of the motive power of the company, with control over all the engineers employed. In an action by the widow and child of the deceased the company set up as a defense that, if the alleged defects existed, which it denied, they were owing to the negligence of those servants, for which the company was not liable. The court held that the company was not thereby exonerated from liability." Northern Pac. R. Co. *v.* Herbert, 116 U. S. 642, 648, 29 L. Ed. 755.

In Hough *v.* Railway Co., 100 U. S. 213, 25 L. Ed. 612, and in Wabash R. Co. *v.* McDaniels, 107 U. S. 454, 27 L. Ed. 605, the action was for the fault of the master; either in providing an unsafe engine, or in employing unfit servants. Randall *v.* Baltimore, etc., R. Co., 109 U. S. 478, 483, 27 L. Ed. 1003. See post, "Negligence in Selecting or Retaining Servants," III, A, 4, b, (3).

Inspection of wheels of cars in freight trains.—The duty rests upon a railroad company to see to it, at the proper inspection station, that the wheels of the cars in a freight train, which is about to be drawn out upon the road, are in safe and proper condition, and this duty cannot be delegated so as to exonerate the company from liability to its servants for injuries resulting from the omission to perform such duty or through its negligent performance. Union Pac. R. Co. *v.* Daniels, 152 U. S. 684, 689, 38 L. Ed. 597.

The evidence showed that the plaintiff, a brakeman, was in the employment of the company, and in the discharge of his duties as such, on a freight train made up

(c) *Promulgating Rules for Conduct of Business.*—It has been held in many states that the master owes, as such, to a servant entering his employment, the further duty of adopting and promulgating safe and proper rules for the conduct of his business, including the government of the machinery and the running of trains on a railroad track. If the master be neglectful in this matter it is a neglect of a duty which he personally owes to his employees, and if the employee suffer damage on account thereof, the master is liable. If, instead of personally performing this obligation, the master engages another to do it for him, he is liable for the neglect of that other, which, in such case, is not the neglect of a fellow servant, no matter what his position as to other matters, but is the neglect of the master to do that which it is the duty of the master to perform as such.[32]

Movement of Trains.—It is the duty of a railroad company to promulgate adequate rules and regulations for the safety of employees engaged in the dangerous duty of operating trains, and at times telegraph orders for the movements of trains. The duty is a continuing one and must be exercised whenever circumstances demand it. It may, indeed, often be discharged by one exercise. It may recur at any moment in keeping, moving and opposing trains in safe relation.[33]

(d) *Particular Employments*—aa. *Buildings and Structures.*—The obligation of a master to provide reasonably safe places and structures for his servants to work upon does not oblige him to keep a building, which they are employed in erecting, in a safe condition at every moment of their work, so far as its safety depends on the due performance of that work by them and their fellow servants.[34]

at Green River; that he was ordered on top of the train to set the brakes at different points going down a long hill, and was so engaged when the train was suddenly wrecked, and he was severely injured; that a wheel on one of the cars of the train had an old crack in it, some twelve inches long, which rendered it unsafe; that the wheel gave way by reason of the fracture and thus the disaster occurred; and that, although the crack, being old, was filled with greasy dirt and rust, it could have been detected without difficulty if the wheel had been properly examined at Green River, which was an inspecting station, at which trains were made up. It was held that upon the inferences properly deducible from such evidence, the rule applied, which requires of the master the exercise of reasonable care in furnishing suitable machinery and appliances for carrying on the business for which he employs the servant, and in keeping such machinery and appliances in repair, including the duty of making inspections, tests, and examinations at the proper intervals, Union Pac. R. Co. *v.* Daniels, 152 U. S. 684, 688, 38 L. Ed. 597.

Defective brakes.—In Northern Pac. R. Co. *v.* Herbert, 116 U. S. 642, 29 L. Ed. 755, it appeared that a brakeman suffered an injury by reason of the fact that the brakes which he was called upon to apply were broken and out of order, the cars had been defective for years; the brakes were all worn out, and their condition had been called to the attention of the yard master, who had control of them while in the yard, and might have been ascertained, upon proper inspection, by the officer or agent of the company charged with the duty of keeping them in repair, yet nothing was done to repair either brakes or cars. It was held that in such circumstances, the company had not exercised ordinary care to keep the cars and brakes in good condition. New England R. Co. *v.* Conroy, 175 U. S. 323, 334, 44 L. Ed. 181.

32. Northern Pac. R. Co. *v.* Peterson, 162 U. S. 346, 353, 40 L. Ed. 994, reaffirmed in Northern Pac. R. Co. *v.* Charless, 162 U. S. 359, 40 L. Ed. 999; New England R. Co. *v.* Conroy, 175 U. S. 323, 338, 44 L. Ed. 181.

33. Santa Fe Pac. R. Co. *v.* Holmes, 202 U. S. 438, 442, 50 L. Ed. 1094.

34. Armour *v.* Hahn, 111 U. S. 313, 28 L. Ed. 440.

Carpenters, under charge of a foreman, and bricklayers, all employed by the owner through his superintendent, were engaged in the erection of a building, with a cornice supported by sticks of timber passing through the wall (which was thirteen inches thick) and projecting sixteen inches, and to be bricked up at the sides and ultimately over the top of the timbers. When the wall had been bricked up on a level with, but not yet over, the timbers, the foreman of the carpenters directed two of them to take a joist for the edge of the cornice, and to push it out to the ends of the projecting timbers. In so arranging the joist, a carpenter stepped on the projecting part of one of the timbers, which tipped over, whereby he fell and was hurt. Held, that the owner of the building was not liable to him for

bb. *Railroads.*—See ante, "In General," III, A, 4, b, (2), (a); "Inspection and Repairs," III, A, 4, b, (2), (b); "Promulgating Rules for Control of Business," III, A, 4, b, (2), (c).[35]

(cc) *Mining.*—See post, "Mine Workers," III, A, 5, d, (2); "Concurrent Negligence of Master or Vice Principal with That of Fellow Servant," III, A, 7.

dd. *Shipping.*—**Members of Crew.**—See post, "Members of Crew of Vessel," III, A, 6, c, (2).

Longshoremen.—See post, "Employees Supplying Machinery Appliances, etc.," III, A, 6, b.

(3) *Negligence in Selecting or Retaining Servants.*—If a servant sustains injuries resulting from the incompetency of a fellow servant whom the master or one representing him has been negligent in selecting or retaining in service, such injured servant may recover for such injuries unless he knew or should have known of such incompetency.[36] A master owes, as such, to a servant entering his employment, the duty to exercise proper diligence in the employment of reasonably safe and competent men to perform their respective duties. If the master be neglectful in this matter it is a neglect of a duty which he personally owes to his employees, and if the employee suffer damage on account thereof, the master is liable. If, instead of personally performing this obligation, the master engages another to do it for him, he is liable for the neglect of that other, which, in such case, is not the neglect of a fellow servant, no matter what his position as to other matters, but is the neglect of the master to do that which it is the duty of the master to perform as such.[37]

The master is not an insurer of the competency of his servants.[38]

The degree of care to be exercised by the master in the appointment and retention of his employees is ordinary care.[39]

the injury. Armour *v.* Hahn, 111 U. S. 313, 28 L. Ed. 440.

35. Orders for movement of trains.—See ante, "Promulgating Rules for Control of Business," III, A, 4, b, (2), (c).

36. Northern Pac. R. Co. *v.* Mares, 123 U. S. 710, 31 L. Ed. 296. See, also, Missouri Pac. R. Co. *v.* Mackey, 127 U. S. 205, 207, 32 L. Ed. 107; Minneapolis, etc., R. Co. *v.* Herrick, 127 U. S. 210, 32 L. Ed. 109.

A master who negligently selects or retains in his employment an incompetent servant is liable for injuries to a fellow servant resulting from the incompetency of the servant so employed and retained, unless the injured servant has assumed the risks incident to such incompetency. Wabash R. Co. *v.* McDaniels, 107 U. S. 454, 27 L. Ed. 605.

The servant in engaging in the service does not undertake to incur the risks arising from the want of skillful colaborers. Northern Pac. R. Co. *v.* Herbert, 116 U. S. 642, 648, 29 L. Ed. 755.

In Hough *v.* Railway Co., 100 U. S. 213, 25 L. Ed. 612, and in Wabash R. Co. *v.* McDaniels, 107 U. S. 454, 27 L. Ed. 605, the action was for the fault of the master; either in providing an unsafe engine, or in employing unfit servants. Randall *v.* Baltimore, etc., R. Co., 109 U. S. 478, 483, 27 L. Ed. 1003.

But the master is exempt from liability for injuries caused by the negligence or incompetency of a fellow servant unless he had employed such negligent or incompetent servant without reasonable inquiry as to his qualifications, or had retained him after knowledge of his negligence or incompetency. Missouri Pac. R. Co. *v.* Mackey, 127 U. S. 205, 207, 32 L. Ed. 107; Minneapolis, etc., R. Co. *v.* Herrick, 127 U. S. 210, 32 L. Ed. 109.

37. Northern Pac. R. Co. *v.* Peterson, 162 U. S. 346, 353, 40 L. Ed. 994, reaffirmed in Northern Pac. R. Co. *v.* Charless, 162 U. S. 359, 40 L. Ed. 999; New England R. Co. *v.* Conroy, 175 U. S. 323, 338, 44 L. Ed. 181.

An employer cannot delegate to a servant the duty to select and retain servants who are fitted and competent for the service, so as to exempt himself from liability for injuries caused to another servant by its neglect or ommision. Northern Pac. R. Co. *v.* Herbert, 116 U. S. 642, 647, 29 L. Ed. 755.

A servant to whom the master transfers this duty is, with respect to its performance, the representative of the master; the negligence of the representative in its performance is the negligence of the master, and imposes a liability upon him to the same extent that he would be liable for his own negligence in the same particular. Northern Pac. R. Co. *v.* Herbert, 116 U. S. 642, 648, 29 L. Ed. 755.

38. Wabash R. Co. *v.* McDaniels, 107 U. S. 454, 27 L. Ed. 605; Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 386, 37 L. Ed. 772; New England R. Co. *v.* Conroy, 175 U. S. 323, 343, 44 L. Ed. 181.

39. Degree of care required.—Wabash

Ordinary care, in the selection and retention of servants and agents implies that degree of diligence and precaution which the exigencies of the particular service reasonably required.[40]

(4) *Number of Servants Employed.*—The servant in engaging in the service does not undertake to incur the risks arising from the want of sufficient colabor-

R. Co. *v.* McDaniels, 107 U. S. 454, 27 L. Ed. 605; Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 386, 37 L. Ed. 772; New England R. Co. *v.* Conroy, 175 U. S. 323, 343, 44 L. Ed. 181; Northern Pac. R. Co. *v.* Mares, 123 U. S. 710, 31 L. Ed. 296.

The duty of seeing that competent and fit persons are in charge of any particular work is discharged when reasonable care or precautions have been taken to place fit and competent persons in charge. The duty does not carry with it an absolute guaranty, but is satisfied with reasonable effort and precaution. Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 386, 37 L. Ed. 772; New England R. Co. *v.* Conroy, 175 U. S. 323, 343, 44 L. Ed. 181.

40. Wabash R. Co. *v.* McDaniels, 107 U. S. 454, 27 L. Ed. 605.

Ordinary care, when applied to the degree of care to be exercised by a railroad company or other corporation in the appointment and retention of its employees, implies the exercise of reasonable diligence, and reasonable diligence implies, as between the employer and employee, such watchfulness, caution, and oversight as, under all the circumstances of the particular service, a corporation controlled by careful, prudent officers ought to exercise. Wabash R. Co. *v.* McDaniels, 107 U. S. 454, 460, 27 L. Ed. 605.

"It is such care as, in view of the consequences that may result from negligence on the part of employees, is fairly commensurate with the perils or dangers likely to be encountered." Wabash R. Co. *v.* McDaniels, 107 U. S. 454, 460, 27 L. Ed. 605.

And does not mean only that degree of diligence which is customary, or is sanctioned by the general practice and usage, which obtains among those entrusted with the management and control of that business. Wabash R. Co. *v.* McDaniels, 107 U. S. 454, 27 L. Ed. 605.

"To charge a brakeman, when entering the service of a railroad company, with knowledge of the degree of care generally or usually observed by agents of railroad corporations in the selection and retention of telegraphic operators along the line traversed by trains of cars—a branch of the company's service of which he can have little knowledge, and with the employees especially engaged therein he can ordinarily have little intercourse—is unwarranted by common experience. And to say, as matter of law, that a railroad corporation discharged its obligation to an employee—in respect of the fitness of coemployees whose negligence has caused him to be injured—by exercising, not that degree of care which ought to have been observed, but only such as like corporations are accustomed to observe, would go far towards relieving them of all responsibility whatever for negligence in the selection and retention of incompetent servants. If the general practice of such corporations in the appointment of servants is evidence which a jury may consider in determining whether, in the particular case, the requisite degree of care was observed, such practice cannot be taken as conclusive upon the inquiry as to the care which ought to have been exercised. A degree of care ordinarily exercised in such matters may not be due, or reasonable, or proper care, and therefore not ordinary care, within the meaning of the law." Wabash R. Co. *v.* McDaniels, 107 U. S. 454, 461, 27 L. Ed. 605.

In an action against a railway company by an employee for damages for injuries resulting from the negligence of an engineer, the evidence established that the engineer had by his conduct frequently shown his negligence, recklessness and unfitness for the place; that complaints had at different times been made of his negligent and reckless conduct to the representatives of the railway company; that, notwithstanding such complaints, he was retained in the same service, except during short intervals when he had been discharged two or three times for misconduct; and that the injury complained of was the result of the negligence of such engineer. It was held that this made a case for the plaintiff unless overthown by a successful defense. Northern Pac. R. Co. *v.* Mares, 123 U. S. 710, 31 L. Ed. 296.

The court was right in refusing to give a peremptory instruction that if the plaintiff knew or even had the opportunity of knowing, before his injury, that the engineer was an unfit or unsafe man to run the engine in question, it was the plaintiff's duty absolutely to refuse to work with him any longer, and that his failure to do so would prevent him from recovering. The duty of the plaintiff under such circumstances is not to be determined by the single fact of his knowledge of the danger he incurred by continuing to serve with a coemployee known by him to be an unfit and incompetent person. It was enough for the court to say that a failure on the part of the plaintiff to refuse to work, in view of that knowledge on his part, might be negligence on his part. It was for the jury to say from all the attending circumstances whether his failure to do so was in fact contributory negligence. A suitable judgment on that question can only be reached by carefully weighing the probable consequences of

ers, and the fellow-servant doctrine cannot be invoked to defeat a recovery for injuries resulting from a neglect of such duty.[41]

(5) *Degree of Care Required of Master.*—The degree of care required to be exercised by the master in the performance of his personal duties to his employer is ordinary care, which implies that degree of diligence and precaution which the exigencies of the particular services reasonably require.[42]

Selection and Retention of Servants.—See ante, "Negligence in Selecting or Retaining Servants," III, A, 4, b, (3).

In Providing Safe Place to Work and Safe Appliances, etc.—See ante, "In General," III, A, 4, b, (1).

In Inspection and Repairs.—See ante, "Inspection and Repairs," III, A, 4, b, (2), (b).

5. Superior Servants—a. *In General.*—Another qualification is where the one guilty of the negligence has such general control and occupies such relation to the work that he in effect takes the place of the employer—becomes a vice principal, or alter ego, as he is sometimes called. If an employer, whether an individual or a corporation, giving no personal attention to the work, places it in the entire control of another, such person may be not improperly regarded as the principal and his negligence that of the principal.[43]

b. *Manager of Department.*—In addition to the liability of the master for his neglect to perform his nonassignable duties, there has been laid upon him by some courts a further liability for the negligence of one of his servants in charge of a separate department or branch of business whereby another of his employees has been injured, even though the neglect was not of that character which the master owed in his capacity as master to the servant who was injured. In such case it has been held that the neglect of the superior officer or agent of the master was the neglect of the master, and was not that of the coemployee, and hence that the servant, who was a subordinate in the department of the officer, could recover against the common master for the injuries sustained by him under such circumstances.[44] The rule is that, in order to form an exception to the general law of nonliability, the person whose neglect caused the injury must be one who was clothed with the control and management of a distinct department, and not a mere separate piece of work in one of the branches of serv-

both courses of conduct, and it might well happen that even at the risk of injury to himself, occasioned by the unskillfulness of his coemployee, the plaintiff might still reasonably be regarded as under a duty not suddenly and instantly to refuse to continue in the conduct of the business of his principal. Northern Pac. R. Co. *v.* Mares, 123 U. S. 710, 31 L. Ed. 296.

It is not error for the court to charge "that the plaintiff had a right to suppose and assume that the railroad company had used proper diligence and care in the employment and retention of an engineer." Northern Pac. R. Co. *v.* Mares, 123 U. S. 710, 31 L. Ed. 296.

Train dispatcher.—In an action against a railway company by a brakeman to recover damages for an injury claimed to have resulted from the employment and retention by the company of an incompetent train dispatcher, it appeared that the train dispatcher was a boy 17 years of age whose whole knowledge of telegraphy was acquired during one year's service as a messenger boy, and that he had not been considered competent for certain parts of the work. It was held that a judgment for damages must be sustained. Wabash R. Co. *v.* McDaniels, 107 U. S. 454, 27 L. Ed. 605.

41. Northern Pac. R. Co. *v.* Herbert, 116 U. S. 642, 648, 29 L. Ed. 755.

42. Wabash R. Co. *v.* McDaniels, 107 U. S. 454, 459, 27 L. Ed. 605.

43. Superior servants.—Northern Pac. R. Co. *v.* Dixon, 194 U. S. 338, 344, 48 L. Ed. 1006.

44. Manager of department.—Northern Pac. R. Co. *v.* Peterson, 162 U. S. 346, 353, 40 L. Ed. 994, reaffirmed in Northern Pac. R. Co. *v.* Charless, 162 U. S. 359, 40 L. Ed. 999.

When it appears that the work in which the employer is engaged is divided into separate and distinct departments, the one in charge of each of those departments is regarded as a vice principal. Northern Pac. R. Co. *v.* Dixon, 194 U. S. 338, 344, 48 L. Ed. 1006.

The master is liable for injuries to servants caused by the negligence of superintendents of departments who are representatives of the master, intrusted with the performance of his duties, and within the scope of their authority as vice

ice in a department. This distinction is a plain one, and not subject to any great embarrassment in determining the fact in any particular case.[45] When the business of the master or employer is of such great and diversified extent that it naturally and necessarily separates itself into departments of service, the individuals placed by the master in charge of these separate branches and departments of service, and given entire and absolute control therein, may properly be considered, with respect to employees under them, vice principals and representatives of the master as fully and as completely as if the entire business of the master were placed by him under one superintendent.[46] But this rule can only

principals. Chicago, etc., R. Co. *v.* Ross, 112 U. S. 377, 390, 28 L. Ed. 787.

45. Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 380, 37 L. Ed. 772; Northern Pac. R. Co. *v.* Peterson, 162 U. S. 346, 40 L. Ed. 994, reaffirmed in Northern Pac. R. Co. *v.* Charless, 162 U. S. 359, 40 L. Ed. 999; New England R. Co. *v.* Conroy, 175 U. S. 323, 338, 44 L. Ed. 181; Northern Pac. R. Co. *v.* Dixon, 194 U. S. 338, 345, 48 L. Ed. 1006.

46. Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 380, 37 L. Ed. 772; Northern Pac. R. Co. *v.* Peterson, 162 U. S. 346, 355, 40 L. Ed. 994, reaffirmed in Northern Pac. R. Co. *v.* Charless, 162 U. S. 359, 40 L. Ed. 999; New England R. Co. *v.* Conroy, 175 U. S. 323, 338, 44 L. Ed. 181; Northern Pac. R. Co. *v.* Dixon, 194 U. S. 338, 344, 48 L. Ed. 1006. See, to the same effect, Central R. Co. *v.* Keegan, 160 U. S. 259, 263, 40 L. Ed. 418.

"In Central R. Co. *v.* Keegan, 160 U. S. 259, 40 L. Ed. 418, Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 37 L. Ed. 772, was approved and followed in respect to its statement as to what constitutes a vice principal." New England R. Co. *v.* Conroy, 175 U. S. 323, 338, 44 L. Ed. 181, overruling Chicago, etc., R. Co. *v.* Ross, 112 U. S. 377, 28 L. Ed. 787.

"Thus, between the law department of a railway corporation and the operating department, there is a natural and distinct separation, one which makes the two departments like two independent kinds of business, in which the one employer and master is engaged. So, oftentimes there is in the affairs of such corporation what may be called a manufacturing or repair department, and another strictly operating department; these two departments are, in their relations to each other, as distinct and separate as though the work of each was carried on by a separate corporation." Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 383, 37 L. Ed. 772; Northern Pac. R. Co. *v.* Peterson, 162 U. S. 346, 355, 40 L. Ed. 994, reaffirmed in Northern Pac. R. Co. *v.* Charless, 162 U. S. 359, 40 L. Ed. 999.

Some indication of the meaning of the phrase "a superintendent of a separate and distinct branch or department of the master's business," is given by the facts and theory upon which a recovery was permitted in the case of Chicago, etc., R. Co. *v.* Ross, 112 U. S. 377, 28 L. Ed. 787; Northern Pac. R. Co. *v.* Peterson, 162 U. S. 346, 354, 40 L. Ed. 994, reaffirmed in Northern Pac. R. Co. *v.* Charless, 162 U. S. 359, 40 L. Ed. 999. The Ross case, supra, was overruled in New England R. Co. *v.* Conroy, 175 U. S. 323, 338, 44 L. Ed. 181. See post, "Employees of Railroads," III, A, 5, d, (1).

"The meaning of the expression 'departmental control' was again and very lately discussed in Northern Pac. R. Co. *v.* Hambly, 154 U. S. 349, 38 L. Ed. 1009." Northern Pac. R. Co. *v.* Peterson, 162 U. S. 346, 356, 40 L. Ed. 994, reaffirmed in Northern Pac. R. Co. *v.* Charless, 162 U. S. 359, 40 L. Ed. 999.

It was this proposition which the court applied in Chicago, etc., R. Co. *v.* Ross, 112 U. S. 377, 28 L. Ed. 787; Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 383, 37 L. Ed. 772; Northern Pac. R. Co. *v.* Dixon, 194 U. S. 338, 344, 48 L. Ed. 1006. The Ross case, supra, was overruled in New England R. Co. *v.* Conroy, 175 U. S. 323, 44 L. Ed. 181.

Agents of a corporation clothed with the control and management of a district department, in which their duty is entirely that of direction and superintendence, are not fellow servants of their subordinate servants. Chicago, etc., R. Co. *v.* Ross, 112 U. S. 377, 390, 28 L. Ed. 787.

Indeed, where the master is a corporation, there can be no negligence on the part of the master except it also be that of some agent or servant, for a corporation only acts through agents. The directors are the managing agents; their negligence must be adjudged the negligence of the corporation, although they are simply agents. So when they place the entire management of the corporation in the hands of a general superintendent, such general superintendent, though himself only an agent, is almost universally recognized as the representative of the corporation, the master, and his negligence as that of the master. Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 382, 37 L. Ed. 772.

It is only carrying the same principle a little further and with reasonable application, when it is held that the manager of a separate department of the master's business is not a fellow servant of the employees under him. Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 383, 37 L. Ed. 772; Northern Pac. R. Co. *v.* Dixon, 194 U. S. 338, 344, 48 L. Ed. 1006.

be fairly applied when the different branches or departments of service are in and of themselves separate and distinct.[47] And from this natural separation flows the rule that he who is placed in charge of such separate branch of the service, who alone superintends and has the control of it, is as to it in the place of the master.[48] But this is a very different proposition from that which affirms that each separate piece of work in one of these branches of service is a distinct department, and gives to the individual having control of that piece of work the position of vice principal or representative of the master.[49]

c. *Coworker in Control or Having Superiority of Position.*—The master's responsibility for the negligence of a servant is not founded upon the fact that the servant guilty of the neglect had control over and a superior position to that occupied by the servant who was injured by his negligence. Mere superiority of position is no ground for liability.[50] So far as the matter of the master's exemption from liability depends upon whether the negligence is one of the ordinary risks of the employment, and, thus assumed by the employee, it includes all coworkers to the same end, whether in control or not.[51]

47. Northern Pac. R. Co. *v.* Dixon, 194 U. S. 338, 344, 48 L. Ed. 1006; Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 383, 37 L. Ed. 772.

48. Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 383, 37 L. Ed. 772; Northern Pac. R. Co. *v.* Peterson, 162 U. S. 346, 355, 40 L. Ed. 994, reaffirmed in Northern Pac. R. Co. *v.* Charless, 162 U. S. 359, 40 L. Ed. 999.

49. Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 383, 37 L. Ed. 772. See, to the same effect, Central R. Co. *v.* Keegan, 160 U. S. 259, 263, 40 L. Ed. 418.

50. Northern Pac. R. Co. *v.* Peterson, 162 U. S. 346, 355, 40 L. Ed. 994, reaffirmed in Northern Pac. R. Co. *v.* Charless, 162 U. S. 359, 40 L. Ed. 999; Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 380, 37 L. Ed. 772; Central R. Co. *v.* Keegan, 160 U. S. 259, 40 L. Ed. 418; Northern Pac. R. Co. *v.* Hambly, 154 U. S. 349, 38 L. Ed. 1009.

That the person sustaining the injury was under the direct authority and control of the person by whose negligence it was caused, does not render the master liable. Northern Pac. R. Co. *v.* Peterson, 162 U. S. 346, 357, 40 L. Ed. 994, reaffirmed in Northern Pac. R. Co. *v.* Charless, 162 U. S. 359, 40 L. Ed. 999.

Even in Chicago, etc., R. Co. *v.* Ross, 112 U. S. 377, 28 L. Ed. 787, liability arising from mere superiority in position and the power to give orders to subordinates was denied. What was approved in that case, and the foundation upon which the approval was given, is very clearly stated by Mr. Justice Brewer in the course of the opinion delivered in the case of Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 380, 37 L. Ed. 772; Northern Pac. R. Co. *v.* Peterson, 162 U. S. 346, 355, 40 L. Ed. 994, reaffirmed in Northern Pac. R. Co. *v.* Charless, 162 U. S. 359, 40 L. Ed. 999. And see New England R. Co. *v.* Conroy, 175 U. S. 323, 338, 44 L. Ed. 181, overruling the Ross case, supra.

51. Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 384, 37 L. Ed. 772; New England R. Co. *v.* Conroy, 175 U. S. 323, 343, 44 L. Ed. 181.

The risks which an employee of a company assumes from the service which he undertakes is from the negligence of one in immediate control, as well as from a coworker, and there is no superintending agency for which a corporation is liable, unless it extends to an entire department of service. New England R. Co. *v.* Conroy, 175 U. S. 323, 346, 44 L. Ed. 181.

" 'The danger from the negligence of one specially in charge of the particular work is as obvious and as great as from that of those who are simply coworkers with him in it; each is equally with the other an ordinary risk of the employment,' which the employee assumes when entering upon the employment, whether the risk be obvious or not." Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 384, 37 L. Ed. 772; Central R. Co. *v.* Keegan, 160 U. S. 259, 263, 40 L. Ed. 418; New England R. Co. *v.* Conroy, 175 U. S. 323, 343, 44 L. Ed. 181.

In Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 37 L. Ed. 772, it was laid down that the rightful test to determine whether the negligence complained of was an ordinary risk of the employment was "whether the negligent act constituted a breach of positive duty owing by the master, such as that of taking fair and reasonable precautions to surround his employees with fit and careful coworkers, and the furnishing to such employees of a reasonably safe place to work and reasonably safe tools or machinery with which to do the work, thus making the question of liability of an employer for an injury to his employee turn rather on the character of the alleged negligence act than on the relations of the employees to each other, so that, if the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master; but if it be not one in the discharge of such positive duty, then there should be

Prima facie, all who enter into the employ of a single master are engaged in a common service, and are fellow servants, and some other line of demarcation than that of control must exist to destroy the relation of fellow servants. All enter the service of the same master, to further his interests in the one enterprise; each knows when entering into that service that there is some risk of injury through the negligence of other employees, and that risk, which he knows exists, he assumes in entering into the employment.[52]

In the courts of the states of Ohio, Kentucky and perhaps others, the rule seems to obtain that while the master is not liable to his servant for any injury committed by a servant of equal degree in the same sphere of employment, unless some negligence is fixed on the master personally, yet that he is liable for the gross negligence of a servant superior in rank to the person injured, and is also liable for the ordinary negligence of a servant not engaged in the same department of service.[53]

some personal wrong on the part of the employer before he is liable therefor." Central R. Co. *v.* Keegan, 160 U. S. 259, 263, 264, 40 L. Ed. 418. See, also, New England R. Co. *v.* Conroy, 175 U. S. 323, 44 L. Ed. 181.

In the course of the opinion in Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 37 L. Ed. 772, Mr. Justice Brewer said: "It may safely be said that this court has never recognized the proposition that the mere control of one servant over another in doing a particular piece of work destroys the relation of fellow servants and puts an end to the master's liability. On the contrary, all the cases proceed on the ground of some breach of positive duty resting upon the master, or upon the idea of superintendence or control of a department. It has ever been affirmed that the employee assumes the ordinary risks incident to the service; and, as we have seen, it is as obvious that there is risk from the negligence of one in immediate control as from one simply a coworker." New England R. Co. *v.* Conroy, 175 U. S. 323, 336, 44 L. Ed. 181, overruling Chicago, etc., R. Co. *v.* Ross, 112 U. S. 377, 28 L. Ed. 787.

"In the cases of Randall *v.* Baltimore, etc., R. Co., 109 U. S. 478, 27 L. Ed. 1003, and Quebec Steamship Co. *v.* Merchant, 133 U. S. 375, 33 L. Ed. 656, the persons whose negligence caused the injury were adjudged to be fellow servants with the parties injured, so as to exempt the master from liability; and while the question in this case was not there presented, yet in neither case were the two servants doing the same work, although it is also true that in each of them there was no control by one over the other." Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 388, 389, 37 L. Ed. 772.

"There is nothing in the later decision of this court in Northern Pac. R. Co. *v.* Hambly, 154 U. S. 349, 38 L. Ed. 1009, militating against the views expressed in the Baugh case. On the contrary, that case is approvingly referred to (p. 359), although said there to involve a different question from that which was in the Hambly case." Central R. Co. *v.* Keegan, 160 U. S. 259, 265, 40 L. Ed. 418.

"Where more than one man is engaged in doing any particular work, it becomes almost a necessity that one should be boss and the other subordinate, but both are nevertheless fellow workmen." Northern Pac. R. Co. *v.* Peterson, 162 U. S. 346, 357, 40 L. Ed. 994, reaffirmed in Northern Pac. R. Co. *v.* Charless, 162 U. S. 359, 40 L. Ed. 999; New England R. Co. *v.* Conroy, 175 U. S. 323, 339, 44 L. Ed. 181.

"The truth is, the various employees of one of these large corporations are not graded like steps in a staircase, those on each step being as to those on the step below in the relation of masters and not of fellow servants, and only those on the same steps fellow servants, because not subject to any control by one over the other." Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 384, 37 L. Ed. 772.

Whether the District of Columbia is exempt from liability for the negligence of its supervisor, resulting in personal injury to those who labor under his direction on public works? District of Columbia *v.* McElligott, 117 U. S. 621, 29 L. Ed. 940.

52. Servants who are engaged in common service.—Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 384, 37 L. Ed. 772. See, to the same effect, Central R. Co. *v.* Keegan, 160 U. S. 259, 263, 40 L. Ed. 418; Northern Pac. R. Co. *v.* Peterson, 162 U. S. 346, 353, 40 L. Ed. 994, reaffirmed in Northern Pac. R. Co. *v.* Charless, 162 U. S. 359, 40 L. Ed. 999; New England R. Co. *v.* Conroy, 175 U. S. 323, 338, 44 L. Ed. 181.

53. Ohio and Kentucky.—New England R. Co. *v.* Conroy, 175 U. S. 323, 333, 44 L. Ed. 181, overruling Chicago, etc., R. Co. *v.* Ross, 112 U. S. 377, 28 L. Ed. 787.

The supreme court of Ohio and the court of appeals of Kentucky do not accept the ordinary rule exempting the master from liability to a servant for the negligent conduct of his fellows. At least, they do not apply such a rule to the extent that the supreme court of the United States and other courts have done. They

d. *Particular Employments*—(1) *Employees of Railroad.*—**In general** all railroad employees below the head of a department are fellow servants where the negligent servant is not intrusted with the personal duties of the master.[54]

Members of Train Crew.—As a general rule all the members of a train crew are fellow servants. Thus, a conductor while in charge of a train is a fellow servant of the engineer, fireman, brakeman and other members of the crew employed in operating such train;[55] and an engineer is a fellow servant of a fireman[56]

hold that no service is common that does not admit a common participation, and no servants are fellow servants when one is placed in control over the other. New England R. Co. *v.* Conroy, 175 U. S. 323, 342, 44 L. Ed. 181, overruling Chicago, etc., R. Co. *v.* Ross, 112 U. S. 377, 28 L. Ed. 787.

54. Hough *v.* Railway Co., 100 U. S. 213, 25 L. Ed. 612.

Car repairers.—A car repairer working underneath a car failed to step from under such car, upon seeing that a caboose was being slowly backed down upon it, and warn the engineer having charge of the engine moving the caboose; but relied upon another car repairer, who was on the side of the track to give the warning. It was held that if the car repairer is to be regarded as the servant of the railroad company, his negligence gave rise to no cause of action on behalf of the injured car repairer, since in every view of the law of fellow servant they were such servants. Southern Pac. Co. *v.* Pool, 160 U. S. 438, 40 L. Ed. 485.

55. Conductors.—A conductor while in charge of a train is not a vice principal, representing the railroad company, as to the engineer, fireman, brakeman and other employees engaged in operating such train in such a sense that his negligence is that of the company, the common employer. New England R. Co. *v.* Conroy, 175 U. S. 323, 44 L. Ed. 181, expressly overruling Chicago, etc., R. Co. *v.* Ross, 112 U. S. 377, 28 L. Ed. 787, which was in effect if not in terms overruled in Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 37 L. Ed. 772. See, also, Northern Pac. R. Co. *v.* Hambly, 154 U. S. 349, 358, 38 L. Ed. 1009.

In the absence of evidence of special and unusual powers having been conferred upon the conductor of a freight train, he, the engineer, and the brakeman, must be deemed to be fellow servants within the meaning of the rule which exempts the railroad company, their common employer, from liability to one of them for injuries caused by the negligence of another. New England R. Co. *v.* Conroy, 175 U. S. 323, 340, 44 L. Ed. 181, overruling Chicago, etc., R. Co. *v.* Ross, 112 U. S. 377, 28 L. Ed. 787.

Chicago, etc., R. Co. *v.* Ross, 112 U. S. 377, 28 L. Ed. 787, was a case wherein an action was maintained, brought by a locomotive engineer to recover damages received in a collision caused by the negligence of the conductor of the train. The reasoning employed in expressing the views of a majority of the court, and the conclusion reached, cannot be reconciled with the other decisions of the supreme court. In New England R. Co. *v.* Conroy, 175 U. S. 323, 340, 44 L. Ed. 181, the court in overruling Chicago, etc., R. Co. *v.* Ross, supra, said: "While the opinion in the Ross case contains a lucid exposition of many of the established rules regulating the relations between masters and servants, and particularly as respects the duties of railroad companies to their various employees, we think it went too far in holding that a conductor of a freight train is, ipso facto, a vice principal of the company. An inspection of the opinion shows that that conclusion was based upon certain assumptions, not borne out by the evidence in the case, as to the powers and duties of conductors of freight trains. * * * In so far as the decision in the case of Ross is to be understood as laying down, as a rule of law to govern in the trial of actions against railroad companies, that the conductor, merely from his position as such, is a vice principal, whose negligence is that of the company, it must be deemed to have been overruled, in effect if not in terms, in the subsequent case of Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 37 L. Ed. 772." Chicago, etc., R. Co. *v.* Ross, 112 U. S. 377, 28 L. Ed. 789, is distinguished in Northern Pac. R. Co. *v.* Peterson, 162 U. S. 346, 354, 40 L. Ed. 994; Northern Pac. R. Co. *v.* Hambly, 154 U. S. 349, 358, 38 L. Ed. 1009.

Kentucky and Ohio.—"It has been held by the supreme court of Ohio and by the court of appeals of Kentucky that railroad companies are responsible for negligence of conductors to other employees." New England R. Co. *v.* Conroy, 175 U. S. 323, 342, 44 L. Ed. 181.

56. An engineer and fireman when engaged in their respective duties as such, are fellow servants of the railroad company, and the fireman is precluded by principles of general law from recovering damages from the company for injuries caused by the negligence of the engineer. Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 37 L. Ed. 772; Northern Pac. R. Co. *v.* Hambly, 154 U. S. 349, 358, 38 L. Ed. 1009.

An engineer and fireman of a locomotive engine running alone on a railroad, without any train attached, when engaged on such duty, are fellow servants of the railroad company, so as to preclude the fireman from recovering damages from

and a brakeman[57] when engaged in their respective duties.

Foreman of and Members of a Float Drill Crew.—The foreman or boss of a float drill crew is a fellow servant with the other members of such crew.[58]

Telegraph Operators and Other Servants Who Transmit Orders.—A telegraph operator who delivers orders for moving trains, received by him from the train dispatcher, and who reports the coming and going of trains, is a fellow servant of the employees in charge of such trains.[59]

the company for injuries caused, during the running, by the negligence of the engineer. Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 37 L. Ed. 772; Central R. Co. *v.* Keegan, 160 U. S. 259, 263, 40 L. Ed. 418; New England R. Co. *v.* Conroy, 175 U. S. 323, 327, 336, 44 L. Ed. 181; Northern Pac. R. Co. *v.* Peterson, 162 U. S. 346, 356, 40 L. Ed. 994, reaffirmed in Northern Pac. R. Co. *v.* Charless, 162 U. S. 359, 40 L. Ed. 999.

The rule of a railroad company provided: "Whenever a train or engine is run without a conductor, the engineman thereof will also be regarded as conductor, and will act accordingly." It was held that the rule of the company does not have the effect of making the engineman the representative of the railroad company while performing his duties and not a fellow servant with the other employees on the train, so as to make the company liable to a fireman for injuries caused by the negligence of the engineman, ad interim conductor under the rule. Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 379, 37 L. Ed. 772; New England R Co. *v.* Conroy, 175 U. S. 323, 346, 44 L. Ed. 181.

The engineer as railroads are now operated, is a much more important functionary in the actual movements of the train, when in motion, than the conductor. It is his hand that regulates the application of the brakes that control the speed of the train, and in doing so he acts upon his own knowledge and observation, and not upon orders of the conductor. Particularly has this become the case since the introduction of the air train-brake system. New England R. Co. *v.* Conroy, 175 U. S. 323, 342, 44 L. Ed. 181, overruling Chicago, etc., R. Co. *v.* Ross, 112 U. S. 377, 28 L. Ed. 787.

57. **Engineer and brakeman.**—A brakeman, who is injured by the negligence of the engineer, and the negligent engineer are fellow servants. Randall *v.* Baltimore, etc., R. Co., 109 U. S. 478, 27 L. Ed. 1003.

58. The foreman of a float drill crew whose duties were not even those of simple direction and superintendence over the operations of the drill crew, but who was a component part of the crew, an active coworker in the manual work of switching, with the specific duty assigned to him by the yardmaster of turning the switches, and who was subordinate to the yardmaster who had control of this and other drill crews and employed and discharged all the workers in the yard, giving them their general instructions, and assigning them to their duty, is a fellow servant with the other members of the drill crew; and the railroad company is not liable to a member of the crew for injuries resulting from the foreman's negligence in moving the detached cars without placing someone at the brake of the moving cars. Central R. Co. *v.* Keegan, 160 U. S. 259, 40 L. Ed. 418.

In Central R. Co. *v.* Keegan, 160 U. S. 259, 40 L. Ed. 418, the men engaged in the service of the railroad company were employed in uncoupling from the rear of trains cars which were to be sent elsewhere and in attaching other cars in their place, and they were held to be fellow servants, although the force, consisting of five men, was under the orders of a "boss" who directed the men which cars to uncouple and what cars to couple, and the neglect was alleged to have been the neglect of the "boss" by which the injury resulted to one of the men. This court held that they were fellow servants, and the mere fact that one was under the orders of the other constituted no distinction, and that the general rule of nonliability applied. Northern Pac. R. Co. *v.* Peterson, 162 U. S. 346, 356, 40 L. Ed. 994, reaffirmed in Northern Pac. R. Co. *v.* Charless, 162 U. S. 359, 40 L. Ed. 999.

"'It is quite obvious that the work of shifting cars in a railroad yard must be left in a great measure to the judgment and discretion of the servants of the railroad who are entrusted with the management of the yard. The details must be left to them, and all that the company can do for the protection of its employees is to provide competent coservants, and prescribe such regulations as experience shows may be best calculated to secure their safety.' * * * A personal, positive duty would clearly not have been imposed upon a natural person, owner of a railroad, to supervise and control the details of the operation of switching cars in a railroad yard; neither is such duty imposed as a positive duty upon a corporation." Central R. Co. *v.* Keegan, 160 U. S. 259, 267, 40 L. Ed. 418.

59. The negligence of a local telegraph operator and station agent of a railway company in observing and reporting by telegraph to the train dispatcher the movement of trains past his station, which causes the injury or death of a fireman of the company, without any fault or negligence of the train dispatcher, is not the negligence of a vice principal for which

Employees Engaged in Repairing Road.—Employees engaged in repairing the road of a railroad company are fellow servants.[60]

Section Foreman or Boss of Repair Gang and Member of Gang.—A section foreman does not occupy the position of a superintendent of a separate and distinct department,[61] but is a fellow servant of a member of his crew, and one of the crew injured by the negligence of such foreman cannot recover.[62]

the railway company is liable in damages to the fireman or his personal representatives, but is the negligence of a fellow servant of the fireman, the risk of which the latter assumed. Northern Pac. R. Co. *v.* Dixon, 194 U. S. 338, 340, 48 L. Ed. 1006.

When a local telegraph operator is called upon specially by a train dispatcher to give information relative to the arrival of a train at his station, to enable the dispatcher to formulate orders for the movement of other trains, the local operator in the matter of giving such information acts as a fellow servant of train operatives in such sense that the master is not liable to train operatives (a fireman) who are injured by obeying an erroneous order of the dispatcher that was induced by false information given by the local operator. Northern Pac. R. Co. *v.* Dixon, 194 U. S. 338, 340, 48 L. Ed. 1006.

The work of the fireman and the operator brings the parties closely together in the matter of the movement of trains. The fireman knew that any negligence on the part of the operator might result in injury to him, and must have contemplated such possibility when he entered the service of the company. Northern Pac. R. Co. *v.* Dixon, 194 U. S. 338, 346, 48 L. Ed. 1006.

In Price *v.* Detroit, etc., R. Co., 145 U. S. 651, 36 L. Ed. 843, the trial court held that a telegraph operator by whose negligence the accident happened, was a fellow servant with the engineer, the person injured, and that the defendant was therefore entitled to a verdict. On writ of error the judgment was affirmed in the supreme court by a divided court.

60. The conductor and the hands on a work train, and a section foreman on a handcar, who has charge of such car, are fellow servants of a member of the section gang on the handcar under the orders of such foreman, who is injured as a result of their negligence by a collision of the train while running backward, and the handcar. Martin *v.* Atchison, etc., R. Co., 166 U. S. 399, 41 L. Ed. 1051.

61. Northern Pac. R. Co. *v.* Peterson, 162 U. S. 346, 357, 40 L. Ed. 994, reaffirmed in Northern Pac. R. Co. *v.* Charless, 162 U. S. 359, 40 L. Ed. 999. These cases hold that Northern Pac. R. Co. *v.* Hambly, 154 U. S. 349, 38 L. Ed. 1009, and Central R. Co. *v.* Keegan, 160 U. S. 259, 40 L. Ed. 418, by their facts and reasoning, exclude the case of a section foreman from such position.

62. Central R. Co. *v.* Keegan, 160 U. S. 259, 267, 40 L. Ed. 418.

The foreman of a gang of laborers employed in keeping in repair sections of a railroad although he has the power to hire or discharge any laborer and exclusive control and management in all matters connected with their work, is a fellow servant with the men in the gang. Northern Pac. R. Co. *v.* Peterson, 162 U. S. 346, 40 L. Ed. 994; Northern Pac. R. Co. *v.* Dixon, 194 U. S. 338, 344, 48 L. Ed. 1006; New England R. Co. *v.* Conroy, 175 U. S. 323, 338, 44 L. Ed. 181.

If a member of a railroad gang is injured, while riding on a handcar as a result of the negligence of the foreman of the gang, the company is not liable to him in the absence of a contract to carry him safely on such car to and from his work. If there is no proof of any contract on the part of the railroad company to carry the injured servant safely, further than is to be inferred from the fact that the company furnished handcars which were worked by the gang and upon which they rode to and from the place of labor and if, under these circumstances, the servant be injured through the neglect of a fellow servant, such as appears in this case, the master is not liable. Northern Pac. R. Co. *v.* Peterson, 162 U. S. 346, 40 L. Ed. 994, reaffirmed in Northern Pac. R. Co. *v.* Charless, 162 U. S. 359, 40 L. Ed. 999.

The boss of a small gang of ten or fifteen men, engaged in making repairs upon the road wherever they might be necessary, over a distance of three sections, aiding and assisting the regular gang of workmen upon each section as occasion demanded, was not such a superintendent of a separate department, nor was he in control of such a distinct branch of the work of the master as would be necessary to render the master liable to a coemployee for his neglect. He is in fact, as well as in law, a fellow workman; he went with the gang to the place of work in the morning, stayed there with them during the day, superintended their work, giving directions in regard to it, and returned home with them in the evening, acting as a part of the crew of the handcar upon which they rode. The mere fact, if it be a fact, that he did not actually handle a shovel or a pick, is an unimportant matter. Northern Pac. R. Co. *v.* Peterson, 162 U. S. 346, 357, 40 L. Ed. 994, reaffirmed in Northern Pac. R. Co. *v.* Charless, 162 U. S. 359, 40 L. Ed. 999; New England R. Co. *v.* Conroy, 175 U. S. 323, 338, 44 L. Ed. 181.

The negligence of a section foreman in

(2) *Mine Workers.*—The foreman of a shift or gang of mine workers is a fellow servant of the members of such shift or gang.[63]

6. Servants in Separate Departments—a. *In General.*—If the departments of the two servants are so far separated from each other that the possibility of coming in contact, and hence incurring danger from the negligent performance of the duties of such other department, could not be said to be within the contemplation of the person injured, the doctrine of fellow service should not apply.[64]

charge of a railroad gang, in running his handcar at too high a rate of speed while carrying his gang to or from the place of labor, as a result of which a member of the gang is injured, is, not the neglect of any duty which the company as master was bound itself to perform, but was nothing more than the negligence of a coservant of the injured member of the gang in performing the duty revolving upon them. Northern Pac. R. Co. *v.* Charless, 162 U. S. 359, 40 L. Ed. 999. The court said: The principle which covers the facts of this case was laid down in Randall *v.* Baltimore, etc., R. Co., 109 U. S. 478, 27 L. Ed. 1003, and distinguished the case of Chicago, etc., R. Co. *v.* Ross, 112 U. S. 377, 28 L. Ed. 787, and cited Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 380, 37 L. Ed. 772; Northern Pac. R. Co. *v.* Hambly, 154 U. S. 349, 38 L. Ed. 1009, as among the latest expression of opinion of that court in regard to views similar to those stated in the case in 109 U. S.

In an action by a laborer or construction hand against a railway company for injuries received by him resulting from the negligence of his fellow servants in allowing a steel rail which they were loading upon a flat car to strike such car and drop upon him, breaking his leg and foot, the negligence alleged consisted in the fact that, after the men had lifted the rail in question and had carried it forward to the car and were holding it, awaiting the word of command from the construction boss or foreman to lift it further and throw it on the car, the foreman failed to give the word of command in such a way as to produce concert of action in the men, but, on the contrary, ordered them to get the rail on the car in any way they could; and the fact that the foreman hurried the men and urged them to hasten as a consequence of which the plaintiff and his fellow workmen became confused and failed to act in concert. It was held that whatever negligence there was, was the negligence either of the plaintiff himself or of his fellow servants who with him had hold of the rail and did not authorize a recovery from the employer. Coyne *v.* Union Pac. R. Co., 133 U. S. 370, 33 L. Ed. 651.

63. The business of a mining company was under the control of a general manager, and was divided into three departments, the mine, the mill and the chlorination works, each of which departments had a foreman or superintendent under the general manager. The mine department had three shifts or gangs of workmen, two by day and one by night. It was held that the foreman of one of these shifts or gangs of workmen was not a vice principal or representative of the corporation, but a fellow servant with the members of such gang although he had authority to engage and discharge the men under him. Alaska Min. Co. *v.* Whelan, 168 U. S. 86, 42 L. Ed. 390.

The foreman was not a vice principal or representative of the corporation. He was not the general manager of its business, or the superintendent of any department of that business. But he was merely the foreman or boss of the particular gang of men to which the plaintiff belonged. Whether he had or had not authority to engage and discharge the men under him is immaterial. Even if he had such authority, he was none the less a fellow servant with them, employed in the same department of business, and under a common head. There was no evidence that he was an unsuitable person for his place, or that the machinery was imperfect or defective for its purpose. The negligence, if any, was his own negligence in using the machinery or in giving orders to the men. The case is governed by a series of recent decisions of the supreme court, undistinguishable in their facts from this one. Alaska Min. Co. *v.* Whelan, 168 U. S. 86, 89, 42 L. Ed. 390; Central R. Co. *v.* Keegan, 160 U. S. 259, 40 L. Ed. 418; Northern Pac. R. Co. *v.* Charless, 162 U. S. 359, 40 L. Ed. 999; Northern Pac. R. Co. *v.* Peterson, 162 U. S. 346, 40 L. Ed. 994; Martin *v.* Atchison, etc., R. Co., 166 U. S. 399, 41 L. Ed. 1051.

Mine manager and Illinois mining act.—See ante, "Mining," III, A, 4, b, (2), (d), cc.

64. Northern Pac. R. Co. *v.* Hambly, 154 U. S. 349, 357, 38 L. Ed. 1009; Northern Pac. R. Co. *v.* Dixon, 194 U. S. 338, 345, 48 L. Ed. 1006. See, also, Quebec Steamship Co. *v.* Merchant, 133 U. S. 375, 33 L. Ed. 656.

"In this view it is not difficult to reconcile the numerous cases which hold that persons whose duty it is to keep railroad cars in good order and repair are not engaged in a common employment with those who run or operate them." Northern Pac. R. Co. *v.* Hambly, 154 U. S. 349,

b. *Employees Supplying Machinery, Appliances, etc.*—Agents or employees who are charged with the duty of supplying safe machinery and appliances are not, with respect to its performance, to be regarded as fellow servants with those who are engaged in operating it, but as representatives of the master.[65]

c. *Particular Employments*—(1) *Employees of Railroads.*—**Officers and agents of a railroad company** employed in supplying safe machinery and appliances are not fellow servants of those engaged in operating the railroad.[66]

Train Dispatcher and Train Crew.—A train dispatcher represents the company in the promulgation of orders for the running of trains and is not a fellow servant of the employees operating such trains.[67]

356, 38 L. Ed. 1009. See post, "Employees Supplying Machinery, Appliances, etc.," III, A, 6, b.

Where the injured servant and the servant from whose carelessness or negligence in the course of his particular work the injury resulted, are engaged in different departments of duty, the injury is not within the exception, and the master is liable in the same manner as if the injured servant stood in no such relation to him. Hough *v.* Railway Co., 100 U. S. 213, 25 L. Ed. 612.

65. Northern Pac. R. Co. *v.* Hambly, 154 U. S. 349, 357, 38 L. Ed. 1009; Hough *v.* Railway Co., 100 U. S. 213, 25 L. Ed. 612.

In Cunard Steamship Co. *v.* Carey, 119 U. S. 245, 30 L. Ed. 354, a judgment in favor of a longshoreman for injuries resulting from the falling of a tub filled with coal upon him, was affirmed by a divided court. The fall was caused by the separation or breaking of a rope which suspended the tub. The longshoreman claimed that the injury was caused by the negligence of B, a servant of the company, in not providing a proper rope. The company defended upon the ground that B was a fellow servant of the longshoreman for whose negligence it was not liable.

Employees of railroads.—See ante, "Employees of Railroads," III, A, 5, d, (1).

66. Railroads.—Hough *v.* Railway Co., 100 U. S. 213, 25 L. Ed. 612; Northern Pac. R. Co. *v.* Hambly, 154 U. S. 349, 356, 38 L. Ed. 1009.

Persons entrusted with the duty of repairing or inspecting cars, engines, or other appliances used in operating railroads, are not fellow servants of other employees of a railroad company and who work on the trains or about the yards, so as to relieve the railroad company from liability for injuries to the latter occasioned by the negligence of the former in the performance of this duty. Northern Pac. R. Co. *v.* Herbert, 116 U. S. 642, 29 L. Ed. 755; Northern Pac. R. Co. *v.* Hambly, 154 U. S. 349, 356, 38 L. Ed. 1009.

A brakeman and a person entrusted with the duty of keeping the cars in order are not fellow servants so as to relieve a railroad company from liability for the negligence of the latter in its performance. Northern Pac. R. Co. *v.* Herbert, 116 U. S. 642, 29 L. Ed. 755; Northern Pac. R. Co. *v.* Hambly, 154 U. S. 349, 356, 38 L. Ed. 1009.

In Northern Pac. R. Co. *v.* Herbert, 116 U. S. 642, 29 L. Ed. 755, the plaintiff was a brakeman in defendant's yard where its cars were switched upon different tracks and its trains were made up for the road. He received an injury from a defective brake, which had been allowed to get out of repair through the negligence of an officer or agent of the company who was charged with the duty of keeping the cars in order. It was held, that the person receiving and the person causing the injury did not occupy the relative position of fellow servants. Northern Pac. R. Co. *v.* Hambly, 154 U. S. 349, 356, 357, 38 L. Ed. 1009. See, also, Hough *v.* Railway Co., 100 U. S. 213, 25 L. Ed. 612; Union Pac. R. Co. *v.* Daniels, 152 U. S. 684, 38 L. Ed. 597.

67. A train dispatcher who represents the company in the promulgation of special orders governing the movement of trains does not relieve the company, by the promulgation of the orders; he may be required to repeat them or promulgate new ones; he must at all times know and guard against possible changes. Santa Fe Pac. R. Co. *v.* Holmes, 202 U. S. 438, 50 L. Ed. 1094.

Two passenger trains No. 3 and No. 4, the former being westbound and the latter eastbound collided causing injuries to an engineer. Train No. 3 was running under special orders indicating the meeting point of the trains. No. 4 should have reached the meeting point before the leaving time for train No. 3. The train dispatcher was informed that No. 3 was running ahead of time, but took no steps to stop such train at the meeting point. Train No. 3 passed the meeting point before the arrival of train No. 4 and collided with it, resulting in the injuries to the engineer. It was held that the collision was the result of the dispatcher's negligence in failing to take into account and do what a prudent man would have taken into account and have done, and that the dispatcher represented the company in the promulgation of orders, for the running of the trains and was not a fellow servant of the engineer. Santa Fe

Members of Crew of Different Trains.—The relation of fellow servant exists between the members of crews employed in operating different trains of the same railroad company.[68]

Laborers Employed upon a Railroad Track and Employees of a Moving Train.—It may be said in general that, as between laborers employed upon a railroad track and the conductor or other employees of a moving train, the courts of Massachusetts, Rhode Island, New York, Indiana, Iowa, Michigan, North Carolina, Minnesota, Maine, Texas, California, Maryland, Pennsylvania, Arkansas, and Wisconsin hold the relation of fellow servants to exist; while in Illinois, Missouri, Virginia, Ohio, and Kentucky the rule is apparently the other way. In the supreme court of the United States although the cases involving the question of fellow service have not been numerous nor, perhaps, altogether harmonious, yet they hold the relation of fellow servants to exist.[69]

Pac. R. Co. *v.* Holmes, 202 U. S. 438, L. Ed. 1094.

68. The relation of fellow servant exists between an engineer operating a locomotive on one train and the conductor on another train of the same road. Oakes *v.* Mase, 165 U. S. 363, 364, 41 L. Ed. 746; New England R. Co. *v.* Conroy, 175 U. S. 323, 340, 44 L. Ed. 181; Northern Pac. R. Co. *v.* Hambly, 154 U. S. 349, 38 L. Ed. 1009; Northern Pac. R. Co. *v.* Charless, 162 U. S. 359, 40 L. Ed. 999; Northern Pac. R. Co. *v.* Peterson, 162 U. S. 346, 40 L. Ed. 994; Central R. Co. *v.* Keegan, 160 U. S. 259, 40 L. Ed. 418.

In Northern Pac. R. Co. *v.* Poirier, 167 U. S. 48, 42 L. Ed. 72, it was held that a brakeman on a regular train of a railroad and the conductor of a wild train, on the same road, are fellow servants, and the railroad company is not responsible for injuries happening to the former by reason of a collision of the two trains, caused by the negligence of the latter and by his disregard of the rules of the company. New England R. Co. *v.* Conroy, 175 U. S. 323, 340, 44 L. Ed. 181.

A brakeman, working a switch for his train on one track in a railroad yard, is a fellow servant with the engineman of another train of the same corporation upon an adjacent track; and cannot maintain an action against the corporation for an injury caused by the negligence of the engineman in driving his engine too fast and not giving due notice of its approach, without proving negligence of the corporation in employing an unfit engineman. Randall *v.* Baltimore, etc., R. Co., 109 U. S. 478, 27 L. Ed. 1003; New England R. Co. *v.* Conroy, 175 U. S. 323, 333, 44 L. Ed. 181.

"They are employed and paid by the same master. The duties of the two bring them to work at the same place at the same time, so that the negligence of the one in doing his work may injure the other in doing his work. Their separate services have an immediate common object—the moving of the trains." Randall *v.* Baltimore, etc., R. Co., 109 U. S. 478, 484, 27 L. Ed. 1003; New England R. Co. *v.* Conroy, 175 U. S. 323, 333, 44 L. Ed. 181; Northern Pac. R. Co. *v.* Hambly, 154 U. S. 349, 356, 38 L. Ed. 1009.

"Neither works under the orders or control of the other. Each, by entering into his contract of service, takes the risk of the negligence of the other in performing his service; and neither can maintain an action for an injury caused by such negligence, against the corporation, their common master." Randall *v.* Baltimore, etc., R. Co., 109 U. S. 478, 484, 27 L. Ed. 1003. See New England R. Co. *v.* Conroy, 175 U. S. 323, 333, 44 L. Ed. 181; Northern Pac. R. Co. *v.* Hambly, 154 U. S. 349, 356, 38 L. Ed. 1009. See, also, Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 375, 37 L. Ed. 772.

"That the running of an engine by itself is not a separate branch of service seems perfectly clear. The fact is all the locomotive engines of a railroad company are in the one department, the operating department; and those employed in running them, whether as engineers or firemen, are engaged in a common employment and are fellow servants. It might as well be said that, where a liveryman has a dozen carriages, the driver of each has charge of a separate branch or department of service, and that if one drives his carriage negligently against another employee, the master is exempt from liability." Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 389, 37 L. Ed. 772. See, to the same effect, New England R. Co. *v.* Conroy, 175 U. S. 323, 336, 44 L. Ed. 181.

69. Northern Pac. R. Co. *v.* Hambly, 154 U. S. 349, 355, 356, 38 L. Ed. 1009. See, also, Martin *v.* Atchison, etc., R. Co., 166 U. S. 399, 41 L. Ed. 1051.

"The services of a switchman in keeping a track clear for the passage of trains do not differ materially, so far as actions founded upon the negligence of trainmen are concerned, from those of a laborer engaged in keeping the track in repair; neither of them is under the personal control of the engineer or conductor of the moving train, but both are alike engaged in an employment necessarily bringing them in contact with passing engines, and in the 'immediate common object' of securing the safe passage of trains over

(2) *Members of Crew of Vessel.*—Upon a full review of the English and American authorities the law may be considered as settled, that all the members of the crew of a vessel, except perhaps the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of their maintenance and cure.[70] The porter and the carpenter of a ship's company are fellow servants with the stewardess.[71]

the road." Northern Pac. R. Co. *v.* Hambly, 154 U. S. 349, 356, 38 L. Ed. 1009.

"As a laborer upon a railroad track, either in switching trains or repairing the track, is constantly exposed to the danger of passing trains, and bound to look out for them, any negligence in the management of such trains is a risk which may or should be contemplated by him in entering upon the service of the company." Northern Pac. R. Co. *v.* Dixon, 194 U. S. 338, 345, 48 L. Ed. 1006; Northern Pac. R. Co. *v.* Hambly, 154 U. S. 349, 356, 38 L. Ed. 1009.

The negligence of the employees on a freight train in giving no signals of their approach around a curve and through a cut, although they were near a public crossing and some signals were necessary on that account, and which result in injury to a member of a section gang who was on a handcar, is not negligence for which the railroad company is liable but the negligence of a fellow servant. Northern Pac. R. Co. *v.* Charless, 162 U. S. 359, 40 L. Ed. 999.

Trainmen and common day laborer.—"A common day laborer in the employ of a railroad company, who, while working for the company under the order and direction of a section boss or foreman, on a culvert on the line of the company's road, receives an injury by and through the negligence of the conductor and of the engineer in moving and operating a passenger train upon the company's road, is a fellow servant with such engineer and such conductor, in such a sense as exempts the railroad company from liability for the injury so inflicted." Northern Pac. R. Co. *v.* Hambly, 154 U. S. 349, 38 L. Ed. 1009; Northern Pac. R. Co. *v.* Peterson, 162 U. S. 346, 356, 40 L. Ed. 994; Northern Pac. R. Co. *v.* Charless, 162 U. S. 359, 363, 40 L. Ed. 999; Northern Pac. R. Co. *v.* Dixon, 194 U. S. 338, 345, 48 L. Ed. 1006; New England R. Co. *v.* Conroy, 175 U. S. 323, 337, 44 L. Ed. 181.

70. The Osceola, 189 U. S. 158, 175, 47 L. Ed. 760. See Quebec Steamboat Co. *v.* Merchant, 133 U. S. 375, 33 L. Ed. 656. See the title SHIPS AND SHIPPING.

In England the master and crew are treated as fellow servants, and hence it would follow that no action would lie by a member of the crew against either the owners or the ship for injuries received through the negligence of the master. It is otherwise, however, in Ireland and in Scotland, where the master is regarded as a vice principal. The statutes of the United States contain no provision upon the subject of the liability of the ship or her owners for damages occasioned by the negligence of the captain to a member of the crew; but in all but a few of the more recent cases the analogies of the English and Continental codes have been followed, and the recovery limited to the wages and expenses of maintenance and cure. The Osceola, 189 U. S. 158, 171, 47 L. Ed. 760.

The statute of Wisconsin, Rev. Stat., 1898, § 3348, which provides that every ship, boat or vessel used in navigating the waters of that state shall be liable "for all damages arising from injuries done to persons or property by such ship, boat or vessel," and that the claim for such damages shall constitute a lien upon such ship, boat or vessel, which shall take precedence of all other claims or liens thereon, does not apply to injuries suffered by a member of the crew on board the ship as a result of a gangway being blown against him through the negligence or mismanagement of the master. The Osceola, 189 U. S. 158, 175, 47 L. Ed. 760.

71. Quebec Steamship Co. *v.* Merchant, 133 U. S. 375, 33 L. Ed. 656; New England R. Co. *v.* Conroy, 175 U. S. 323, 335, 44 L. Ed. 181.

In Quebec Steamship Co. *v.* Merchant, 133 U. S. 375, 33 L. Ed. 656, an action was brought by one Merchant, who was employed as a stewardess of the steamship belonging to the defendant. "It appeared that the ship's company consisted of thirty-two persons, divided into three classes of servants, called three departments—the deck department, the engineers' department, and the steward's department. The captain, the first and second officers, the purser, the carpenter and the sailors were in the deck department; the engineers, the firemen and the stokers were in the engineers' department; the steward, the waiters, the cooks, the porter and the stewardess were in the steward's department. At the close of the evidence the defendant's counsel requested the court to charge the jury to find a verdict for the defendant on the ground that the injury sustained by the plaintiff was occasioned, if there was any negligence, by the negligence of a fellow servant. This the court refused to do. There was a verdict for the plaintiff, and the case was brought to this court. Here it was contended that, as the carpenter whose negligence was alleged as

(3) *Persons Engaged in Erecting Buildings.*—Persons employed in erecting a building are generally fellow servants.[72]

7. Concurrent Negligence of Master or Vice Principal with That of Fellow Servant.—If the neglect of the master or of a servant intrusted with performance of a personal duty of the master concurs with the negligence of a fellow servant in causing an injury to another servant, the master is liable therefor.[73] If the neglect of the master's duty to furnish safe applicances and safe working places concurs with that of the negligence of a fellow servant, the master is liable.[74]

the cause of the accident, was in the deck department, and the stewardess in the steward's department, those were different departments in such a sense that the carpenter was not a fellow servant with the stewardess." It was held that the carpenter and stewardess were fellow servants, and that the case fell within the fellow-servant rule. New England R. Co. *v.* Conroy, 175 U. S. 323, 335, 44 L. Ed. 181.

In Quebec Steamship Co. *v.* Merchant, 133 U. S. 375, 33 L. Ed. 656, "the stewardess of a steamship belonging to a corporation brought suit to recover damages for personal injuries sustained by her by reason of a defective railing at a gangway, which gave way as she leaned against it, and precipitated her into the water. The railing had been recently removed and the gangway opened to take off some freight, and had not been properly replaced by the porter and carpenter of the ship whose duty it was to replace them. It was held that, as the porter and the carpenter were fellow servants with the stewardess, the corporation was not liable. Said Mr. Justice Blatchford: 'As the porter was confessedly in the same department with the stewardess, his negligence was that of a fellow servant. The contention of the plaintiff is that, as the carpenter was in the deck department and the stewardess in the steward's department, those were different departments in such a sense that the carpenter was not a fellow servant with the stewardess. But we think that, on the evidence, both the porter and the carpenter were fellow servants with the plaintiff. The carpenter had no authority over the plaintiff, nor had the porter. * * * There was nothing in the employment or service of the carpenter or the porter which made either of them any more the representative of the defendant than the employment and service of the stewardess made her such representative.' The division of the crew into departments was treated as evidently for the convenience of administration upon the vessel, but having no effect upon the question of fellow service." Northern Pac. R. Co. *v.* Hambly, 154 U. S. 349, 358, 38 L. Ed. 1009.

The court left it as a question for the jury to determine, if they found that negligence existed, whether the injury was occasioned by the careless act of a servant not employed in the same department with the plaintiff. This ruling was excepted to by the defendant, and it was held to be erroneous. Quebec Steamship Co. *v.* Merchant, 133 U. S. 375, 379, 33 L. Ed. 656.

72. Armour *v.* Hahn, 111 U. S. 313, 28 L. Ed. 440.

Thus, carpenters and bricklayers, all of whom were employed and paid by the same master, and were working in the course of their employment at the same place and time, with an immediate common object, the erection of a building, are within the strictest limits of the rule of law upon the subject, fellow servants, one of whom cannot maintain an action for injuries caused by the negligence of another against their common master. Armour *v.* Hahn, 111 U. S. 313, 318, 28 L. Ed. 440, citing Hough *v.* Railway Co., 100 U. S. 213, 25 L. Ed. 612; Randall *v.* Baltimore, etc., R. Co., 109 U. S. 478, 27 L. Ed. 1003.

73. Grand Trunk R. Co. *v.* Cummings, 106 U. S. 700, 27 L. Ed. 266.

An employer is liable to a servant for the negligence of a fellow servant, when his own negligence contributes to the injury. The exemption of the employer under the fellow servant rule is destroyed in such case. New England R. Co. *v.* Conroy, 175 U. S. 323, 335, 44 L. Ed. 181; Quebec Steamship Co. *v.* Merchant, 133 U. S. 375, 33 L. Ed. 656.

If two concurring causes contribute to an accident to a servant, the fact that one of the efficient causes does not give rise to a right of recovery from the master, because of the fellow-servant rule, does not absolve him from responsibility for the cause of the accident for which he was liable. Wilmington Star Min. Co. *v.* Fulton, 205 U. S. 60, 75, 51 L. Ed. 708, citing Washington, etc., R. Co. *v.* Hickey, 166 U. S. 521, 41 L. Ed. 1101.

"It is indispensable to the employer's exemption from liability to his servant for the consequences of risks thus incurred, that he should himself be free from negligence. * * * In other words, whilst claiming such exemption, he must not himself be guilty of contributory negligence." Chicago, etc., R. Co. *v.* Ross, 112 U. S. 377, 383, 28 L. Ed. 787.

74. Deserant *v.* Cerillos Coal R. Co., 178 U. S. 409, 420, 44 L. Ed. 1127; Grand Trunk R. Co. *v.* Cummings, 106 U. S. 700, 27 L. Ed. 266.

The plaintiff, in the course of his em-

For using in a negligent manner a defective appliance furnished by the master, the latter might be liable if a coemployee were thereby and in consequence thereof injured. As the master furnished the defective appliance, it would be no answer to say that it was negligently used. But, on the other hand, the master would not be responsible for the negligent use of a proper appliance.[75]

8. Liability of Master for Personal Negligence.—A servant is entitled to recover damages for injuries suffered through the personal fault or misconduct of his employer.[76]

9. Risks Not within Contract of Service.—But this presumption cannot arise where the risk is not within the contract of service, and the servant had no reason to believe he would have to encounter it.[77]

10. Servants Who Are or Are Not Fellow Servants—a. *General Rule.*—The general rule is that those entering into the service of a common master becomes thereby engaged in a common service and are fellow servants, and, prima facie,

ployment as an engine driver for the defendant, a railroad company, was injured by the collision of the train on which he was with another train of the company. Held, that the court did not err in charging the jury that the company, if its negligence had a share in causing the injuries of the plaintiff, was liable, notwithstanding the contributory negligence of his fellow servant. Grand Trunk R. Co. *v.* Cummings, 106 U. S. 700, 27 L. Ed. 266.

If the negligence of a railroad company contributed to, that is to say, had a share in producing, the injury, the company is liable, even though the negligence of a fellow servant was contributory also. If the negligence of the company contribute to it, it must necessarily have been an immediate cause of, the accident, and it is no defense that another was likewise guilty of wrong. Grand Trunk R. Co. *v.* Cummings, 106 U. S. 700, 702, 27 L. Ed. 266.

Mines.—One of the efficient causes contributing to an accident to an employee in a mine was an order of the mine manager to such employee to go into a certain roadway in the mine, for which no recovery could be had under the pleadings in the case. The other cause of the accident was the neglect by the mine owner to perform his statutory duty to prevent the accumulation of the dangerous gases which led to the accident. It was held that because the order of the mine manager, under the pleadings, did not give rise to a right of recovery, it did not follow that therefore the owner was absolved from responsibility for the cause of the accident for which he was liable and that a recovery might be had against him. Wilmington Star Min. Co. *v.* Fulton, 205 U. S. 60, 51 L. Ed. 708.

75. Northern Pac. R. Co. *v.* Charless, 162 U. S. 359, 364, 40 L. Ed. 999.

So held where the language of the court does not separate the question of general negligence in running a handcar which was in good order too fast from that which might be negligence with reference to running a handcar with a defective brake at the same rate of speed. Northern Pac. R. Co. *v.* Charless, 162 U. S. 359, 364, 40 L. Ed. 999.

76. Northern Pac. R. Co. *v.* Dixon, 194 U. S. 338, 342, 48 L. Ed. 1006.

77. Railroad Co. *v.* Fort, 17 Wall. 553, 557, 21 L. Ed. 739; Hough *v.* Railway Co., 100 U. S. 213, 217, 25 L. Ed. 612.

"If it were otherwise, principals would be released from all obligations to make reparations to an employee in a subordinate position for any injury caused by the wrongful conduct of the persons placed over him, whether they were fellow servants in the same common service or not. Such a doctrine would be subversive of all just ideas of the obligations arising out of the contract of service, and withdraw all protection from the subordinate employees of railroad corporations. These corporations, instead of being required to conduct their business so as not to endanger life, would, so far as this class of persons were concerned, be relieved of all pecuniary responsibility in case they failed to do it. A doctrine that leads to such results is unsupported by reason, and cannot receive our sanction." Hough *v.* Railway Co., 100 U. S. 213, 217, 25 L. Ed. 612; Railroad Co. *v.* Fort, 17 Wall. 553, 558, 21 L. Ed. 739.

"In Railroad Co. *v.* Fort, 17 Wall. 553, 21 L. Ed. 739, where a boy was injured through dangerous machinery in doing an act which was not within the scope of his duty and employment, though done at the command of his immediate superior, this court, while sustaining the liability of the master, did so on the ground that the risk was not within the contract of service, and that the servant had no reason to believe that he would have to encounter such a danger." Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 388, 37 L. Ed. 772.

In Railroad Co. *v.* Fort, 17 Wall. 553, 21 L. Ed. 739, the plaintiff maintained his action because at the time of the injury he was not acting under his contract of service with the defendant; being a minor, he was performing, by direction of his

the common master is not liable for the negligence of one of his servants which has resulted in an injury to a fellow servant.[78]

b. *Relation to Master.*—Servants to be fellow servants must be in the employ of the same master.[79]

c. *Common Employment.*—The doctrine assumes that the servant causing the injury is in the same employment with the servant injured, that is, that both are engaged in a common employment.[80] It has not become necessary to define with any great precision what was meant by the words "common service" or "common employment," and perhaps it might be difficult beforehand to suggest any exact definition of them.[81]

superior, work outside of and disconnected with the contract which his father had made for him with the defendant. Randall *v.* Baltimore, etc., R. Co., 109 U. S. 478, 483, 27 L. Ed. 1003.

F., a boy of tender years, had been engaged, by a company owning it, in a machine shop, as a workman or helper under the superintendence of C., and required to obey his orders. After being employed for a few months chiefly in receiving and putting away mouldings as they came from a moulding machine, the boy, by the order of C., ascended a ladder to a great height from the floor, among rapidly revolving and dangerous machinery, for the purpose of adjusting a belt by which a portion of the machinery was moved, and while engaged in the endeavor to execute the order had his arm torn from his body. The jury, by a special verdict, found that the order was not within the scope of the boy's duty and employment, but was within that of C.; that the order was not a reasonable one; that its execution was attended with hazard to life or limb, and that a prudent man would not have ordered the boy to execute it. Held, that the company was liable in damages for the injuries, and that the rule that the master is not liable to one of his servants for injuries resulting from the carelessness of another, when both are engaged in a common service, although the injured person was under the control and direction of the servant who caused the injury—whether a true rule or not—had no application to the case. Railroad Co. *v.* Fort, 17 Wall. 553, 21 L. Ed. 739.

78. Northern Pac. R. Co. *v.* Peterson, 162 U. S. 346, 40 L. Ed. 994, reaffirmed in Northern Pac. R. Co. *v.* Charless, 162 U. S. 359, 40 L. Ed. 999; New England R. Co. *v.* Conroy, 175 U. S. 323, 328, 44 L. Ed. 181. See to the same effect, Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 384, 37 L. Ed. 772; Central R. Co. *v.* Keegan, 160 U. S. 259, 263, 40 L. Ed. 418.

Who, within the true sense of the rule, or upon grounds of public policy, are to be deemed fellow servants in the same common adventure or undertaking, is a question in reference to which much contrariety of opinion exists in the courts of the several states. Hough *v.* Railway Co., 100 U. S. 213, 216, 25 L. Ed. 612. See Chicago, etc., R. Co. *v.* Ross, 112 U. S. 377, 387, 28 L. Ed. 787.

79. Philadelphia, etc., R. Co. *v.* Derby, 14 How. 468, 14 L. Ed. 502. See, also, Chicago, etc., R. Co. *v.* Ross, 112 U. S. 377, 387, 28 L. Ed. 787; New England R. Co. *v.* Conroy, 175 U. S. 323, 328, 44 L. Ed. 181; Northern Pac. R. Co. *v.* Dixon, 194 U. S. 338, 343, 48 L. Ed. 1006.

The fellow-servant rule can have no application unless the person sought to be charged is the common master both of the person injured and the person by whose negligence the injury was occasioned. Philadelphia, etc., R. Co. *v.* Derby, 14 How. 468, 14 L. Ed. 502.

The plaintiff was a stockholder in the railroad company, riding by invitation of the president of the road, paying no fare, and not in the usual passenger cars, when he was injured by the negligence of a servant of the railroad company. It was held that the fellow servant's rule did not apply. Philadelphia, etc., R. Co. *v.* Derby, 14 How. 468, 489, 14 L. Ed. 502.

80. Chicago, etc., R. Co. *v.* Ross, 112 U. S. 377, 381, 28 L. Ed. 787.

The employer is not liable for an injury to one employee occasioned by the negligence of another engaged in the same general undertaking; it is not necessary that the servants should be engaged in the same operation or particular work; it is enough, to bring the case within the general rule of exemption, if they are in the employment of the same master, engaged in the same common enterprise, both employed to perform duties tending to accomplish the same general purposes, or, in other words, if the services of each in his particular sphere or department are directed to the accomplishment of the same general end. New England R. Co. *v.* Conroy, 175 U. S. 323, 328, 44 L. Ed. 181, overruling Chicago, etc., R. Co. *v.* Ross, 112 U. S. 377, 28 L. Ed. 787; Northern Pac. R. Co. *v.* Dixon, 194 U. S. 338, 348, 48 L. Ed. 1006.

"The question in all cases therefore is, what is essential to render the service in which different persons are engaged a common employment? And this question has caused much conflict of opinion between different courts, and often much vacillation of opinion in the same court." Chicago, etc., R. Co. *v.* Ross, 112 U. S. 377, 387, 28 L. Ed. 787.

81. Chicago, etc., R. Co. *v.* Ross, 112 U. S. 377, 387, 28 L. Ed. 787.

Where Questions of "Subordination" or of "Different Departments" Involved.—"To hold the principal liable whenever there are graduations of rank between the person receiving and the person causing the injury, or whenever they are employed in different departments of the same general service, would result in frittering away the whole doctrine of fellow service. Cases arising between persons engaged together in the same identical service, as, for instance, between brakemen of the same train or two seamen of equal rank in the same ship, are comparatively rare. In a large majority of cases there is some distinction either in respect to grade of service, or in the nature of their employments. Courts, however, have been reluctant to recognize these distinctions unless the superiority of the person causing the injury was such as to put him rather in the category of principal than of agent, as, for example, the superintendent of a factory or railway, and the employments were so far different that, although paid by the same master, the two servants were brought no farther in contact with each other than as if they had been employed by different principals."[82]

d. *Servants Off Duty or Where Contract of Service Terminated.*—An employee not on duty is not a fellow servant with those engaged in the same common employment in which he is ordinarily engaged, so as to relieve the master from liability to him for injuries resulting from their negligence.[83]

B. Under State Statutes.—In some of the states the statutes in respect to the fellow-servant rule are declaratory of the common law as it exists in states which have not adopted the superior servant or separate department rule.[84] Some

82. Northern Pac. R. Co. *v.* Hambly, 154 U. S. 349, 359, 360, 38 L. Ed. 1009; New England R. Co. *v.* Conroy, 175 U. S. 323, 337, 44 L. Ed. 181. See ante, "Superior Servants," III, A, 5; "Servants in Separate Departments," III, A, 6.

83. Fletcher *v.* Baltimore, etc., R. Co., 168 U. S. 135, 138, 42 L. Ed. 411.

The plaintiff, a workman employed by the defendant railway company in its work shops, while returning from his day's work, stopped at the intersection of two streets while a repair train passed him. As the train passed, one of the workmen on board threw from the car on which he was standing a stick of bridge timber, which struck the ground and rebounded, struck the plaintiff and seriously injured him. It was the custom of the railroad company to allow the workmen on the repair train to bring back with them for their individual use sticks of refuse timber left over from their work after repairing the road. It was the constant habit of these men to throw off these pieces of timber while the train was in motion at such points on the road as were nearest their homes. The only caution given the men on the part of the servants or agents of the company was that they should be careful not to hurt any one in throwing the wood off. The foreman of the gang gave such instruction. The plaintiff sued the company to recover damages. It was held that the liability of the defendant to the plaintiff for the act in question is not to be gauged by the law applicable to fellow servants. The plaintiff having at the time of the accident finished his employment for the day, and left the work shop and grounds of the defendant, and being on a public highway in the city with the same rights as any other citizen, was not a fellow servant of the workmen on the train. Fletcher *v.* Baltimore, etc., R. Co., 168 U. S. 135, 42 L. Ed. 411.

In Packet Co. *v.* McCue, 17 Wall. 508, 21 L. Ed. 705, the plaintiff maintained his action because at the time of the injury he was not acting under his contract of service with the defendant; he had wholly ceased to be the defendant's servant. Randall *v.* Baltimore, etc., R. Co., 109 U. S. 478, 483, 27 L. Ed. 1003.

84. Northern Pac. R. Co. *v.* Herbert, 116 U. S. 642, 29 L. Ed. 755.

The North Dakota Civil Code, § 1130, does not relieve an employer from liability for injuries suffered by an employee in consequence of the negligence of a coservant, employed by the same employer in different department from that in which the injured employee is employed. Northern Pac. R. Co. *v.* Herbert, 116 U. S. 642, 29 L. Ed. 755.

In Northern Pac. R. Co. *v.* Herbert, 116 U. S. 642, 29 L. Ed. 755, it appeared that a brakeman suffered an injury by reason of the fact that the brakes which he was called upon to apply were broken and out of order. There was a question as to the import and effect of a statute of Dakota, in which territory the accident took place, providing that "an employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employee," and that "an employer must, in all cases, indemnify his employee for losses caused

of the state statutes abolish or modify the fellow-servant doctrine, especially in so far as it is applicable to railroads. The following states have such statutes which have been construed or applied by the supreme court of the United States: Illinois;[85] Iowa;[86] Kansas;[87] Texas.[88]

by the former's want of ordinary care." It was held, that these provisions of the Dakota code expressed the general law that an employer is responsible for the injury to his employees caused by his own want of ordinary care; that his selection of defective machinery, which is to be moved by steam power, is of itself evidence of a want of ordinary care, and allowing it to remain out of repair, when its condition is brought to his notice, or by proper inspection might be known, is culpable negligence. The cars, in that case, had been defective for years; the brakes were all worn out, and their condition had been called to the attention of the yardmaster, who had control of them while in the yard, and might have been ascertained, upon proper inspection, by the officer or agent of the company charged with the duty of keeping them in repair, yet nothing was done to repair either brakes or cars. It was held that in such circumstances, the company had not exercised ordinary care to keep the cars and brakes in good condition; and that, therefore, under the provisions of the statute, the company was bound to indemnify the plaintiff. New England R. Co. *v.* Conroy, 175 U. S. 323, 334, 44 L. Ed. 181, overruling Chicago, etc., R. Co. *v.* Ross, 112 U. S. 377, 28 L. Ed. 787.

85. Under the mining act of Illinois of 1899, as construed by the supreme court of the state a mine manager and a mine examiner are vice principals of the mine owner, and are engaged in the performance of duties which the owner cannot delegate to others in such manner as to relieve himself from responsibility. Wilmington Star Min. Co. *v.* Fulton, 205 U. S. 60, 72, 51 L. Ed. 708.

86. Iowa.—Under § 1307 of the Iowa Code the wrongs for which a railroad company is to be liable must be wrongs connected with the use and operation of the railway on or about which the employees are employed. This statute is not confined to employees engaged in operating and moving trains and who are injured by such trains, and employees who, while in the discharge of their duty, are injured by trains used in operating the railway. Chicago, etc., R. Co. *v.* Artery, 137 U. S. 507, 511, 34 L. Ed. 747.

An injury to an employee riding on or propelling a handcar, resulting from the negligence of a coemployee in the management and running of the handcar, falls within the provisions of the statute of Iowa on this subject. Chicago, etc., R. Co. *v.* Artery, 137 U. S. 507, 34 L. Ed. 747.

In Chicago, etc., Railway *v.* McLaughlin, 119 U. S. 566, 30 L. Ed. 477, a judgment in favor of A, who was engaged as a car repairer, and injured at a side track while upon a ladder, which rested against a car he was repairing, by order of his immediate superior, by being thrown from the ladder as a result of the car's being struck by a switching engine and car, was affirmed by a divided court. The suit was brought under § 1307, Code of Iowa, 1873.

87. Kansas.—Missouri Pac. R. Co. *v.* Mackey, 127 U. S. 205, 32 L. Ed. 107; Minneapolis, etc., R. Co. *v.* Beckwith, 129 U. S. 26, 32, 32 L. Ed. 585.

In Chicago, etc., R. Co. *v.* Pontius, 157 U. S. 209, 39 L. Ed. 675, a bridge carpenter, employed by a railroad company, who was injured through the negligence of employees of the company while assisting in loading timber, taken from the false work used in constructing a bridge, on a car for transportation to another point on the company's road, was held to be an employee of the company within the meaning of the statute of Kansas, and the validity of that act was again affirmed. Tullis *v.* Lake Erie, etc., R. Co., 175 U. S. 348, 352, 44 L. Ed. 192, reaffirmed in St. Louis Merchants', etc., R. Co. *v.* Callahan, 194 U. S. 628, 48 L. Ed. 1157.

A bridge carpenter employed by a railroad and engaged at the time the accident occurred, not in building a bridge but in loading timber on a car for transportation over the line of defendant's road, is an employee of the company while so engaged, within the meaning of § 93, ch. 23, 1 Kan. Gen. Stat. 1889, p. 415. "Every railroad company organized or doing business in this state shall be liable for all damages done to any employee of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees to any persons sustaining such damage." "The mere fact that the plaintiff's regular employment was as a bridge carpenter does not affect the case, nor does it matter that the road was newly constructed, nor whether it was in regular operation or not. The injury happened to the plaintiff while he was engaged in labor directly connected with the operation of the road, and the statute applies even though it should be given the construction counsel places on it." Chicago, etc., R. Co. *v.* Pontius, 157 U. S. 209, 210, 39 L. Ed. 675.

88. A brakeman brought an action against a railroad company for personal injuries sustained by falling from a car. He based his claim upon negligence in stopping the cars suddenly with knowledge of his position and the slippery condition of the roof of the car, and upon the projection of a nail in the running

A statute requiring warning at crossings does not supersede the fellow-servant doctrine.[89]

A statute regulating the liability of ships for injuries to persons or property does not supersede the fellow-servant doctrine.[90]

IV. Actions.

A. What Law Governs.—In an action for injuries to a servant resulting from negligence of a coemployee the application of the fellow-servant doctrine depends upon the law of the place where the injury occurred or cause of action arose and not on the lex fori unless such law is in conflict with the public policy of the latter state.[91]

Law Applied by Federal Courts.—See the title COURTS, vol. 4, p. 1096.

B. Questions of Law and Fact.—Contributory Negligence.—See post, "Evidence," IV, C.

C. Evidence.—Burden of Proof and Presumptions.—Prima facie, the common master is not liable for the negligence of one of his servants which has resulted in an injury to a fellow servant.[92]

Contributory Negligence.—As a general rule the burden of proof of contributory negligence upon the part of an injured fellow servant is upon the master.[93]

FELONIOUSLY.—See the title INDICTMENTS, INFORMATIONS, PRESENTMENTS AND COMPLAINTS.

FELONY.—See the titles CRIMINAL LAW, vol. 5, p. 65; EXTRADITION, ante, p. 215.

FEME COVERT OR FEME SOLE.—See the title HUSBAND AND WIFE.

FENCE LAW.—See the title ANIMALS, vol. 1, p. 321.

board, which increased the danger and contributed to his fall. It was held that by the statute of Texas if there was negligence, the fact that it was the negligence of a fellow servant was not a defense. Texas, etc., R. Co. *v.* Behymer, 189 U. S. 468, 47 L. Ed. 905.

It was the special duty of the foreman of a bridge gang to see that the track was clear for an approaching train, although it was also the duty of a man using tools when he got through with them to put them out of the way where a train would not strike them, and to see that the track was clear. A member of a bridge gang repairing a bridge was injured by being hit by a spike maul which had been left on the track through the negligence of the foreman and which was struck by the train and hurled with great force against the injured workman. It was held that the neglect of the foreman to perform such special duty is under the statute of Texas that of a vice principal and not a fellow servant. Texas, etc., R. Co. *v.* Carlin, 189 U. S. 354, 47 L. Ed. 849.

89. A statute which provides that a bell or whistle shall be placed on every locomotive engine, and shall be rung or sounded by the engineman or fireman sixty rods from any highway crossing, and until the highway is reached, and that "the corporation owning the railroad shall be liable to any person injured for all damages sustained" by reason of neglect so to do, does not make the corporation liable for an injury caused by negligence of the fireman in this respect, to a fellow servant. "It does not supersede the general rule of law which exempts the corporation from liability to its own servants for the fault of their fellow servants." Randall *v* Baltimore, etc., R. Co., 109 U. S. 478, 485, 27 L. Ed. 1003.

90. The Osceola, 189 U. S. 158, 175, 47 L. Ed. 760; Craig *v.* Continental Ins. Co., 141 U. S. 638, 35 L. Ed. 886. See the title SHIPS AND SHIPPING.

91. Minneapolis, etc., R. Co. *v.* Herrick, 127 U. S. 210, 32 L. Ed. 109.

92. Northern Pac. R. Co. *v.* Peterson, 162 U. S. 346, 353, 40 L. Ed. 994, reaffirmed in Northern Pac. R. Co. *v.* Charless, 162 U. S. 359, 40 L. Ed. 999.

93. Contributory negligence.—If the servant of a railroad company who has knowledge of defects in machinery gives notice thereof to the proper officer, and is promised that they shall be remedied, his subsequent use of it, in the well-grounded belief that it will be put in proper condition within a reasonable time, does not necessarily, or as matter of law, make him guilty of contributory negligence. It is a question for the jury whether, in relying upon such promise, and using the machinery after he knew its defective or insufficient condition, he was in the exercise of due care. The burden of proof, in such a case, is upon the company to show contributory negligence. Hough *v.* Railway Co., 100 U. S. 213, 25 L. Ed. 612.

FENCES.

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As to unlawful enclosure of public lands, see the title PUBLIC LANDS. As to right to build very high fences—spite fences—see the title ADJOINING LANDOWNERS, vol. 1, p. 117.

I. Definition, Nature and Object.

Definition.—A fence is a line of obstacle.[1]

Object.—See post, "In General," II, B, 1.

An "Improvement."—See post, "Taxation," III.

II. Obligation to Erect and Maintain.

A. Against Trespassing Live Stock—1. COMMON-LAW DOCTRINE AND ITS ADOPTION IN THE UNITED STATES.—See the title ANIMALS, vol. 1, p. 320.

Railroads.—See the title RAILROADS.

2. UNDER FENCE LAWS—a. *In General.*—Nearly all the states in early days had what was called the fence law, and such laws still exist in part of the states.[2]

b. *Sufficiency of Fence.*—See the title ANIMALS, vol. 1, p. 321.

c. *Railroads.*—See the title RAILROADS.

d. *Mining Property.*—See post, "Mining Pits, Shafts, Slack Piles, etc.," II, B, 3.

B. In Circumstances Where the Public Safety Requires—1. IN GENERAL.—In circumstances where the public safety requires a precaution as a fence to prevent danger to strangers not themselves in fault, the omission of it is negli-

1. **Definition.**—See Hayes *v.* Michigan Cent. R. Co., 111 U. S. 228, 28 L. Ed. 410.

2. Buford *v.* Houtz, 133 U. S. 320, 328, 33 L. Ed. 618. See the title ANIMALS, vol. 1, p. 321.

Texas has a fence law. Texas Rev. Stat., art. 2431; Lazarus *v.* Phelps, 152 U. S. 81, 84, 38 L. Ed. 363.

Utah.—The territory of Utah has now, and has always had, a similar statute. Section 2234 of the Compiled Laws of Utah, 1888, Vol. 1, p. 789. Buford *v.* Houtz, 133 U. S. 320, 328, 33 L. Ed. 618.

Adoption by vote of county, etc.—In part of the states the question whether the common-law rule or a state fence law shall prevail is determined by the vote of the county or other subdivision

gence; and it is a question of fact for a jury, whether the circumstances exist which create such a duty.[3] This principle has been recognized and applied in cases of collisions at crossings of railroads and public highways;[4] and in other cases than those of the actual coincidence, at crossings, of public highways,[5] as, for instance, where the proprietor or occupier of land makes an excavation on his own land but adjoining a public highway, rendering the way unsafe to those who use it with ordinary care,[6] and of a railroad failing to fence its track within the limits of a city or a public park.[7] These cases all rest on the common-law rule that when there are different public easements to be enjoyed by two parties at the same time and in the same place, each must use his privilege with due care, so as not to injure the other.[8] As the ground of liability in these cases is that of a public nuisance, causing special injury, the rule, of course, does not apply where the structure complained of on the defendant's property, and the mode of its use, are authorized by law.[9]

2. Railroads.—See the title Railroads.

3. Mining Pits, Shafts, Slack Piles, etc.—A statute of Colorado compels owners of coal mines to fence their slack piles and abandoned pits or shafts.[10]

of the state. Buford *v.* Houtz, 133 U. S. 320, 329, 33 L. Ed. 618.

3. Hayes *v.* Michigan Cent. R. Co., 111 U. S. 228, 235, 28 L. Ed. 410.

One at least of the objects for which a gate or stile is required is to warn people of what is before them and to make them pause before reaching a dangerous place. Hayes *v.* Michigan Cent. R. Co., 111 U. S. 228, 241, 28 L. Ed. 410.

A fence between public highways or grounds, such as a park, and a dangerous place serves, at least, as notice and signal of danger, if not as an obstacle and a prevention. For young children, such an impediment to straying might prove of value and importance in obtaining the security of their persons. Hayes *v.* Michigan Cent. R. Co., 111 U. S. 228, 239, 28 L. Ed. 410.

4. Hayes *v.* Michigan Cent. R. Co., 111 U. S. 228, 235, 28 L. Ed. 410. See the titles CROSSINGS, vol. 5, p. 149; RAILROADS.

5. Hayes *v.* Michigan Cent. R. Co., 111 U. S. 228, 235, 28 L. Ed. 410.

6. The proprietor and occupier of land making an excavation on his own land, but adjoining a public highway, rendering the way unsafe to those who use it with ordinary care, is guilty of negligence if he omit to provide a fence, barrier or railing requisite to make the way itself safe and convenient; and guilty of a public nuisance, even though the danger consisted in the risk of accidentally deviating from the road, and liable to an action for damages to one injured by reason thereof; for the danger thus created may reasonably deter prudent persons from using the way, and thus the full enjoyment of it by the public is, in effect, as much impeded as in the case of an ordinary nuisance to a highway. This doctrine has always been recognized in England, and it has also been generally adopted in this country. Hayes *v.* Michigan Cent. R. Co., 111 U. S. 228, 28 L. Ed. 410.

"The enforcement of this rule in regard to excavations made by proprietors of lots adjacent to streets and public grounds in cities and towns, in the prosecution of building enterprises, and in the construction of permanent areas for cellar ways, is universally recognized as an obvious and salutary exercise of the common police powers of municipal government; and the omission to provide barriers and signals, prescribed by ordinance in such cases for the safety of individuals in the use of thoroughfares, is a failure of duty, charged with all the consequences of negligence, including that of liability for personal injuries of which it is the responsible cause. The true test is, as said by Hoar, J., in Alger *v.* City of Lowell, 3 Allen 402, 'not whether the dangerous place is outside of the way, or whether some small slip of ground not included in the way must be traversed in reaching the danger, but whether there is such a risk of a traveler, using ordinary care, in passing along the street, being thrown or falling into the dangerous place, that a railing is requisite to make the way itself safe and convenient.'" Hayes *v.* Michigan Cent. R. Co., 111 U. S. 228, 236, 28 L. Ed. 410. See the titles NEGLIGENCE; STREETS AND HIGHWAYS.

7. See the title RAILROADS.

8. Basis of rule.—Hayes *v.* Michigan Cent. R. Co., 111 U. S. 228, 235, 28 L. Ed. 410.

9. Hayes *v.* Michigan Cent. R. Co., 111 U. S. 228, 236, 28 L. Ed. 410. See the title NUISANCES.

10. Mining pits, slack files, etc.—Union Pac. R. Co. *v.* McDonald, 152 U. S. 262, 266, 38 L. Ed. 434.

A railroad company operated a coal mine near one of its depots in Colorado. It had a slack pit near such depot. The surface of the slack pit was a mere covering of ashes, sufficient in depth to conceal from view the fire underneath. The company's agents and officers had knowl-

III. Taxation.

Under the laws of California fences must be assessed separately from the land as an improvement thereon.[11]

FEOFFMENT.—See the title DEEDS, vol. 5, p. 252.

FERÆ NATURÆ.—See the title ANIMALS, vol. 1, p. 317.

FERMENTED LIQUORS.—In common parlance, spirituous liquor means distilled liquor. Fermented liquor, though intoxicating, is not spirituous.[1]

FERRIES.

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edge of the existence of this slack pit and its dangerous condition. The slack pit had no fence around it, nor was it guarded in any way, although a statute of Colorado required it to be fenced in such manner as to prevent loose cattle or horses from having access to it. The plaintiff, a lad about twelve years of age, who had no knowledge of the slack pit, being frightened by employees of the company, ran along a narrow uneven foot path extending from the coal mine to the depot and close to the slack pit, and in attempting to pass some persons on the bank near the edge of the pit, fell into the burning slack, and was badly burned. Suit was brought against the railway company to recover damages for the injuries thus sustained. It was held that the failure of the company to put a fence around the slack pit as required by the statute of Colorado was negligence and the plaintiff could recover for personal injuries sustained by him by reason thereof. Union Pac. R. Co. *v.* McDonald, 152 U. S. 262, 38 L. Ed. 434.

11. The constitution of California provides that "land and improvements thereon shall be separately assessed." Art. XIII, § 2. The political code of that state expressly declares that the term "improvements" includes "fences." Section 3617. Taxes on fences must therefore be separately assessed. Santa Clara County *v.* Southern Pac. R. Co., 118 U. S. 394, 412, 30 L. Ed. 118. See the title TAXATION.

Railroad fences.—See the titles RAILROADS; TAXATION.

1. Fermented liquors.—Sarlis *v.* United States, 152 U. S. 570, 573, 38 L. Ed. 556. See, generally, the title INTOXICATING LIQUORS.

I. Definition, Nature and Purpose.

A ferry in a strict technical sense is a continuation of the highway from one side of the water over which it passes to the other, and is for transportation of passengers or of travelers with their teams and vehicles and such other property as they may carry or have with them.[1]

A ferry which is designed for the transportation of railroad cars only is unlike an ordinary ferry for the transportation across a river of persons, animals and freight, at intervals more or less regular, for fare or toll.[2]

Ancient ferries are ferries by prescription or a presumed grant.[3]

Nature of Franchise.—See post, "Nature and Extent of Franchise or Right," II, E.

II. Establishment, Maintenance and Operation.

A. Right of Individual to Establish.—No individual without a license can establish a ferry for general travel,[4] for it is a well-settled principle of common law that no man may set up a ferry for all passengers, without prescription, time out of mind, or a charter from the king.[5] He may make a ferry for his own use, or the use of his family, but not for the common use of all the king's subjects passing that way, because it doth in consequence tend to a common charge, and is become a thing of public interest and use;[6] and every man for his passage pays a toll, which is a common charge.[7] Every ferry ought to be under a public regulation,[8] viz, that it give attendance at due times, keep a boat in due order, and take but reasonable toll; for if the owner fail in these he is finable.[9]

Indictment for Neglect to Operate Ferry.—The owner of a ferry franchise is indictable for neglect to operate the ferry.[10]

B. Power to Establish or Grant Franchise and Mode of Exercise—1. In General.—The power of the states to regulate matters of internal police includes the establishment of ferries, entirely within the state.[11]

1. St. Clair County *v.* Interstate, etc., Transfer Co., 192 U. S. 454, 466, 48 L. Ed. 513.

"In a strict sense the ferry business is confined to the transportation of persons with or without their property, and a ferryman carrying on only a ferry business is bound to transport in no other way." St. Clair County *v.* Interstate, etc., Transfer Co., 192 U. S. 454, 467, 48 L. Ed. 518.

2. **Ferry for transportation of railroad cars.**—St. Clair County *v.* Interstate, etc., Transfer Co., 192 U. S. 454, 468, 48 L. Ed. 518. See the title INTERSTATE AND FOREIGN COMMERCE.

3. Charles River Bridge Co. *v.* Warren Bridge, 11 Pet. 420, 583t, 9 L. Ed. 773.

4. The Binghamton Bridge, 3 Wall. 51, 81, 18 L. Ed. 137; Munn *v.* Illinois, 94 U. S. 113, 126, 24 L. Ed. 77.

In the United States the right of ferry exists only by legislative grant. Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 583t, 9 L. Ed. 773.

5. The Binghamton Bridge, 3 Wall. 51, 81, 18 L. Ed. 137; Munn *v.* Illinois, 94 U. S. 113, 126, 24 L. Ed. 77; Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 583q, 9 L. Ed. 773.

6. The Binghamton Bridge, 3 Wall. 51, 81, 18 L. Ed. 137; Munn *v.* Illinois, 94 U. S. 113, 126, 24 L. Ed. 77. See Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 583u, 9 L. Ed. 773.

Riparian proprietor.—So if one owns the soil and landing places on both banks of a stream, he cannot use them for the purposes of a public ferry, except upon such terms and conditions as the body politic may from time to time impose; and this because the common good requires that all public ways shall be under the control of the public authorities. This privilege or prerogative of the king, who in this connection only represents and gives another name to the body politic, is not primarily for his profit, but for the protection of the people and the promotion of the general welfare. Munn *v.* Illinois, 94 U. S. 113, 126, 24 L. Ed. 77.

7. Munn *v.* Illinois, 94 U. S. 113, 126, 24 L. Ed. 77.

8. The Binghamton Bridge, 3 Wall. 51, 81, 18 L. Ed. 137; Munn *v.* Illinois, 94 U. S. 113, 126, 24 L. Ed. 77. See post, "Regulation and Control," II, I.

9. Munn *v.* Illinois, 94 U. S. 113, 126, 24 L. Ed. 77.

The proprietor of a ferry franchise is bound to maintain the ferry for the use of the public. Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 639, 9 L. Ed. 773.

10. Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 639, 9 L. Ed. 773.

11. **Power to grant franchise.**—Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 215, 29 L. Ed. 158. See Gibbons *v.* Ogden, 9 Wheat. 1, 6 L. Ed. 23; St. Clair

Ferries between One of the States and a Foreign Country.—See the title INTERSTATE AND FOREIGN COMMERCE.

Ferries over Waters Separating States.—See the title INTERSTATE AND FOREIGN COMMERCE.

Ferry Not Extending across River.—See post, "Nature and Extent of Franchise or Right," II, E.

2. EXCLUSIVE FRANCHISE.—**At common law** the exclusive franchise to operate a ferry within designated limits might be conferred upon a particular person or persons.[12]

The legislature has the power to license ferries, and so to regulate them, that no rival ferries can be established within certain fixed distances.[13]

The United States have not in any manner attempted to interfere with the power of a state to grant exclusive ferry privileges across public waters between places within its own jurisdiction.[14]

Municipal Corporations.—If the legislature has aliened to a municipal corporation its whole power to establish and regulate ferries within the limits of the latter, the municipal body, in respect to this legislative or public trust, represents the former, or sovereign power, and may make grants of ferry rights in as ample a manner as the legislature;[15] but where the simple power to establish and regulate ferries within the corporate limits is conferred upon a municipal corporation, the corporation itself does not possess an exclusive power, and therefore cannot grant exclusive ferry rights to others.[16]

Power of Courts.—The power of a court to grant exclusive ferry privileges depends upon the laws of the particular states.[17]

Construction of Grants.—Exclusive rights to ferry franchises will never be presumed. Such right must be clearly expressed or necessarily implied.[18] In the absence of an express prohibition in the grant of a ferry franchise against the creation of rival ferries, or the construction of bridges, the legislature may grant rival ferry franchises or authorize the construction of free or toll bridges near an existing ferry, although the effect of so doing impairs or destroys the value of the existing franchises.[19]

County *v.* Interstate, etc., Transfer Co., 192 U. S. 454, 48 L. Ed. 518; Conway *v.* Taylor, 1 Black 603, 17 L. Ed. 191; Fanning *v.* Gregoire, 16 How. 524, 14 L. Ed. 1043.

12. **Exclusive franchise.**—St. Clair County *v.* Interstate, etc., Transfer Co., 192 U. S. 454, 467, 48 L. Ed. 518.

13. **Power of legislature.**—The Binghamton Bridge, 3 Wall. 51, 81, 18 L. Ed. 137; Minturn *v.* Larue, 23 How. 435, 16 L. Ed. 574.

14. **Power of United States.**—Starin *v.* New York, 115 U. S. 248, 258, 29 L. Ed. 388.

15. **Power of municipality.**—Minturn *v.* Larue, 23 How. 435, 16 L. Ed. 574.

16. Minturn *v.* Larue, 23 How. 435, 437, 16 L. Ed. 574.

Where the charter of a town or city which conferred upon the corporation power to regulate ferries, did not give an exclusive power, the corporation did not possess the power to confer upon others an exclusive privilege to establish them. So held as to the town, now city, of Oakland, in California. Minturn *v.* Larue, 23 How. 435, 16 L. Ed. 574.

17. **Inferior courts of Georgia.**—The legislature of Georgia has not conferred on the inferior courts of its several counties the power of contracting away the right of the state to establish such ferries in a particular locality as the everchanging wants of the public should in the progress of time require. It gave these courts the right to establish ferries but not to tie the hands of the public in respect to its future necessities. The right to establish one ferry and fix its rate of toll does not imply a power to bind the state or its instrumentalities not to establish another in case of necessity. Wright *v.* Nagle, 101 U. S. 791, 796, 25 L. Ed. 921.

18. Wright *v.* Nagle, 101 U. S. 791, 796, 25 L. Ed. 921; Fanning *v.* Gregoire, 16 How. 524, 14 L. Ed. 1043. See ante, "Exclusive Franchise," II, B, 2.

19. Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 9 L. Ed. 773; East Hartford *v.* Hartford Bridge Co., 10 How. 511, 13 L. Ed. 518; Fanning *v.* Gregoire, 16 How. 524, 14 L. Ed. 1043; Wheeling, etc., Bridge Co. *v.* Wheeling Bridge Co., 138 U. S. 287, 293, 34 L. Ed. 967. See post, "Termination of Right," II, H.

In 1838, the legislature of the territory of Iowa authorized Fanning, his heirs and assigns, to establish and keep a ferry across the Mississippi river, at the town of Dubuque, for the term of twenty

3. Delegation of Power by Legislature.—The delegation of power to license ferries to subordinate or inferior bodies does not deprive the legislature of the power of licensing ferries by direct legislation.[20]

4. Mode of Exercise.—**City Council.**—If a city council has the power to grant a ferry franchise it is not necessary that the council act by an ordinance in making such grant, but a contract made by the mayor under the sanction of the council is a valid exercise of the power.[21]

C. Persons to Whom Franchise Grantable.—Under the laws of Kentucky a ferry franchise is grantable only to riparian owners.[22]

D. Construction of Grant.—Nothing Passes by Implication.—In the grant of a ferry franchise by the sovereign power, the rule of construction is, that if the meaning of the words be doubtful, they shall be taken most strongly against the grantee and for the government, and therefore should not be extended by implication beyond the natural and obvious meaning of the words; and if these do not support the claim, it must fall.[23]

Interpretation Giving Grant Effect Adopted.—If the grant admits of two interpretations, one of which is more extended, and the other more restricted, so that a choice is fairly open, and either may be adopted without any violation of the apparent objects of the grant, if, in such case, one interpretation would render the grant inoperative, and the other would give it force and effect, the latter, if within a reasonable construction of the terms employed, should be adopted.[24]

Grant as a Contract.—The grant of a ferry franchise as a rule constitutes a contract between the state and the grantee, which is within the protection of the provision of the federal constitution prohibiting the states from passing any

years; and enacted further, that no court or board of county commissioners should authorize any person to keep a ferry within the limits of the town of Dubuque. In 1840, Fanning was authorized to keep a horse ferry boat instead of a steamboat. In 1847, the general assembly of the state of Iowa passed an act to incorporate the city of Dubuque, the fifteenth section of which enacted that the "city council shall have power to license and establish ferries across the Mississippi river, from said city to the opposite shore, and to fix the rates of the same." In 1851, the mayor of Dubuque, acting by the authority of the city council, granted a license to Gregoire (whose agent Bogg was) to keep a ferry for six years from the 1st of April, 1852, upon certain payments and conditions. The right granted to Fanning was not exclusive of such a license as this. The prohibition to license another ferry did not extend to the legislature, nor to the city council, to whom the legislature had delegated its power. Nor was it necessary for the city council to act by an ordinance in the case, corporations can make contracts through their agents without the formalities which the old rules of law required. Fanning *v.* Gregoire, 16 How. 524, 14 L. Ed. 1043.

20. Wright *v.* Nagle, 101 U. S. 791, 25 L. Ed. 921. See ante, "Exclusive Franchise," II, B, 2.

21. Fanning *v.* Gregoire, 16 How. 524, 14 L. Ed. 1041.

22. Persons to whom grantable.—Conway *v.* Taylor, 1 Black 603, 629, 17 L. Ed. 191.

23. Mills *v.* St. Clair County, 8 How. 569, 12 L. Ed. 1201; Minturn *v.* Larue, 23 How. 435, 437, 16 L. Ed. 574. See, also, Fanning *v.* Gregoire, 16 How. 524, 534, 14 L. Ed. 1043; Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 583, 9 L. Ed. 773; Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 365, 371, 27 L. Ed. 419.

Thus an exclusive right must be clearly expressed or necessarily inferred. Fanning *v.* Gregoire, 16 How. 524, 14 L. Ed. 1043; Minturn *v.* Larue, 23 How. 435, 437, 16 L. Ed. 574.

24. Mills *v.* St. Clair County, 8 How. 569, 581, 12 L. Ed. 1201.

In the year 1819, the legislature of Illinois authorized Samuel Wiggins, his heirs and assigns, to establish a ferry on the east bank of the River Mississippi, near the town of Illinois, and to run the same from lands "that may belong to him," provided the ferry should be put into actual operation within eighteen months. At this time he had no land, but within the eighteen months acquired an interest in a tract of one hundred acres. In 1821, another act was passed, authorizing him to remove the ferry "on any land that may belong to him" on the said Mississippi River, under the same privileges as were prescribed by the former act. The words of this act, "on any land that may belong to him," must be construed to apply to the lands which then belonged to him, and not to such as he obtained after the passage of the act, viz, in 1822. Mills *v.* St. Clair County, 8 How. 569, 12 L. Ed. 1201.

law impairing the obligation of contracts.[25] The grant of a ferry franchise to a municipality is not within the protection of such constitutional provision.[26] As to exclusiveness of franchise, see ante, "Exclusive Franchise," II, B, 2.

E. Nature and Extent of Franchise or Right.—A ferry franchise is property entitled to the protection of the law. The privilege of establishing a ferry and taking tolls for the use of the same is a franchise, and belongs to the class of estates called incorporeal hereditaments;[27] and an estate in such a franchise, and an estate in land, rest upon the same principle,[28] being equally grants of a right or privilege for an adequate consideration.[29]

Extent.—At Common Law.—The franchise of a ferry extends beyond the landing places.[30]

A ferry is in respect of the landing place, and not of the water. The water may be to one and the ferry to another.[31]

A license to establish a ferry which does not extend across the river may be less valuable for that reason, but not less valid as far as it goes.[32]

Interstate Ferries.—See the title INTERSTATE AND FOREIGN COMMERCE.

F. Infringement of or Interference with Franchise or Right—1. WHAT CONSTITUTES.—A general act forbidding county courts to license additional ferries is not infringed by a subsequent act giving special right to a single county court to establish a particular ferry. No promise made by the legislature by the first act is broken by the second.[33] An act licensing a ferry and forbidding any

25. Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 9 L. Ed. 773; East Hartford *v.* Hartford Bridge Co., 10 How. 511, 13 L. Ed. 518.

26. In East Hartford *v.* Hartford Bridge Co., 10 How. 511, 534, 13 L. Ed. 18, it was held that a grant of a ferry franchise to the town of East Hartford in view of the nature of the subject matter and the character of the parties must be considered rather as public law than as a contract which would prevent the legislature from discontinuing the ferry at will without compensation to the town.

27. **Nature of franchise.**—Louisville, etc., Ferry Co. *v.* Kentucky, 188 U. S. 385, 394, 47 L. Ed. 513; Conway *v.* Taylor, 1 Black 603, 632, 17 L. Ed. 191.

"A ferry franchise is as much property as a rent or any other incorporeal hereditament, or chattels, or realty. It is clothed with the same sanctity and entitled to the same protection as other property." Conway *v.* Taylor, 1 Black 603, 632, 17 L. Ed. 191; Louisville, etc., Ferry Co. *v.* Kentucky, 188 U. S. 385, 395, 47 L. Ed. 513.

"In his Treatise on the American Law of Real Property, Washburn says that the right granted by the legislature, as representing the sovereign power, to carry passengers across streams, or bodies of water, or the arms of the sea, from one point to another, for compensation, is to be deemed a franchise, and belongs to the class of estates called incorporeal hereditaments. 2 Washburn, §§ 1[illegible]2," Louisville, etc., Ferry Co. *v.* Kentucky, 188 U. S. 385, 395, 47 L. Ed. 513.

The right of the widow to have dower assigned to her in a ferry has been recognized. Louisville, etc., Ferry Co. *v.* Kentucky, 188 U. S. 385, 394, 47 L. Ed. 513.

28. Louisville, etc., Ferry Co. *v.* Kentucky, 188 U. S. 385, 394, 47 L. Ed. 513; Conway *v.* Taylor, 1 Black 603, 632, 17 L. Ed. 191.

29. Louisville, etc., Ferry Co. *v.* Kentucky, 188 U. S. 385, 394, 47 L. Ed. 513.

30. Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 556, 9 L. Ed. 773.

Massachusetts.—The rule is the same in Massachusetts. Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 556, 9 L. Ed. 773.

31. **Ferries are in respect of the landing places.**—Conway *v.* Taylor, 1 Black 603, 17 L. Ed. 191; St. Clair County *v.* Interstate, etc., Transfer Co., 192 U. S. 454, 459, 48 L. Ed. 518.

32. **Ferry not extending across river.**—Conway *v.* Taylor, 1 Black 603, 17 L. Ed. 191.

"The privilege of the license may not be as valuable to the grantee, by not extending across the river; but as far as it does extend, he is entitled to all the provisions of the law, the object of which is to secure the exclusive privilege of maintaining a ferry at a designated place." The point has been so ruled in a large number of cases: Mills *v.* St. Clair County, 8 How. 569, 12 L. Ed. 1201; Fanning *v.* Gregoire, 16 How. 524, 14 L. Ed. 1043. In Fanning *v.* Gregorie, "the arguments on file show that this objection was pressed with learning and ability. In the opinion delivered, the court seems to have assumed the validity of such a license, without in terms adverting to the question. Another question was fully discussed and expressly decided. This point does not appear in the report of the case." Conway *v.* Taylor, 1 Black 603, 630, 17 L. Ed. 191.

33. **What constitutes infringement.**—Williams *v.* Wingo, 177 U. S. 601, 604, 44 L. Ed. 905.

court or board of county commissioners to authorize any person to keep additional ferries within the limits of a town is not infringed by a subsequent act incorporating the town into a city and empowering the city council to license and establish ferries.[34]

Rights of commerce give no authority to their possessor to invade the ferry franchise of another without authority from the holder. The vitality of such a

It was provided by an act of the general assembly of Virginia, Acts 1839-1840, p. 58, ch. 72 "that it shall not be lawful for the court of any county to grant leave to establish a ferry over any watercourses within one-half mile, in a direct line, of any other ferry legally established over the same watercourse." A county court under a special law, passed in 1894, authorizing it to do so, established a ferry within less than half a mile of one established by the plaintiff under a prior license, granted under the general law of 1840. The contention of the plaintiff was that under the laws of Virginia, the license granted to him to establish a ferry created a contract between him and the state to the effect that no other ferry should be established within half a mile, and that the special act of 1894 and the proceedings of the court thereunder impaired the obligation of that contract. It was held that the only effect of the act of 1840, while in force, was to tie the hands of the county court. It operated in no manner as a restraint upon the legislature or as a contract upon its part that the state would not act whenever in its judgment it perceived the necessity for an additional ferry. The fact that in this case the special authority was given to the county court is immaterial. Williams *v.* Wingo, 177 U. S. 601, 603, 44 L. Ed. 905.

In Wheeling, etc., Bridge Co. *v.* Wheeling Bridge Co., 138 U. S. 287, 34 L. Ed. 967, "this very statute of Virginia of 1840 was under consideration, and it was said (p. 292): 'Here the prohibition of the act of 1840 was only upon the county courts, and that in no way affected the legislative power of the state.' The case of The Binghamton Bridge, 3 Wall. 51, 18 L. Ed. 137 is not inconsistent." Williams *v.* Wingo, 177 U. S. 601, 603, 44 L. Ed. 905.

A ferry connecting Wheeling with Wheeling Island was established and maintained for many years, prior to the enactment of a general law by the state of Virginia, prohibiting county courts from licensing other ferries within a half mile in a direct line from an established ferry. In 1847 the defendant bridge company purchased a ferry and its rights. It was held that the general law of Virginia did not grant a perpetual monopoly or exclusive ferry franchise so as to prevent the establishment of rival ferries within the prohibited distance after the repeal of such general law; such law had in it nothing in the nature of a contract but was a gratuitous proceeding on the part of the legislature, by which a certain benefit was conferred upon existing ferries, but not accompanied by any condition that made the act take the character of a contract; and it was further held that the mere purchase by the defendant bridge company of the existing ferry rights and privileges added nothing to them and that the transfer from vendor to vendee gave them no additional force or validity. Wheeling, etc., Bridge Co. *v.* Wheeling Bridge Co., 138 U. S. 287, 292, 34 L. Ed. 967.

34. Fanning *v.* Gregoire, 16 How. 524, 14 L. Ed. 1043. See, also, Wheeling, etc., Bridge Co. *v.* Wheeling Bridge Co., 138 U. S. 287, 34 L. Ed. 967; Williams *v.* Wingo, 177 U. S. 601, 603, 44 L. Ed. 905; St. Clair County *v.* Interstate, etc., Transfer Co., 192 U. S. 454, 459, 48 L. Ed. 518.

In Fanning *v.* Gregoire, 16 How. 524, 14 L. Ed. 1043, the plaintiff was by an act of the Iowa territorial legislature given authority to establish a ferry across the Mississippi River at the then town of Dubuque, and the act also provided that no court or board of county commissioners should authorize any other person to keep a ferry within the limits of the town. The city of Dubuque was thereafter incorporated, and under its general corporate powers entered into a contract with the defendant to run a steam ferryboat across the river. The plaintiff thereupon filed a bill to restrain the defendant from so doing. It was held that the first grant was not exclusive and the bill could not be maintained. Williams *v.* Wingo, 177 U. S. 601, 603, 44 L. Ed. 905.

In Fanning *v.* Gregoire, 16 How. 524, 533, 14 L. Ed. 1043, the court said: "Although the county court and county commissioners were prohibited from granting another license to Dubuque, yet this prohibition did not apply to the legislature: and as it had the power to authorize another ferry, the general authority to the council to 'license and establish ferries across the Mississippi River at the city,' enabled the corporation, in the exercise of its discretion, to grant a license, as the legislature might have done. * * * The restriction on the commissioners of the county does not apply, in terms, to the city council; and the court think it cannot be made to apply by implication." This case was cited with approval in Wheeling, etc., Bridge Co. *v.* Wheeling Bridge Co., 138 U. S. 287, 34 L. Ed. 967; and the above extract from the opinion quoted in Williams *v.* Wingo, 177 U. S. 601, 603, 44 L. Ed. 905. See, also, St. Clair County *v.* Interstate, etc., Transfer Co., 192 U. S. 454, 459, 48 L. Ed. 518.

franchise lies in its exclusiveness. The moment the right becomes common the franchise ceases to exist.[35]

Ferry Designed for Transportation of Railroad Cars.—A ferry franchise is not interfered with by a ferry which is designed for the transportation of railroad cars only.[36]

2. REMEDIES—a. *Action for Damages.*—The act of keeping a public ferry without license being illegal, when done "without lawful authority or warrant," is a nuisance, and case lies for damages consequent upon it, but the action does not lie, if the act, though unlawful, was not an interference with the right of the other, and within the limits of his prescription.[37]

b. *Injunction.*—Injunction lies to restrain continuous infringement or encroachment upon a ferry franchise.[38] An injunction to protect the exclusive privilege to a ferry does not conflict or interfere with the right of a boat to carry passengers or goods in the ordinary prosecution of commerce without the regularity or purpose of ferry trips; that remedy applies only to one which is run openly and avowedly as a ferry boat.[39]

G. Right to Collect Toll.—See ante, "Right of Individual to Establish," II, A.

H. Termination of Right.—Eminent Domain.—A ferry franchise is subject to the right of eminent domain in the state and may be condemned and taken on just compensation being made therefor.[40]

Abandonment and Assertion of Adverse Rights or User.—An exclusive right to maintain a ferry may be lost by abandonment, and the assertion of an adverse right or user by another person,[41] or by surrender.[42]

Grant of Bridge Franchise in Lieu of Ferry Right.—The authority of a legislature may probably supersede such a ferry as is public, and across a great public highway of a navigable river, by allowing a bridge over the same place.[43]

35. Conway *v.* Taylor, 1 Black 603, 634, 17 L. Ed. 191.

36. St. Clair County *v.* Interstate, etc., Transfer Co., 192 U. S. 454, 468, 48 L. Ed. 518.

The transportation of railroad cars—whether loaded or unloaded—across the Mississippi River is not the maintenance of a ferry in the proper sense of that term, and such business is essentially interstate commerce. St. Clair County *v.* Interstate, etc., Transfer Co., 192 U. S. 454, 468, 48 L. Ed. 518. See, also, Conway *v.* Taylor, 1 Black 603, 17 L. Ed. 191. See the title INTERSTATE AND FOREIGN COMMERCE.

37. Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 583, 9 L. Ed. 773.

38. East Hartford *v.* Hartford Bridge Co., 10 How. 511, 13 L. Ed. 518.

A town, having without legal authority exercised a ferry privilege to the special injury of a bridge company, should be restrained by injunction at the suit of such bridge company from exercising it longer. East Hartford *v.* Hartford Bridge Co., 10 How. 511, 539, 13 L. Ed. 518.

39. Conway *v.* Taylor, 1 Black 603, 17 L. Ed. 191.

40. Eminent domain.—The West River Bridge Co. *v.* Dix, 6 How. 507, 534, 12 L. Ed. 535. See the title EMINENT DOMAIN, vol. 5, p. 746.

41. Abandonment.—Charles River Bridge Co. *v.* Warren Bridge Co., 11 Pet. 420, 541, 556, 9 L. Ed. 773.

The agent of the original riparian owner resided in the immediate neighborhood and had knowledge of the existence of a ferry under a public statute, for thirty-eight years, after which the original owner brought suit to enjoin the operation of the ferry and for an account of profits. It was held that it is too late for the original owners to interfere with the ferry right. Bowman *v.* Wathen, 1 How. 189, 195, 11 L. Ed. 97.

42. Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 9 L. Ed. 773.

43. East Hartford *v.* Hartford Bridge Co., 10 How. 511, 536, 13 L. Ed. 518; Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 422, 9 L. Ed. 773; The West River Bridge Co. *v.* Dix, 6 How. 507, 12 L. Ed. 535. See ante, "Construction of Grant," II, D.

Where a franchise to erect a bridge in lieu of and in the very place where a ferry exists is granted, the ferry franchise is entirely extinguished or superseded and not in obeyance. Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 541, 9 L. Ed. 773.

From the year 1681 to 1783, a franchise in the ferry over the Connecticut River belonged to the town of Hartford, situated on the west bank of the river. In 1783, the legislature incorporated the town of East Hartford, and granted to it one-half of the ferry during the pleasure of the general assembly. In 1802, a company was incorporated to build a bridge

Franchise Exercised by Municipality.—A ferry privilege to be exercised by a town as a mere public license may be discontinued by the legislature at any time.[44]

I. Laws Applicable, Regulation and Control.—The common law as to ferries was adopted and prevails in most of the states of the United States.[45]

Regulation and Control.—Ferries are subject to public regulation.[46] A state may regulate ferries under its police powers.[47]

Municipality.—A state may delegate its power to regulate ferries to a municipal corporation.[48]

J. Taxation or Imposition of License Fee.—A state has power to impose a license fee, either directly or through one of its municipal corporations, upon ferry keepers in the state.[49] When a state expressly grants to an incorporated city, the power "to license, tax and regulate ferries," the latter may impose a license tax on the keeper of ferries.[50]

Interstate Ferries.—See the title INTERSTATE AND FOREIGN COMMERCE.

FERRY BRIDGE.—A ferry bridge is generally a floating structure, hinged or chained to a wharf.[1]

across the river, which, being erected, was injured and rebuilt in 1818, when the legislature resolved that the ferry should be discontinued. This act, discontinuing the ferry, is not inconsistent with that part of the constitution of the United States which forbids the states from passing any law impairing the obligation of contracts. There was no contract between the state and the town of East Hartford, by which the latter could claim a permanent right to the ferry. The nature of the subject matter of the grant, and the character of the parties to it, both show that it is not such a contract as is beyond the interference of the legislature. Besides, the town of East Hartford only held the ferry right during the pleasure of the general assembly, and in 1818 the latter expressed its pleasure that the ferry should cease. East Hartford *v.* Hartford Bridge Co., 10 How. 511, 13 L. Ed. 518.

In Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 9 L. Ed. 773, it was held, upon the facts of that case, that the ferry right which was owned by the grantee of a ferry franchise, was extinguished by the building of a bridge where the ferry had formerly been; the ferry, with all its privileges, was then at an end forever, and a compensation in money given in lieu of it.

44. East Hartford *v.* Hartford Bridge Co., 10 How. 511, 536, 13 L. Ed. 518.

45. Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 583f, 9 L. Ed. 773.

Massachusetts.—The common law prevails in Massachusetts. Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 583f, 9 L. Ed. 773.

46. The Binghamton Bridge, 3 Wall. 51, 81, 18 L. Ed. 137; Munn *v.* Illinois, 94 U. S. 113, 126, 24 L. Ed. 77; St. Clair County *v.* Interstate, etc., Transfer Co., 192 U. S. 454, 48 L. Ed. 518.

47. Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 365, 27 L. Ed. 419.

A ferry growing out of the local necessities and the public interest in its operation, is subject to local control. St. Clair County *v.* Interstate, etc., Transfer Co., 192 U. S. 454, 466, 48 L. Ed. 518.

Laws which respect ferries are part of the immense mass of legislation which embraces everything within the territory of a state not surrendered to the general government; all of which can be most advantageously exercised by the states themselves. Conway *v.* Talyor, 1 Black 603, 633, 17 L. Ed. 191; Gibbons *v.* Ogden, 9 Wheat. 1, 6 L. Ed. 23.

Laws respecting ferries entirely within a state, are within the undelegated powers reserved to the state respectively. Gibbons *v.* Ogden, 9 Wheat. 1, 6 L. Ed. 23; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 215, 29 L. Ed. 158. See St. Clair County *v.* Interstate, etc., Transfer Co., 192 U. S. 454, 48 L. Ed. 518; Conway *v.* Taylor, 1 Black 603, 17 L. Ed. 191; Fanning *v.* Gregoire, 16 How. 524, 14 L. Ed. 1043.

Interstate ferries.—See the title INTERSTATE AND FOREIGN COMMERCE.

48. Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 365, 27 L. Ed. 419.

49. Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 365, 27 L. Ed. 419; Covington, etc., Bridge Co. *v.* Kentucky, 154 U. S. 204, 220, 38 L. Ed. 962.

50. Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 365, 374, 27 L. Ed. 419; Ficklen *v.* Shelby County Taxing District, 145 U. S. 1, 23, 36 L. Ed. 601.

The exaction of a license fee is an ordinary exercise of police power by municipal corporations. Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 365, 376, 27 L. Ed. 419; Postal Tel. Cable Co. *v.* Charleston, 153 U. S. 692, 695, 38 L. Ed. 871.

1. Cope *v.* Vallett Dry Dock Co., 119 U. S. 625, 627, 30 L. Ed. 501.

FERTILIZERS.—As to amendment of charter of fertilizer company, see the title CORPORATIONS, vol. 4, p. 621. As to state regulations in regard to fertilizers, see the title INSPECTION LAWS.

FICTIONS.—See the title EJECTMENT, vol. 5, p. 698.

FICTITIOUS SUITS.—See the titles APPEAL AND ERROR, vol. 2, p. 293; CONTEMPT, vol. 4, p. 531; EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL, ante, p. 1. As to dismissal on appeal because of fictitious suit, see the title APPEAL AND ERROR, vol. 2, p. 293. As constituting contempt of court, see the titles APPEAL AND ERROR, vol. 2, p. 300; CONTEMPT, vol. 4, p. 537.

FIDELITY AND GUARANTY INSURANCE.—See the titles OFFICERS AND AGENTS OF PRIVATE CORPORATIONS; PUBLIC OFFICERS; PRINCIPAL AND SURETY. As to questions connected with liability on bank officers bond, see the title BANKS AND BANKING, vol. 3, p. 102.

FIDUCIARIES.—See the titles EXECUTORS AND ADMINISTRATORS, ante, p. 119; GUARDIAN AND WARD; TRUSTS AND TRUSTEES.

FIDUCIARY CAPACITY.—See the title BANKRUPTCY, vol. 2, p. 865.

FIDUCIARY RELATION.—A fiduciary relationship is one in which, if a wrong arise, the same remedy exists against the wrongdoer on behalf of the principal as would exist against a trustee on behalf of the cestui que trust.[1]

FIERI FACIAS.—See the title EXECUTIONS, ante, p. 84.

FILE.—See note 2.

FILING PLEADINGS AND PAPERS.—As to filing particular pleadings and papers, see the titles ADMIRALTY, vol. 1, p. 163, et seq.; AFFIDAVITS, vol. 1, p. 202; AMENDMENTS, vol. 1, p. 302; APPEAL AND ERROR, vol. 2, pp. 183, 269; BILL OF REVIEW, vol. 2, p. 250; CHATTEL MORTGAGES, vol. 3, p. 711; CLERKS OF COURT, vol. 3, p. 859; DISCOVERY, vol. 5, p. 350; EQUITY, vol. 5, p. 803; EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL, ante, p. 1; LIS PENDENS; MINES AND MINERALS; NATURALIZATION; PLEADING; VENUE. As to compensation for filing, see the titles CLERKS OF COURT, vol. 3, p. 859; ELECTIONS, vol. 5, p. 721; EQUITY, vol. 5, p. 803; UNITED STATES COMMISSIONERS.

FILLERS.—Fillers, as used in relation to tobacco, are leaves that make up the main body of a cigar.[3]

FILLING BLANKS.—See the title ALTERATION OF INSTRUMENTS, vol. 1, p. 267.

FINAL.—Every trial of a cause is final until, in some form, it has been vacated.[4]

1. National Bank *v.* Insurance Co., 104 U. S. 54, 68, 26 L. Ed. 693. See, generally, the title TRUSTS AND TRUSTEES.

2. **File.**—The act of congress of May, 1896, terminating the terms of office of all commissioners of the circuit courts and directing them to deposit all the records and official papers in the office of the circuit courts by which they were appointed, did not entitle clerks of the circuit courts to fees for **filing** the various papers, as no good purpose would have been subserved by the formal **filing** of these dockets and writings, which, in the ordinary course, never would have been forwarded to the clerk for filing, and, hence, the construction which attributes to the word "deposit," as used in the statute, a meaning synonymous with "filing," is strained. United States *v.* Van Duzee, 185 U. S. 278, 281, 46 L. Ed. 909. See the title CLERKS OF COURT, vol. 3, p. 854.

3. Falk *v.* Robertson, 137 U. S. 225, 231, 34 L. Ed. 645.

4. Vannevar *v.* Bryant, 21 Wall. 41, 43, 22 L. Ed. 476.

Final decision.—By the use of the word **final** in the act of June 12th, 1858, which declares that the 11th section of the general pre-emption law of 1841 shall "be so amended that appeals from the decision of the district officers, in cases of contest between different settlers for the right of pre-emption, shall hereafter be decided by the commissioner of the general land office, whose decision shall be **final**, unless appeal therefrom be taken to the secretary of the interior," it seems that nothing more was intended than to say that, with the single exception of an appeal to his superior, the secretary of the interior, his decision should exclude further inquiry in that department. But there does not appear, in the language used in this connection, any intention to give to the **final** decision of the department of the interior, to which the control of the land system of the government

FINAL JUDGMENTS AND DECREES.—See the titles APPEAL AND ERROR, vol. 1, 929; BILL OF REVIEW, vol. 3, p. 245. See note 1.

FINDINGS OF COURT.—See the title APPEAL AND ERROR, vol. 1, p. 1023.

FINE.—See note 2.

had been transferred, any more conclusive effect than what belonged to it without its aid. Johnson *v.* Towsley, 13 Wall. 72, 82, 83, 20 L. Ed. 485. See the title PUBLIC LANDS.

"The use of the term 'final decisions' in § 1911 does not enlarge the scope of the jurisdiction of this court. It is only a substitute for the words 'final judgments and decrees' in § 702 and means the same thing." Harrington *v.* Holler, 111 U. S. 796, 28 L. Ed. 602. See the title APPEAL AND ERROR, vol. 1, p. 535.

Final disposition.—The words "final disposition" in § 2 of the act of June 25th, 1868, allowing the court of claims "at any time while any suit or claim is pending before or on appeal from the said court, or within two years next after the final disposition of any such suit or claim, on motion on behalf of the United States, to grant a new trial in any such suit or claim," mean the final determination of the suit on appeal (if an appeal is taken), or if none is taken, then its final determination in the court of claims. Ex parte Russell, 13 Wall. 664, 20 L. Ed. 632.

Final hearing.—The act of congress of 1867 authorizes the petition for removal from a state court to United States circuit court to be filed "at any time before the final hearing or trial of the suit." The hearing or trial here referred to, is the examination of the facts in issue. Hearing applies to suits in chancery and trials to actions at law. Vannevar *v.* Bryant, 21 Wall. 41, 43, 22 L. Ed. 476.

The act of March 2d, 1867, which allows removal of a suit from a state court in o the circuit court of the United States, in certain cases specified by it, "at any time before the final hearing or trial of the suit" is not of the same import as the language of the act of July 27th, 1866, on the same general subject—"at any time before the trial or final hearing." On the contrary, the word final in the first-mentioned act, must be taken to apply to the word "trial" as well as to the word "hearing." Accordingly, although a removal is made after a trial on merits, a verdict, a motion for a new trial made and refused, and a judgment on the verdict, yet it having been so made in a state where by statute the party could still demand, as of right, a second trial, such first trial is not a "final trial within the meaning of the act of congress; the party seeking to remove the case having demanded and having got leave to have a second trial under the said statute of the state. Insurance Co. *v.* Dunn, 19 Wall. 214, 22 L. Ed. 68; Fisk *v.* Henarie, 142 U. S. 459, 466, 35 L. Ed. 1079. See the title REMOVAL OF CAUSES.

1. Final judgments and decrees.—A final condemnation in an inferior court of admiralty, where a right of appeal exists, and has been claimed, is not a definitive condemnation, within the meaning of the 4th article of the convention with France, signed September 30th, 1800, the court saying: "A decree or sentence may be interlocutory or final, in the court which pronounces it, and receives its appellation from its determining the power of that particular court over the subject to which it applies, or being only an intermediate order, subject to the future control of the same court. The last decree of an inferior court is final, in relation to the power of that court, but not in relation to the property itself, unless it be acquiesced under." On any other construction, the word definitive would be rendered useless and inoperative. The Peggy, 1 Cranch 103, 108, 2 L. Ed. 49.

In § 989 of the Revised Statutes providing that when recovery is had against a collector or other officer of revenue for any act done by him, or for the recovery of money exacted or paid to him and by him paid into the treasury, in the performance of his official duty, and the court certifies that there was probable cause for the act done, or that he acted under the direction of the secretary of the treasury or other proper officer of the government, no excution shall issue against him but the amount so recovered shall upon final judgment, be provided for and paid out of the proper appropriation of the treasury, the final judgment referred to is the judgment as it stands after its affirmance by the supreme court, and after the court below has rendered such judgment as the mandate of the supreme court requires. Schell *v.* Cochran, 107 U. S. 625, 628, 27 L. Ed. 543.

2. Fine.—"A fine was in the form of a judgment of a court of record, at first in an actual, and afterwards in a fictitious suit by the conusee against the conusors to recover possession of the land; and derived its very name from its putting an end to that suit and to all other controversies concerning the same matter." Hitz *v.* Jenks, 123 U. S. 297, 302, 31 L. Ed. 156.

FINES.

BY R. E. MAXWELL.

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CROSS REFERENCES.

See the titles APPEAL AND ERROR, vol. 1, p. 333; CONSTITUTIONAL LAW, vol. 4, p. 513; CONTEMPT, vol. 4, p. 531; DAMAGES, vol. 5, p. 157; DISTRICT OF COLUMBIA, vol. 5, p. 404; INTEREST; PENALTIES AND FORFEITURES; SENTENCE AND PUNISHMENT; TRESPASS.

As to particular offenses punishable by fine, see the appropriate titles throughout this work. As to review of order imposing fine, see the title APPEAL AND ERROR, vol. 1, p. 992. As to fine for contempt, see the title CONTEMPT, vol. 4, p. 532. As to right of a state, in a prosecution for embezzlement to provide for the imposition of a fine double the amount of the money embezzled, see the title EMBEZZLEMENT, vol. 5, p. 742. As to whether fines imposed on the master of a vessel for violation of statutes regulating the number of passengers to be carried are liens on the ship, see the title MARITIME LIENS. As to fines imposed by court martial, see the title MILITARY LAW. As to fines imposed on militiamen for disobedience, see the title MILITIA. As to fines for violations of revenue acts, see the title REVENUE LAWS. As to recovery back of fines paid to the United States, see the title UNITED STATES.

I. General Consideration.

The words "fine," and "fined" in their primary sense, import the punishment of a person convicted of crime.[1] And a fine is not incurred, and does not accrue, in the technical sense of the term, until judgment.[2]

Fines as a Debt.—See post, "Under Bankrupt Act," V, B.

II. Power to Impose Fine.

The power of the state to impose fines for a violation of its laws is coeval with government.[3]

1. **Meaning.**—Shick *v.* United States, 195 U. S. 65, 77, 49 L. Ed. 99, Harlan, J., dissenting.

2. **Does not accure until judgment.**—United States *v.* Morris, 10 Wheat. 246, 299, 6 L. Ed. 314.

3. **Power to impose fine.**—Missouri Pac. R. Co. *v.* Humes, 115 U. S. 512, 523, 29 L. Ed. 463.

Power to fine for contempt.—See the title CONTEMPT, vol. 4, pp. 532, 533, 540.

III. Excessive Fines.

See the title CONSTITUTIONAL LAW, vol. 4, p. 513.

IV. Enforcement.

A. Mode of Enforcement.—The mode in which fine shall be enforced, whether at the suit of a private party, or at the suit of the public, is merely a matter of legislative discretion.[4]

B. Action of Debt.—Almost every fine under a penal statute may be recovered by an action of debt, as well as by information.[5]

C. By Execution.—An execution may be ordered, by court, to issue against the property of a defendant upon whom a fine has been imposed.[6]

D. By Imprisonment—1. DISCRETION OF COURT.—When a party is convicted of an offense, and sentenced to pay a fine, it is within the discretion of the court to order his imprisonment until the fine shall be paid.[7]

2. CAPIAS PRO FINE.—**At common law,** whenever a fine and imprisonment constitute a part of the judgment upon a conviction in a criminal case, the judgment, if the party is in court, is, that he be committed to jail in execution of the sentence, and until the fine is paid. If he is not then in court, a special writ of capais pro fine issues against him; the exigency of which is, that his body be taken and committed to jail, until the fine is paid.[8]

3. CAPIAS AD SATISFACIENDUM.—Although the writ of capias ad satisfaciendum more commonly applies to civil suits, yet in some states the writ may be ordered to issue for the recovery of fines as in cases where similar writs are issued on judgments obtained in personal suits.[9] And where the officer makes a return on the writ, that he has taken the body of the party fined, he must either acknowledge in open court the receipt of the fine, or produce the body of the party to the court.[10]

4. Mode of enforcement is in the discretion of legislature.—Missouri Pac. R. Co. *v.* Humes, 115 U. S. 512, 523, 29 L. Ed. 463.

The acts of congress of 27th of February and 3d of March, 1801, concerning the District of Columbia, have not changed the laws of Maryland and Virginia, adopted by congress as the laws of that district, any further than the change of jurisdiction rendered a change of laws necessary, and fines, arising from a breach of those laws, are to be sued for and recovered in the same manner as before the change of jurisdiction, mutatis nutandis. United States *v.* Simms, 1 Cranch 252, 2 L. Ed. 98.

5. Enforcement by action of debt.—Adams *v.* Woods, 2 Cranch 336, 341, 2 L. Ed. 297. See the title DEBT, THE ACTION OF, vol. 5, p. 205.

6. Execution against property of defendant.—Ex parte Watkins, 7 Pet. 568, 574, 8 L. Ed. 786; Levy Court *v.* Ringgold, 5 Pet. 451, 8 L. Ed. 188. See the title EXECUTIONS, ante, p. 84.

The "act concerning the District of Columbia," passed 3d of March, 1801, does not require the marshal to apply to the district attorney for executions, in all cases of fines levied by the circuit court, and make him liable for neglecting to do so, if no execution issued. Levy Court *v.* Ringgold, 5 Pet. 451, 8 L. Ed. 188.

7. Enforcement by imprisonment.—Ex parte Jackson, 96 U. S. 727, 24 L. Ed. 877; Ex parte Watkins, 7 Pet. 568, 574, 8 L. Ed. 786.

In another section of the act of Maryland of the 20th of April, 1777 (§ 4), "there is a proviso, that nothing therein contained shall be construed to extend to prevent the several courts, as they might heretofore lawfully do, from committing any person from the nonpayment of any fine, if they shall deem it expedient so to do. This proviso completely establishes the antecedent practice in Maryland to have been like that at the common law, to commit the offender for payment of the fine, and leaves it at the discretion of the court to order it in any future case. By necessary implication, it affirms that without such order, the offender is not detainable in jail for the fine." Ex parte Watkins, 7 Pet. 568, 575, 8 L. Ed. 786.

"Where the party convicted is already in custody, when the sentence is passed, the party is to be deemed in custody until the fine is paid, without any award of a commitment in the sentence, or the issuing of any capias ad satisfaciendum." Ex parte Watkins, 7 Pet. 568, 578, 8 L. Ed. 786.

8. Capias pro fine.—Ex parte Watkins, 7 Pet. 568, 573, 8 L. Ed. 786.

9. Writ of capias ad satisfaciendum may issue for fines.—Ex parte Watkins, 7 Pet. 568, 574, 8 L. Ed. 786. See the title EXECUTION AGAINST THE BODY AND ARREST IN CIVIL CASES, ante, p. 80.

10. Officer must produce body in open court.—Ex parte Watkins, 7 Pet. 568, 575,

V. Payment and Satisfaction.

A. Effect of Payment.—When a court has imposed fine and imprisonment, where the statute only confers power to punish by fine or imprisonment, and the fine has been paid, it cannot, even during the same term, modify the judgment by imposing imprisonment instead of the former sentence.[11]

B. Under Bankrupt Act.—A fine is not a debt, so that a person upon whom one has been imposed is discharged from payment under the bankrupt act.[12]

VI. Disposition of Fines.

What disposition shall be made of fines is a matter of legislative discretion,[13] and it is generally regulated by statute.[14] And it may be provided that the fine or a share thereof be given to the informer,[15] or the person aggrieved by the act for which the fine was imposed.[16]

FINISHED.—See note 1.
FIREARMS.—See the title WEAPONS.
FIRE FROM EXPLOSION.—See the title INSURANCE.
FIRE INSURANCE.—See the title INSURANCE.

8 L. Ed. 786. See the title EXECUTION AGAINST THE BODY AND ARRESTS IN CIVIL CASES, ante, p. 80.

11. Cannot imprison after payment of fine.—Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872. See, generally, the titles JUDGMENTS AND DECREES; SENTENCE AND PUNISHMENT.

12. Not discharged by bankrupt act.—Spalding *v.* New York, 4 How. 21, 35, 11 L. Ed. 858. See the title BANKRUPTCY, vol. 2, p. 859, et seq.

13. Disposition of fines a matter of legislative discretion.—Missouri Pac. R. Co. *v.* Humes, 115 U. S. 512, 523, 29 L. Ed. 463; United States *v.* Murphy, 16 Pet. 203, 10 L. Ed. 937.

The fine imposed on the person who shall be convicted of the offense of stealing on the high seas, on board a vessel of the United States, is part of the punishment, in furtherance of public justice; rather than an indemnity or compensation to the owner. From the nature of an indictment and the sentence thereon, the government alone has the right to control the whole proceedings, and execution of the sentence; even after verdict, the government may not choose to bring the party up for sentence; and if sentence is pronounced, and the fine is imposed, the owner has no authority to interfere in the collection of it, any more than the informer or prosecutor; and the fine, therefore, must be deemed receivable by the government, and the government alone. United States *v.* Murphy, 16 Pet. 203, 10 L. Ed. 937.

The levy court of Washington county are not entitled to one-half of all the fines, penalties and forfeitures imposed by the circuit court in cases of common law, and under the acts of congress, as well as the acts of assembly of Maryland, adopted by congress as the law of the District of Columbia. Levy Court *v.* Ringgold, 5 Pet. 451, 8 L. Ed. 188.

14. Disposition of fine regulated by statute.—United States *v.* Simms, 1 Cranch 252, 258, 2 L. Ed. 98; United States *v.* Connor, 138 U. S. 61, 65, 34 L. Ed. 860.

15. Fine given to informer.—United States *v.* Connor, 138 U. S. 61, 65, 34 L. Ed. 860. See, generally, the titles PENALTIES AND FORFEITURES; REVENUE LAWS.

Informer cannot recover fine after repeal of act allowing him the fine.—The act of July 13, 1866 (14 Stat. 145, c. 184), provided that an informer was entitled to a share of the fine imposed for a violation of the internal revenue laws. This act was repealed by another in 1872. Where an action was brought under the former act for such a share of a fine, it was held that if the amount had not been fixed by judgment or compromise or by its having been paid before the passage of the act of 1872, such claim could not be recovered in after the date of the last act. United States *v.* Connor, 138 U. S. 61, 65, 34 L. Ed. 860.

16. Given to person aggrieved.—United States *v.* Simms, 1 Cranch 252, 258, 2 L. Ed. 98.

"By the laws of Virginia, an officer is liable to a heavy fine, for not returning an execution which came to his hands to be served, or for retaining in his hands money levied on such execution. This goes to the party injured, and on his motion, the judgment for the fine is to be rendered. It would be going a great way, to construe this act of congress as making such a fine recoverable for the use of the United States; and yet this would be the consequence of construing it to extend to fines and penalties accruing by law, not to government, but to individuals." United States *v.* Simms, 1 Cranch 252, 258, 2 L. Ed. 98.

1. Finished.—"The term **finished** as applied to furniture, had, in the furniture trade, on and prior to March 3, 1883, a particular trade meaning, namely, that an article had been varnished, stained, oiled,

FIRES.

CROSS REFERENCES.

See the titles ADMIRALTY, vol. 1, p. 119; BARRATARY, vol. 3, p. 201; CARRIERS, vol. 3, p. 556; CONSTITUTIONAL LAW, vol. 4, p. 1; EVIDENCE, vol. 5, p. 1004; EXPERT AND OPINION EVIDENCE, ante, p. 200; INSURANCE; LANDLORD AND TENANT; NEGLIGENCE; RAILROADS; SHIPS AND SHIPPING.

As to a libel in a court of admiralty against a municipal corporation for damages caused by a fire boat, see the title ADMIRALTY, vol. 1, p. 145. As to admiralty jurisdiction over fires on land caused by a steamboat, see the title ADMIRALTY, vol. 1, p. 145. As to liability of a carrier for loss of cotton by fire caused by the operation of locomotives in the proximity of uncovered masses of cotton, see the title CARRIERS, vol. 3, p. 595. As to payment, by railroad, of the attorneys fees where it has caused damage by fire, see the title CONSTITUTIONAL LAW, vol. 4, p. 387. As to competency of evidence to prove value of goods destroyed by fire, see the title EVIDENCE, vol. 5, p. 1004.

Liability by Common Law.—"At common law, every man appears to have been obliged, by the custom of the realm, to keep his fire safe so that it should not injure his neighbor; and to have been liable to an action if a fire, lighted in his own house, or upon the land, by the act of himself, or of his servants or guests, burned the house or property of his neighbor, unless its spreading to his neighbor's property was caused by a violent tempest or other inevitable accident which he could not have foreseen."[1]

Liability in England.—"In modern times in England, the strict rule of the common law as to civil liability in damages for fire originating on one's own land, and spreading to property of another, has been recognized as still existing, except so far as clearly altered by statute."[2]

Liability in the United States.—"In this country, the strict rule of the common law of England as to liability for accidental fires has not been generally adopted; but the matter has been regulated, in many states, by statute."[3]

Liability of Railroads.—In some states, by statute, railroad companies are made absolutely liable for injuries by fire communicated from their engines;[4]

polished, or the like." Hedden *v.* Richard, 149 U. S. 346, 347, 37 L. Ed. 763.

Finished off square.—Cohn *v.* United States Corset Co., 93 U. S. 366, 374, 23 L. Ed. 907.

1. Civil liability at common law.—St. Louis, etc., R. Co. *v.* Mathews, 165 U. S. 1, 5. 41 L. Ed. 611.

The common-law liability in case of ordinary accident, without proof of negligence, was impliedly recognized ten years after the decision in Tuberville *v.* Stamp (1698), Comyns, 32 and providing that "no action, suit or process whatsoever shall be had, maintained or prosecuted against any person in whose house or chamber any fire shall accidentally begin, or any recompense be made by such person for any damage suffered or occasioned thereby; any law or usage or custom to the contrary notwithstanding." St. Louis, etc., R. Co. *v.* Mathews, 165 U. S. 1, 6, 31 L. Ed. 611.

2. Liability in England.—St. Louis, etc., R. Co. *v.* Mathews, 165 U. S. 1, 6, 41 L. Ed. 611.

3. Liability in the United States.—St. Louis, etc., R. Co. *v.* Mathews, 165 U. S. 1, 9, 41 L. Ed. 611.

4. Liability of railroads.—The earliest statute which declares railroad corporations to be absolutely responsible, independently of negligence, for damages by fire communicated from their locomotive engines to property of others, was passed in Massachusetts in 1840, soon after such engines had become common. In England, at the time of the passage of that statute, it was undetermined whether a railroad corporation, without negligence, was liable to a civil action, as at common law, for damages to property of others by fire from its locomotive engines; and the result that it was not so liable was subsequently reached after some conflict of judicial opinion, and only when the acts of Parliament had expressly authorized the corporation to use locomotive engines upon its railroad, and had not declared it to be responsible for such damages. From the time of the passage of the Massachusetts statute of 1840 to the present time

but, in compensation, are given an insurable interest in any building along the route.[5] Such statutes are remedial in character,[6] and are not unconstitutional.[7]

Degree of Care.—The determination of an issue, as to whether the destruction of property by fire communicated by a locomotive was the result of negligence on the part of a railroad company, depends upon the facts shown as to whether or not it used such caution and diligence as the circumstances of the

the validity of that and similar statutes has been constantly upheld in the courts of every state of the Union in which the question has arisen. In the federal supreme court, the constitutionality of such a statute has never been directly drawn into judgment. But it appears to have been assumed in Grand Trunk R. Co. *v.* Richardson, 91 U. S. 454, 472, 23 L. Ed. 356, and it rests upon principles often affirmed here. St. Louis, etc., R. Co. *v.* Mathews, 165 U. S. 1, 22, 41 L. Ed. 611. destructive element, which often escapes

"Fire, while necessary for many uses of civilized man, is a dangerous, volatile and in the form of sparks, capable of being wafted afar through the air, and of destroying any combustible property on which they fall; and which, when it has once gained headway, can hardly be arrested or controlled. Railroad corporations, in order the better to carry out the public object of their creation, the sure and prompt transportation of passengers and goods, have been authorized by statute to use locomotive engines propelled by steam generated by fires lighted upon those engines. It is within the authority of the legislature to make adequate provision for protecting the property of others against loss or injury by sparks from such engines. The right of the citizen not to have his property burned without compensation is no less to be regarded than the right of the corporation to set it on fire. To require the utmost care and diligence of the railroad corporations in taking precautions against the escape of fire from their engines might not afford sufficient protection to the owners of property in the neighborhood of the railroads. When both parties are equally faultless, the legislature may properly consider it to be just that the duty of insuring private property against loss or injury caused by the use of dangerous instruments should rest upon the railroad company, which employs the instruments and creates the peril for its own profit, rather than upon the owner of the property, who has no control over or interest in those instruments." St. Louis, etc., R. Co. *v.* Mathews, 165 U. S. 1, 26, 41 L. Ed. 611.

The statute applies to an injury to such buildings and property which is caused by fire spreading from other buildings to which it was first communicated by the locomotive. Grand Trunk R. Co. *v.* Richardson, 91 U. S. 454, 23 L. Ed. 356.

The fact that the destroyed property is located near the line of the railroad does not deprive the owners of the protection of the statute, certainly if it is placed where it is under a license from the defendant. Grand Trunk R. Co. *v.* Richardson, 91 U. S. 454, 472, 23 L. Ed. 356.

Where the statute of a state provides, that, "when an injury is done to a building or other property by fires communicated by a locomotive engine of any railroad corporation, the said corporation shall be responsible in damages for such injury," and have an insurable interest in such property "along its route," held, that the phrase "along its route" means in proximity to the rails upon which the locomotive engines run; and that the corporation is liable for such an injury to buildings or other property along its route, whether they are outside of the lines of its roadway, or lawfully within those lines. Grand Trunk R. Co. *v.* Richardson, 91 U. S. 454, 23 L. Ed. 356. See, generally, the title RAILROADS.

5. The statute of Missouri of March 31, 1889, which makes the railroad company liable in damages for property so destroyed, gives it, for its protection against such damages, an insurable interest in the property in danger of destruction, and the right to obtain insurance thereon in its own behalf; and it may obtain insurance upon all such property generally, without specifying any particular property. St. Louis, etc., R. Co. *v.* Mathews, 165 U. S. 1, 26, 41 L. Ed. 611.

6. "The statute is not a penal one, imposing punishment for a violation of law; but it is purely remedial, making the party, doing a lawful act for its own profit, liable in damages to the innocent party injured thereby, and giving to that party the whole damages, measured by the injury suffered." St. Louis, etc., R. Co. *v.* Mathews, 165 U. S. 1, 27, 41 L. Ed. 611.

A statute of Vermont making railroads liable for property destroyed by fire was resigned to be a remedial one, and it is to be liberally construed. Grand Trunk R. Co. *v.* Richardson, 91 U. S. 454, 472, 23 L. Ed. 356.

7. The statute of Missouri of March 31, 1887, by which every railroad corporation owning or operating a railroad in the state is made responsible in damages for property of any person injured or destroyed by fire communicated by its locomotive engines; and is declared to have an insurable interest in property along its route, and authorized to insure such property, for its protection against such damages; is not an arbitrary, unreasonable and unconstitutional exercise of legislative power, imposing an absolute and oner-

case demanded or prudent men ordinarily exercise, and not upon the usual conduct of other companies in the vicinity.[8]

Proximate Cause.—A finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury by fire is not warranted, unless it appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been forseen in the light of the attending circumstances.[9] Where there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it.[10]

Evidence.—Evidence is admissible which goes to show that a fire could not have been caused by a different instrument than the one alleged.[11]

Presumptions.—Negligence may be presumed when the evidence warrants such presumption.[12]

ous liability for the consequences of doing a lawful act, and of conducting a lawful business in a lawful and careful manner; nor does it violate the constitution of the United States, by depriving the railroad company of its property without due process of law, by denying to it the equal protection of the laws, and by impairing the obligation of the contract previously made between it and the state by its incorporation under general laws authorizing it to convey passengers and freight over its railroad by the use of locomotive engines. St. Louis, etc., R. Co. *v.* Mathews, 165 U. S. 1, 5, 41 L. Ed. 611. See, generally, the titles CONSTITUTIONAL LAW, vol. 4, p. 1; DUE PROCESS OF LAW, vol. 5, p. 499.

8. Degree of care.—Grand Trunk R. Co. *v.* Richardson, 91 U. S. 454, 23 L. Ed. 356. See, generally, the title NEGLIGENCE.

9. Proximate cause.—Milwaukee, etc., R. Co. *v.* Kellogg, 94 U. S. 469, 24 L. Ed. 256. See, generally, the title NEGLIGENCE.

"These circumstances, in a case like the present, are the strength and direction of the wind, the combustible character of the elevator, its great height, and the proximity and combustible nature of the sawmill and the piles of lumber. , Most of these circumstances were ignored in the request for instruction to the jury. Yet it is obvious that the immediate and inseparable consequences of negligently firing the elevator would have been very different if the wind had been less, if the elevator had been a low building constructed of stone, if the season had been wet, or if the lumber and the mill had been less combustible. And the defendants might well have anticipated or regarded the probable consequences of their negligence as much more far reaching than would have been natural or probable in other circumstances. We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury." Milwaukee, etc., R. Co. *v.* Kellogg, 94 U. S. 469, 475, 24 L. Ed. 256.

10. Milwaukee, etc., R. Co. *v.* Kellogg, 94 U. S. 469, 24 L. Ed. 256.

"If a building be set on fire by negligence, and an adjoining building destroyed without any negligence of the occupants of the first, no one would doubt that the destruction of the second was due to the negligence that caused the burning of the first. Yet in truth, in a very legitimate sense, the immediate cause of the burning of the second was the burning of the first. The same might be said of the burning of the furniture in the first. Such refinements are too minute for rules of social conduct." Milwaukee, etc., R. Co. *v.* Kellogg, 94 U. S. 469, 476, 24 L. Ed. 256.

Where a jury found, in substance, that the burning of a mill and some lumber was caused by the negligent burning of an elevator, and that it was the unavoidable consequence of that burning, it was in effect, a finding that there was no intervening and independent cause between the negligent conduct of the defendants and the injury to the plaintiff. Milwaukee, etc., R. Co. *v.* Kellogg, 94 U. S. 469, 476, 24 L. Ed. 256.

11. Evidence.—In an action against a railroad to recover the price of cotton which was destroyed while stored near its tracks, evidence of the surrounding circumstances and conditions, which a process of exclusion would have tended to establish, that the burning of the cotton could not have been caused other than by the locomotive in question would be clearly relevant. Texas, etc., R. Co. *v.* Watson, 190 U. S. 287, 289, 47 L. Ed. 1057. See, generally, the title EVIDENCE, vol. 5, p. 1004.

12. Presumptions.—An instruction is correct which states "that evidence of a railroad company allowing combustible materials to accumulate upon its track and right of way which is liable to take fire from sparks escaping from passing engines and communicate it to adjacent property, is sufficient to warrant the jury in imputing negligence to the company." Eddy *v.* Lafayette, 163 U. S. 456, 466, 41 L. Ed. 225. See, generally, the titles INSTRUCTIONS; PRESUMPTIONS AND BURDEN OF PROOF.

An instruction is correct which states

Right to Destroy Property to Prevent Spread of Fires.—Either public officers or private persons may raze houses to prevent the spreading of a conflagration.[13] This right rests on public necessity, and no one is bound to compensate for or to contribute to the loss, unless the town or neighborhood is made liable by express statute.[14]

"that evidence showing that the fire originated from sparks of a passing engine is prima facie proof of negligence, and the burden shifts on the railway company to show that it was guilty of no negligence." Eddy *v.* Layafette, 163 U. S. 456, 466, 41 L. Ed. 225.

13. Right to destroy property to prevent spread of fire.—Ralli *v.* Tropp, 157 U. S. 386, 405, 39 L. Ed. 742.

"At the common law every one had the right to destroy real and personal property, in cases of actual necessity, to prevent the spreading of a fire, and there was no responsibility on the part of such destroyer, and no remedy for the owner." Bowditch *v.* Boston, 101 U. S. 16, 18, 25 L. Ed. 980.

14. Ralli *v.* Troop, 157 U. S. 386, 405, 39 L. Ed. 742.

"The putting out of fires which are in danger of spreading is for the benefit of the whole public, and for the protection of the property of all. The danger is so great and imminent that it is especially one of those cases in which the public safety must be preferred to private interests. Salus populi suprema lex. It is the public good, the general welfare, that justifies the destruction of neighboring buildings to prevent the spreading of a fire which as yet rages in one building only. The duty of protecting, so far as may be, all property within the state against destruction by fire, is a public and governmental duty, which rests upon the government of the state; and it does not cease to be a duty of that character because the state has delegated it to, or permitted it to be performed by, a municipal corporation. When entrusted by the legislature to a municipal corporation, a political division of the state, it is not for the peculiar benefit of that corporation or division, but for its benefit in common with the whole public. A fire department is established in a municipality, not merely for the protection of buildings and property within the municipality itself, but equally for the protection of buildings and property beyond its limits, to which a fire originating within those limits may be in danger of spreading. Moreover, the necessity and appropriateness of the course and measures to be taken to stay a conflagration must be promptly determined, in the first instance, by those charged with the performance of the duty at the time of the exigency; and often cannot be as accurately judged of long after the fact. The members of the fire department of a city, therefore, whether appointed by the municipal corporation or otherwise, are not mere agents or servants of the corporation, but are public officers charged with a public service; and for their acts or their negligence in the performance of this service no action lies against the corporation, unless expressly given by statute." Workman *v.* New York City, 179 U. S. 552, 586, 45 L. Ed. 314.

"In Bowditch *v.* Boston (1879), 101 U. S. 16, 25 L. Ed. 980, it was adjudged that no action would lie, either at common law or by statute, against the city of Boston to recover damages for the destruction of a building, blown up under a general order of the chief engineer of the city to prevent the spreading of a conflagration; that the action, not being maintainable to common law, could only be supported by an express statute; and that the statutes of Massachusetts, as construed by the highest court of the state, did not authorize such an action against the city, except for the destruction of a building by specific order of three firewards or engineers acting jointly. In support of the position that the action would not lie at common law, this court relied on the ancient rule, as stated by Coke, that 'for the commonwealth a man shall suffer damage; as, for saving of a city or town, a house shall be plucked down if the next be on fire; and a thing for the commonwealth every man may do without being liable to an action.'" Workman *v.* New York City, 179 U. S. 552, 584, 45 L. Ed. 314.

"The precise question whether a municipal corporation is liable to an action at law for injuries caused by negligence of members of its fire department has never been decided or considered by this court. But the principles affirmed and illustrated in the authorities already cited forbid the maintenance of a private action against a municipal corporation for injuries caused by the negligence of members of a fire department, while engaged in the performance of their official duties." Workman *v.* New York City, 179 U. S. 552, 585, 45 L. Ed. 314.

"The duty of the state to protect the property of all from destruction by fire covers vessels in its harbors, as well as buildings within its territory. The authority of the fire department and its members as to both kinds of property is derived from the municipal law, and not from the maritime law. Ralli *v.* Troop, 157 U. S. 386, 419, 420, 39 L. Ed. 742. All the shipping, foreign and domestic, in the port, is under the same safeguards, and subject to the same risks. Prompt, decisive and unembarrassed action of the firemen

FIREWORKS.—See note 1.
FIRST.—See note 2.

FISH AND FISHERIES.

BY T. B. BENSON.

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is necessary to the protection of both buildings and vessels from the dangers of a conflagration. The necessity of allowing a municipal fireboat to proceed on her way to put out a fire affords a special reason for not allowing her, while so occupied, to be seized on a libel in rem. But all the reasons for not maintaining an action of this kind against the city in a court of common law apply with undiminished force to a libel against the city in personam in a court of admiralty." Workman *v.* New York City, 179 U. S. 552, 590, 45 L. Ed. 314.

1. Fireworks.—Where a clause in a policy provided that fireworks, among other things, should be specially written in the policy, it would seem that fireworks are not included under the name of fire crackers, and it has been held that evidence is rightfully refused to prove that fireworks constitute "an article in the line of a German jobber and importer." Steinbach *v.* Insurance Co., 13 Wall. 183, 185, 20 L. Ed. 615. See, generally, the title INSURANCE.

2. First.—The words in the act of March, 1875, providing in cases of diverse citizenship for removal of causes from state to federal courts, limiting the time within which the application for a removal must be made—"before or at the term at which said cause could be first tried, and before the trial thereof"—necessarily meant the

I. Fishery Distinguished from Oystery.

There is a distinction clearly held up, in many cases to be found in the books, between an oystery and a fishery, in the common use of the term. The one applying to the use of land under the water, which is peculiarly adapted to the growing of oysters, and to be used for that purpose, in the cultivation of oysters, as other lands are used for the purpose to which they are particularly adapted; whereas, a fishery, in common acceptation, has reference to the use of the water for floating fish; and this is a very obvious and natural distinction.[1]

II. Kinds of Fisheries.

A several fishery is the exclusive right to fish in one's own waters, or is derived therefrom by grant; a common of fishery is the right to fish in the waters of another.[2]

III. Rights and Property in Fish and Fisheries.

A. Property in Fish and Fisheries.—Fishing rights when legally acquired are rights of property, not mere privileges.[3] The right is a subject of private ownership, and when held by a good title is a vested right, entitled to public protection and legislative regulation and control.[4]

B. Source of Right.—The exclusive right of fishery has its source in the ownership of the bank of the stream.[5]

C. In Navigable Waters.—By the American Revolution the people of each state, in their sovereign character, acquired the absolute right to all their navigable waters, and the soil under them. The shores of navigable waters and the soil under them were not granted by the constitution to the United States, but were reserved to the states respectively.[6] And new states have the same

first trial, whether it resulted in a verdict or not, and although the verdict and judgment may have been set aside; because the express requirement was that the application for removal must, in any event, be made before or at the term at which said cause could be first tried. Fisk *v.* Henarie, 142 U. S. 459, 470, 35 L. Ed. 1079. See, generally, the title REMOVAL OF CAUSES.

In the act of congress enabling the commissioners of the District of Columbia to sell at public auction lots sold by them on credit, and remaining unpaid for, and to retain sufficient money, produced by the resale, to defray all principal and interest due by the first contract, the original purchaser to receive the balance received by them on second sale, the words "first contract," "original purchaser," designate, as expressly and exclusively as any words our language furnishes, the first sale made of the property, and the purchaser at that sale, and no other. O'Neale *v.* Thornton, 6 Cranch 53, 68, 3 L. Ed. 150. See, generally, the titles JUDICIAL SALES; SHERIFFS', CONSTABLES' AND MARSHALS' SALES.

1. **Fishery distinguished from oystery.**—Martin *v.* Waddell, 16 Pet. 367, 421, 10 L. Ed. 997, dissenting opinion of Thompson, J.

2. **Kinds of fisheries.**—Hardin *v.* Jordan, 140 U. S. 371, 389, 35 L. Ed. 428.

3. **Property rights in fisheries.**—Boston *v.* Lecraw, 17 How. 426, 15 L. Ed. 118; Manchester *v.* Massachusetts, 139 U. S. 240, 259, 35 L. Ed. 159; McCready *v.* Virginia, 94 U. S. 391, 24 L. Ed. 248; Damon *v.* Hawaii, 194 U. S. 154, 158, 48 L. Ed. 916; Wedding *v.* Meyler, 192 U. S. 573, 583, 48 L. Ed. 370; Carter *v.* Hawaii, 200 U. S. 255, 50 L. Ed. 470; Holyoke Co. *v.* Lyman, 15 Wall. 500, 512, 21 L. Ed. 133.

Waters appropriated by a state to its citizens as a common of fishery, create in such citizens a property right and not a mere privilege. McCready *v.* Virginia, 94 U. S. 391, 24 L. Ed. 248.

4. Holyoke Co. *v.* Lyman, 15 Wall. 500, 507, 21 L. Ed. 133; Damon *v.* Hawaii, 194 U. S. 154, 48 L. Ed. 916. See post, "In Navigable Waters," II, C.

5. **Source of right.**—Holyoke Co. *v.* Lyman, 15 Wall. 500, 507, 21 L. Ed. 133.

The right to a fishery depends on the right to the soil, and if the plaintiff can show that the proprietors, under whom he claims, were legally entitled to it, the judgment of the court must be in his favor. Russell *v.* Jersey Co., 15 How. 426, 432, 14 L. Ed. 757. See post, "In Nonnavigable Waters," III, D.

6. **In navigable waters.**—County of St. Clair *v.* Livingston, 23 Wall. 46, 68, 23 L. Ed. 59; Pollard *v.* Hagan, 3 How. 212, 11 L. Ed. 565; Martin *v.* Waddell, 16 Pet. 367, 10 L. Ed. 997; Russell *v.* Jersey Co., 15 How. 426, 14 L. Ed. 757; Smith *v.* Maryland, 18 How. 71, 74, 15 L. Ed. 269.

Subject to the paramount right of navigation, the regulation of which in relation to foreign and interstate commerce has been granted to the United States, each state owns the beds of all tidewaters within its jurisdiction, and may appropriate

rights of sovereignty and jurisdiction over this subject as the original ones.[7] But the public right of fishery in navigable waters is held by the people of the state in their sovereign character, as a public trust.[8] In England, the dominion and property in navigable waters is held by the king in his sovereign and trust character, for the common benefit of the people.[9] The people possess a public common of piscary, and may not, in general, without injury to their rights, be deprived thereof.[10] Since Magna Charta, it is doubtful whether the king or any particular subject can gain a proprietary right, exclusive of the common right of fishery in the general public.[11] The American colonists enjoyed in common the benefits derived from navigable waters.[12] Under the charters granted to the different proprietaries of the colonies, the rights of fishery in navigable waters passed to such proprietaries as one of the incidents of the powers of government, and were held by them in the same manner as the public waters of England were held by the crown.[13] In none of these charters was the right

them, to be used by its citizens as a common for taking and cultivating fish, if navigation be not thereby obstructed. McCready *v.* Virginia, 94 U. S. 391, 24 L. Ed. 248.

In England.—The right of public fishery is never mentioned in the English decisions except in connection with tide-waters, where the title to the land is in the crown. Hardin *v.* Jordan, 140 U. S. 371, 389, 35 L. Ed. 428.

7. Rights of new states.—County of St. Clair *v.* Livingston, 23 Wall. 46, 68, 23 L. Ed. 59. See the title INDIANS.

8. Right held by state as trust.—Illinois Cent. R. Co. *v.* Illinois, 146 U. S. 387, 457, 36 L. Ed. 1018; Martin *v.* Waddell, 16 Pet. 367, 410, 414, 10 L. Ed. 997; Pollard *v.* Hagan, 3 How. 212, 220, 11 L. Ed. 565; McCready *v.* Virginia, 94 U. S. 391, 394, 395, 24 L. Ed. 248; Hallett *v.* Beebe, 13 How. 25, 14 L. Ed. 35; Withers *v.* Buckley, 20 How. 84, 15 L. Ed. 816; Russell *v.* Jersey Co., 15 How. 426, 14 L. Ed. 757; Goodtitle *v.* Kibbe, 9 How. 471, 13 L. Ed. 220; Geer *v.* Connecticut, 161 U. S. 519, 528, 40 L. Ed. 793; Smith *v.* Maryland, 18 How. 71, 74, 15 L. Ed. 269; Russell *v.* Jersey Co., 15 How. 426, 14 L. Ed. 757; Manchester *v.* Massachusetts, 139 U. S. 240, 260, 35 L. Ed. 159; Mumford *v.* Wardwell, 6 Wall. 423, 436, 18 L. Ed. 756; Weber *v.* Harbor Commissioners, 18 Wall. 57, 66, 21 L. Ed. 798; Shively *v.* Bowlby, 152 U. S. 1, 17, 38 L. Ed. 331; Damon *v.* Hawaii, 194 U. S. 154, 156, 48 L. Ed. 916; Bridge Co. *v.* United States, 105 U. S. 470, 490, 26 L. Ed. 1143; Blake *v.* McClung, 172 U. S. 239, 250, 43 L. Ed. 432; Kean *v.* Calumet Canal, etc., Co., 190 U. S. 452, 481, 47 L. Ed. 1134; County of St. Clair *v.* Livingston, 23 Wall. 46, 68, 23 L. Ed. 59.

The soil below low-water mark in the Chesapeake Bay, within the boundaries of Maryland, belongs to the state, subject to any lawful grant of that soil by the state or the sovereign power which governed its territory before the Declaration of Independence. But this soil is held by the state not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish, as well shell fish as floating fish. Smith *v.* Maryland, 18 How. 71, 15 L. Ed. 269.

Reclaimed land.—The principle covers a case where land had been reclaimed from the water under an act of the legislature. Russell *v.* Jersey Co., 15 How. 426, 14 L. Ed. 757.

The dissenting opinion of Mr. Justice Thompson in Russell *v.* Jersey Co., 15 How. 426, 14 L. Ed. 757, was approved in Shively *v.* Bowlby, 152 U. S. 1, 17, 38 L. Ed. 331. See, generally, the title NAVIGABLE WATERS.

9. Held in trust in England.—Martin *v.* Waddell, 16 Pet. 367, 10 L. Ed. 997.

10. Martin *v.* Waddell, 16 Pet. 367, 412, 10 L. Ed. 997.

11. Martin *v.* Waddell, 16 Pet. 367, 412, 10 L. Ed. 997.

12. In American colonies.—"In no one of the colonies has the soil under its navigable waters, and the rights of fishery for shell fish or floating fish, been severed by the letters patent from the powers of government. In all of them, from the time of the settlement to the present day, the previous habits and usages of the colonists have been respected, and they have been accustomed to enjoy in common, the benefits and advantages of the navigable waters, for the same purposes, and to the same extent, that they have been used and enjoyed, for centuries, in England." Martin *v.* Waddell, 16 Pet. 367, 414, 10 L. Ed. 997.

13. In New York.—See Martin *v.* Waddell, 16 Pet. 367, 10 L. Ed. 997.

In New Jersey.—The soil under the public navigable waters of East New Jersey belonged to the state and not to the proprietaries. Russell *v.* Jersey Co., 15 How. 426, 14 L. Ed. 757.

In Maryland.—"The appellants' contention is that the property in the soil under the river Potomac passed to Lord Baltimore and his grantees and that it passed, not as one of the regalia of the crown, or as a concomitant of government, but as an absolute proprietary interest, subject to every lawful public use, but not the less, on that account, a hereditament, and the subject of lawful ownership, and of the right of full and unqualified possession

to fishery ever severed from the powers of government.[14]

D. In Nonnavigable Waters.—Fishing rights in large streams, though not navigable, may be regarded as public rights.[15] Persons owning the whole of the soil constituting the bed and banks of such streams are entitled to the whole use and profits of the water opposite their land as a fishery, subject to the implied condition that they shall so use their own right as not to injure the concomitant right of another riparian owner, and to such regulations as the legislature of the state shall prescribe.[16] Where such a proprietor owns the land on one side only of the stream, his right to the land and to the use of the water as a fishery extends only to the middle thread of the stream, at common law, and is subject to the same conditions and regulations as when the ownership includes the whole soil over which the water of the stream flows.[17]

E. In Lakes and Ponds.—"In England proper there are so few lakes and ponds of large size, and so many fresh water streams and rivers, that in speaking of interior or fresh waters it was natural to refer to the latter without mentioning the former."[18] As many features of the common law with regard to the rights of riparian owners were borrowed directly from the civil law, it would not be strange if the rule relating to lakes and ponds came from the same source. Under the civil law, if the proprietor owns both banks of the lake, he has the exclusive right of fishery therein, subject to legislative regulation.[19] "Where a lake is very long in comparison with its width, the method applied to rivers and streams would probably be most suitable for adjusting riparian rights in the lake bottom along its sides, and the use of converging lines would only be required at its two ends."[20]

F. In Waters of Hawaiian Islands.—The organic act of the Territory of Hawaii of April 30, 1890, repealing all laws of the Republic of Hawaii which

when that public use shall have ceased. We need not enter into a discussion of this proposition, because the doctrine on which it is based has been heretofore adversely decided by this court in several leading and well-considered cases." Morris *v.* United States, 174 U. S. 196, 226, 43 L. Ed. 946.

14. Martin *v.* Waddell, 16 Pet. 367, 414, 10 L. Ed. 997; Russell *v.* Jersey Co., 15 How. 426, 433, 14 L. Ed. 757.

15. In nonnavigable waters.—Holyoke Co. *v.* Lyman, 15 Wall. 500, 506, 21 L. Ed. 133.

Rivers, though not navigable even for boats or rafts, and even smaller streams of water, may be and often are regarded as public rights, subject to legislative control, as the source for furnishing a valuable supply of fish, suitable for food and sustenance. Fisheries of the kind, even in waters not navigable, are so far public rights that the legislature of the state may ordain and establish regulations to prevent obstructions to the passage of the fish, and to promote the usual and uninterrupted enjoyment of the right by the riparian owners. Holyoke Co. *v.* Lyman, 15 Wall. 500, 506, 21 L. Ed. 133.

16. Where proprietor owns both sides of stream.—Holyoke Co. *v.* Lyman, 15 Wall. 500, 506, 21 L. Ed. 133; Hardin *v.* Jordon, 140 U. S. 371, 388, 35 L. Ed. 428. See, also, Russell *v.* Jersey Co., 15 How. 426, 432, 14 L. Ed. 757.

A proprietor who owned both banks of a watercourse of a large stream, and the whole soil over which the water flows, where the stream is not navigable, may claim the exclusive right of fishing, subject, however, to legislative regulation. Holyoke Co. *v.* Lyman, 15 Wall. 500, 506, 21 L. Ed. 133.

In lakes and ponds.—This is the law as to all fresh waters, including lakes and ponds as well. Hardin *v.* Jordan, 140 U. S. 371, 388, 35 L. Ed. 428.

17. Where proprietor owns one side of stream only.—Holyoke Co. *v.* Lyman, 15 Wall. 500, 506, 21 L. Ed. 133.

18. Hardin *v.* Jordan, 140 U. S. 371, 388, 35 L. Ed. 428.

The right of public fishery is never mentioned in English decisions except in connection with tidewaters, where the title to the land is in the crown. It is never said that this right exists in lakes or ponds, or in any other fresh waters. Hardin *v.* Jordan, 140 U. S. 371, 389, 35 L. Ed. 428.

The colonial ordinance of Massachusetts, adopted in 1641, provided that great ponds containing more than ten acres of land, and lying in common, though within the bounds of a town, should be free for fishing and fowling. In other states the rule of the common law has prevailed. Hardin *v.* Jordan, 140 U. S. 371, 393, 35 L. Ed. 428.

19. Hardin *v.* Jordan, 140 U. S. 371, 390, 35 L. Ed. 428.

20. Hardin *v.* Jordan, 140 U. S. 371, 398, 35 L. Ed. 428. See ante, "In Nonnavigable Waters," III, D.

Marshes.—See Niles *v.* Cedar Point Club, 175 U. S. 300, 308, 44 L. Ed. 171.

conferred exclusive fishing rights, subject to vested rights, and requiring all claimants to such right to start actions within two years, did not affect certain fishing rights created by the act of the Republic of Hawaii of 1846, "of public and private rights of piscary." The act of 1846 created a vested right, within the saving of the organic act, in the owner of an ahupuaa to the adjacent fishing grounds within a coral reef.[21]

G. Seal Fisheries.—Seal fisheries are a branch of commerce, and the governmental powers exercised in their regulation cannot be delegated or contracted away.[22] But the United States government may grant the privilege of fishing for seals to private persons, and may charge a rental therefor, which may be reduced, in case the government should restrict the number of seals permitted to be killed to a less number than that agreed upon at the time of granting the privilege.[23]

H. Grant of Fishing Rights—1. By Patent.—No particular words are necessary to convey a right of fishery, and a patent, granting an ahupuaa in the Hawaiian Islands, which states that "a fishing right is also attached to this

21. In Hawaiian waters.—Damon *v.* Hawaii, 194 U. S. 154, 157, 48 L. Ed. 916; Carter *v.* Hawaii, 200 U. S. 255, 50 L. Ed. 470.

"The right claimed is a right within certain metes and bounds to set apart one species of fish to the owner's sole use, or, alternatively, to put a taboo on all fishing within the limits for certain months and to receive from all fishermen one-third of the fish taken upon the fishing grounds. A right of this sort is somewhat different from those familiar to the common law, but it seems to be well known to Hawaii, and, if it is established, there is no more theoretical difficulty in regarding it as property and a vested right than there is regarding any ordinary easement or profit a prendre as such. The plaintiff's claim is not to be approached as if it were something anomalous or monstrous, difficult to conceive and more difficult to admit. Moreover, however anomolous it is, if it is sanctioned by legislation, if the statutes have erected it into a property right, property it will be, and there is nothing for the courts to do except to recognize it as a right." Damon *v.* Hawaii, 194 U. S. 154, 158, 48 L. Ed. 916.

The land commission of Hawaii was established to determine the title to lands as against the Hawaiian government. In practice it treated the fisheries as not within its jurisdiction, and it would seem to have been right in its view. Carter *v.* Hawaii, 200 U. S. 255, 257, 50 L. Ed. 470.

22. Seal fisheries.—North American Commercial Co. *v.* United States, 171 U. S. 110, 137, 43 L. Ed. 98.

23. Grant of privilege.—Under an agreement between the United States and a company organized for the purpose of carrying on seal fisheries, by which the United States should receive a per annum rental, in a fixed sum, during the term of the contract, in consideration for the privilege of permitting the killing of an agreed number of seals each year, and also a certain sum for each seal killed and shipped, which also contain a provision that, in case the government limited the number permitted to be killed to a less number than that fixed, the rental should be reduced, the court held that in case of restriction of the number of seals killed that the per annum rental may be reduced, but that the per capita would not be. North American Commercial Co. *v.* United States, 171 U. S. 110, 43 L. Ed. 98.

"The privilege leased was the exclusive right to take fur seal, but it was subject, and expressly subjected, from the beginning, to whatever regulations of the business the United States might make. If those regulations reduced the catch, the company was protected by a reduction of the rental, and paid taxes and per capita only on the number taken. The other expenses to which it bound itself were part of the risk of the venture." North American Commercial Co. *v.* United States, 171 U. S. 110, 137, 43 L. Ed. 98.

The reduction in the amount of rental should be made proportionate to the reduction in the number permitted to be taken, regardless of the number actually taken. In making the reduction in the number of seals permitted to be killed it is immaterial whether or not the secretary of the treasury acts in compliance with the will of the government, expressed in a treaty with foreign nations, or in accordance with his own judgment. By the act of 1874 the secretary of the treasury is empowered to reduce the number of seals permitted to be killed, and in exercising this right he acts at his discretion. North American Commercial Co. *v.* United States, 171 U. S. 110, 43 L. Ed. 98.

Where the original agreement contained no provision for increasing the number which might be killed, this number is not increased by subsequent legislation. The restriction contained in the act of 1870, Rev. Stat., § 1962, remains in force, in this regard, despite the act of May 24, 1874, amendatory thereof, and which removes the restrictions in regard to the number that may be taken at certain places and the months during which

land in the adjoining sea" defining it by boundaries, passes the fishery right although the habendum refers only to the "granted land."[24]

2. By General Law.—A general law may grant titles to fisheries as well as a special law.[25]

3. As Incident to Land under Water.—When the sovereign grants land under water, which cannot in its natural state be subjected to any of the uses to which dry land may be devoted, such a grant may be made to give an exclusive right of fishery.[26]

I. Termination of Right.—The exclusive right of fishery in nonnavigable waters is not divested by the condemnation of the land for milling purposes, unless the words of the grant indicate that such was the intention of the legislature.[27]

J. Protection of Right.—The adjoining landowner may prevent all other persons from participating in his several, or exclusive, right of fishery, and has a right of action against any who usurps the exercise of it without his consent.[28] A person who has the right of common fishery may set up such right against the owner of the water by the plea of common fishery.[29]

K. Rights of Nonresidents.—A state may prohibit the citizens of other states from fishing in its waters.[30]

IV. Protection and Regulation of Fish and Fisheries.

A. Benefit of Protection.—"The preservation of fish, even though they are not used as food for human beings, but as food for other fish which are so used, is for the common benefit."[31]

B. On High Seas.—The control of fisheries, to the extent of at least a marine league from the shore, belongs to the nation on whose coast the fisheries are situated.[32]

they may be taken. North American Commercial Co. *v.* United States, 171 U. S. 110, 129, 43 L. Ed. 98.

Under this agreement the United States government is not liable to damages because of the reduction. North American Commercial Co. *v.* United States, 171 U. S. 110, 136, 43 L. Ed. 98.

24. Damon *v.* Hawaii, 194 U. S. 154, 48 L. Ed. 916.

"The only difference between this case and Damon *v.* Hawaii, 194 U. S. 154, 48 L. Ed. 916, is that in this the fishery is not described in the royal patent, and that, apart from the question of prescription, upon which we shall say nothing, the plaintiffs have to rely upon the statutes alone." Carter *v.* Hawaii, 200 U. S. 255, 256, 50 L. Ed. 470. See ante, "Seal Fisheries," II, G. See the title INDIANS.

25. By general law.—Damon *v.* Hawaii, 194 U. S. 154, 160, 48 L. Ed. 916.

26. As incident to land under water.—Lowndes *v.* Huntington, 153 U. S. 1, 31, 38 L. Ed. 615.

27. Termination of right.—Holyoke Co. *v.* Lyman, 15 Wall. 500, 507, 21 L. Ed. 133.

28. Protection of right.—Holyoke Co. *v.* Lyman, 15 Wall. 500, 513, 21 L. Ed. 133. See ante, "In Navigable Waters," III, C.

By action of trespass.—The exclusive right of fishery in one's own waters may be asserted and by an action of trespass. Hardin *v.* Jordan, 140 U. S. 371, 389, 35 L. Ed. 428.

Action in nature of bill to quiet title.—In this case, an action at law, somewhat like a bill to quiet title, to establish the plaintiff's right to a several fishery of a peculiar sort, between the coral reef and the ahupuaa of Moanalua on the main land of the Island of Oahu was allowed. Damon *v.* Hawaii, 194 U. S. 154, 157, 48 L. Ed. 916.

29. By plea of common fishery.—Hardin *v.* Jordan, 140 U. S. 371, 389, 35 L. Ed. 428; McCready *v.* Virginia, 94 U. S. 391, 24 L. Ed. 248.

30. Rights of nonresidents.—McCready *v.* Virginia, 94 U. S. 391, 394, 24 L. Ed. 248; Manchester *v.* Massachusetts, 139 U. S. 240, 259, 35 L. Ed. 159; Thompson *v.* Whitman, 18 Wall. 457, 21 L. Ed. 897.

31. Protection and regulation.—Manchester *v.* Massachusetts, 139 U. S. 240, 265, 35 L. Ed. 159.

32. On high seas.—Manchester *v.* Massachusetts, 139 U. S. 240, 257, 35 L. Ed. 159; Louisiana *v.* Mississippi, 202 U. S. 1, 52, 50 L. Ed. 913.

"We think it must be regarded as established that, as between nations, the minimum limit of the territorial jurisdiction of a nation over tidewaters is a marine league from its coast; that bays wholly within its territory not exceeding two marine leagues in width at the mouth are within this limit; and that included in this territorial jurisdiction is the right of control over fisheries, whether the fish be migratory, free-swimming fish, or free-moving fish, or fish attached to or embedded in the soil. The open sea within this limit is, of course, subject to the common right of navigation; and all gov-

C. In Nonnavigable Waters.—Fishing rights in large streams, though not navigable, are regarded as public rights and subject to legislative control.[33]

D. Obstruction of Streams.—The right of fishery is equally entitled to legislative protection with the right of milling on nonnavigable waters.[34] Neither the exclusive right of fishery nor the right to dam a stream for milling purposes, confers the right to prevent the free passage of fish up and down the stream.[35] Although the right to dam the stream is conferred by a legislative act condemning the land to the use of another for mill purposes, unless the words of the grant conferring the authority to construct the dam plainly indicate that such was the intention of the legislature, the grantee cannot obstruct the passage of fish.[36]

E. Time and Method of Taking Fish.—A state may, under the exercise of its police power, preserve from destruction the fisheries within its jurisdic-

ernments, for the purpose of self-protection in time of war or for the prevention of frauds on its revenue, exercise an authority beyond this limit." Manchester *v.* Massachusetts, 139 U. S. 240, 258, 35 L. Ed. 159. And see proceedings of the Halifax Commission of 1877, under the Treaty of Washington of May 8, 1871, Executive Document No. 89, 45th Congress, 2d session, Ho. Reps. pp. 120, 121, 166.

The maritime belt is that part of the sea which, in contradistinction to the open sea, is under the sway of the riparian states, which can exclusively reserve the fishery within their respective maritime belts for their own citizens, whether fish, or pearls, or amber, or other products of the sea. Louisiana *v.* Mississippi, 202 U. S. 1, 52, 50 L. Ed. 913.

33. In nonnavigable waters.—Holyoke Co. *v.* Lyman, 15 Wall. 500, 506, 21 L. Ed. 133.

"Public rights, in all jurisdictions, are subject to legislative control, and it is settled law in Massachusetts, and has been for a century and a half, including her colonial history, that the right of fishery in such rivers as the Connecticut and Merrimac, even above the point where they are navigable for boats or rafts, and the right to erect and maintain dams to create water power for mill purposes, are public rights, and that the owners of such rights are bound by such reasonable regulations as the state may make and ordain for their protection and enjoyment." Holyoke Co. *v.* Lyman, 15 Wall. 500, 514, 21 L. Ed. 133.

34. Obstruction of streams.—Holyoke Co. *v.* Lyman, 15 Wall. 500, 507, 21 L. Ed. 133.

35. Dams.—Holyoke Co. *v.* Lyman, 15 Wall. 500, 512, 21 L. Ed. 133.

"Ownership of the banks and bed of the stream * * * gives to the proprietor the exclusive right of fishery, opposite his land, as well as the right to use the water to create power to operate mills, but neither the one nor the other right nor both combined confer any right to erect obstructions in the river to prevent the free passage of the fish up and down the river at their accustomed seasons." Holyoke Co. *v.* Lyman, 15 Wall. 500, 512, 21 L. Ed. 133.

36. Holyoke Co. *v.* Lyman, 15 Wall. 500, 507, 21 L. Ed. 133.

Fishways.—There is an implied obligation to construct passage ways for fish over dams in large streams. Such implied obligation may, however, be abrogated by the express terms of the charter of the corporation that built the dam. Holyoke Co. *v.* Lyman, 15 Wall. 500, 520, 21 L. Ed. 133.

Under the laws of Massachusetts, where the charter of a manufacturing corporation empowers it to build a dam across a large stream, but does not contain any provision negativing the implied obligation to construct passage ways for fish, though subjecting the corporation to damages for injury to the fishery rights of adjoining landowners above the dam, and the charter is subject to amendment and repeal, the state may thereafter compel the corporation to construct and maintain passage ways for fish over such dam, although the damages provided for have been paid. "That corporation, or any other which purchases its dam under the authority of a subsequent statute, may be constitutionally required by the legislature to construct a fishway in the dam to the satisfaction of commissioners appointed by the legislature for the purpose." Holyoke Co. *v.* Lyman, 15 Wall. 500, 21 L. Ed. 133.

Although the charter may have exempted the corporation from the duty to construct and maintain passage ways for fish over its dam in favor of upper riparian fisheries, yet the lower riparian fishery owners may compel the performance of such duty. Holyoke Co. *v.* Lyman, 15 Wall. 500, 523, 21 L. Ed. 133.

Who may complain of obstruction.—Where a fishery is injured by the erection of a dam in the Schuylkill River, whereby the passage of fish is prevented, not only may the owners of land contiguous to the river complain of the obstruction, but all others near it, who may have been accustomed to receive fish thence, or to fish with an angle or hoop-net. Willson *v.* Blackbird Creek Marsh Co., 2 Pet. 245, 252b, 7 L. Ed. 412.

Effect of provision for damages.—The provision obligating the milling company to pay damages for injury to fishery

tion, by restricting the catching of them to certain seasons,[37] or preventing the use of exhaustive methods of fishing, and a state law prohibiting fishing with nets,[38] and declaring such nets to be a nuisance and subject to forfeiture, is not unconstitutional.[39]

F. Penalties and Forfeitures.—A state may declare nets used unlawfully for fishing purposes a nuisance and forfeited,[40] and it has the right to protect this fishery by inflicting the penalty of forfeiture upon the vessel employed in violating its fishing laws,[41] although the vessel which is forfeited is enrolled and licensed for the coasting trade of the United States under an act of congress.[42]

G. Power of State to Regulate—1. IN NAVIGABLE WATERS.—In the distribution of powers between the general and state governments, the right to the fisheries and the power to regulate the fisheries on the coasts and in the tidewaters of the several states, were left, by the constitution of the United States, with the states, subject only to such powers as congress may justly exercise in the regulation of commerce, interstate and foreign;[43] and if congress does not assert by affirmative legislation its right or will to assume the control of fisheries in such waters, the right to control such fisheries must remain with the state which contains such waters.[44] The state cannot regulate

rights to riparian owners, does not exempt the company from the duty to build passage ways for fish. Holyoke Co. *v.* Lyman, 15 Wall. 500, 521, 21 L. Ed. 133.

37. Of time and method of catching fish.—Lawton *v.* Steele, 152 U. S. 133, 138, 38 L. Ed. 385. See, also, McCready *v.* Virginia, 94 U. S. 391, 24 L. Ed. 248.

38. "The duty of preserving the fisheries of a state from extinction, by prohibiting exhaustive methods of fishing, or the use of destructive instruments as are likely to result in the extermination of the young as well as the mature fish, is as clear as its power to secure to its citizens, as far as possible, a supply of any other wholesome food." Lawton *v.* Steele, 152 U. S. 133, 139, 38 L. Ed. 385.

39. Lawton *v.* Steele, 152 U. S. 133, 38 L. Ed. 385.

The main and only real difficulty connected with the act in question is in its declaration that any net, etc., maintained in violation of any law for the protection of fisheries, is to be treated as a public nuisance, "and may be abated and summarily destroyed by any person, and it shall be the duty of each and every protector aforesaid and every game constable to seize, remove, and forthwith destroy the same." The legislature, however, undoubtedly possessed the power not only to prohibit fishing by nets in these waters, but to make it a criminal offense, and to take such measures as were reasonable and necessary to prevent such offenses in the future. It certainly could not do this more effectually than by destroying the means of the offense. If the nets were being used in a manner detrimental to the interests of the public, we think it was within the power of the legislature to declare them to be nuisances, and to authorize the officers of the state to abate them. Where the property is of little value, and its use for the illegal purpose is clear, the legislature may declare it to be a nuisance, and subject to summary abatement, without judicial detention. Lawton *v.* Steele, 152 U. S. 133, 139, 38 L. Ed. 385. See Smith *v.* Maryland, 18 How. 71, 15 L. Ed. 269.

40. Penalties and forfeitures.—Lawton *v.* Steele, 152 U. S. 133, 38 L. Ed. 385. See ante, "Time and Method of Taking Fish," IV, C.

41. Smith *v.* Maryland, 18 How. 71, 15 L. Ed. 269; Thompson *v.* Whitman, 18 Wall. 457, 21 L. Ed. 897.

42. Smith *v.* Maryland, 18 How. 71, 15 L. Ed. 269.

Such a law is not repugnant to the constitution as interfering with the admiralty and maritime jurisdiction of the judicial power of the United States. Smith *v.* Maryland, 18 How. 71, 74, 75, 76, 15 L. Ed. 269; The Malek Adhel, 2 How. 210, 233, 11 L. Ed. 239; Manchester *v.* Massachusetts, 139 U. S. 240, 261, 35 L. Ed. 159; United States *v.* Bevans, 3 Wheat. 336, 386, 4 L. Ed. 404.

43. Power of state to regulate.—Manchester *v.* Massachusetts, 139 U. S. 240, 258, 35 L. Ed. 159.

Subject to the paramount right of navigation, the regulation of which in relation to foreign and interstate commerce has been granted to the United States, each state owns the beds of all tidewaters within its jurisdiction, and may appropriate them, to be used by its citizens as a common for taking and cultivating fish, if navigation be not thereby obstructed. The right which the citizens of the state thus acquire is a property right and not a mere privilege or immunity of citizenship. McCready *v.* Virginia, 94 U. S. 391, 24 L. Ed. 248; Wharton *v.* Wise, 153 U. S. 155, 173, 38 L. Ed. 669; Smith *v.* Maryland, 18 How. 71, 74, 15 L. Ed. 269; Martin *v.* Waddell, 16 Pet. 367, 10 L. Ed. 997.

44. When congress does not act.—Manchester *v.* Massachusetts, 139 U. S. 240, 266, 35 L. Ed. 159.

"We do not consider the question whether or not congress would have the

fisheries so as to affect the admiralty jurisdiction of the United States.[45] The state of Maryland can regulate fisheries in Chesapeake Bay.[46]

2. In Interstate Rivers.—It may be doubted whether a state can obstruct the migration of fish in an interstate river. The question has, however, not been decided.[47]

3. Under Compact between States.—A state, which, under an agreement with another state, has no right to fish in border waters, cannot regulate the fisheries therein.[48]

V. Validity of Fishing Compacts between States.

An agreement between two states in regard to fisheries in border waters does not fall within the inhibition of the articles of confederation forbidding any treaty, etc., between the different states without consent of congress, and is valid.[49]

VI. Fishing Vessels as Prize of War.

See the titles Neutrality; Prize.

right to control the menhaden fisheries which the statute of Massachusetts assumes to control; but we mean to say only that, as the right of control exists in the state in the absence of the affirmative action of congress taking such control, the fact that congress has never assumed the control of such fisheries is persuasive evidence that the right to control them still remains in the state." Manchester *v.* Massachusetts, 139 U. S. 240, 266, 35 L. Ed. 159.

45. Cannot so regulate as to affect admiralty jurisdiction.—Upon the question of the admiralty jurisdiction the court said: "But we consider it to have been settled by this court, in United States *v.* Bevans, 3 Wheat. 336, 4 L. Ed. 404, that this clause in the constitution did not affect the jurisdiction, nor the legislative power of the states, over so much of their territory as lies below high-water mark, save that they parted with the power so to legislate as to conflict with the admiralty jurisdiction or laws of the United States. As this law conflicts neither with the admiralty jurisdiction of any court of the United States conferred by congress, nor with any law of congress whatever, we are of opinion it is not repugnant to this clause of the constitution." Manchester *v.* Massachusetts, 139 U. S. 240, 261, 35 L. Ed. 159.

46. Maryland in Chesapeake Bay.—The soil below low-water mark in the Chesapeake Bay, within the boundaries of Maryland, belongs to the state, subject to any lawful grants of that soil by the state or the sovereign power which governed its territory before the Declaration of Independence. Smith *v.* Maryland, 18 How. 71, 15 L. Ed. 269.

"The state holds the proprietv of this soil for the conservation of the public rights of fishery thereon, and may regulate the modes of that enjoyment so as to prevent the destruction of the fishery. In other words, it may forbid all such acts as would render the public right less valuable, or destroy it altogether. This power results from the ownership of the soil, from the legislative jurisdiction of the state over it, and from its duty to preserve unimpaired those public uses for which the soil is held." Smith *v.* Maryland, 18 How. 71, 75, 15 L. Ed. 269.

In Buzzard's Bay.—Fisheries in such waters as Buzzard's Bay have never been the subject of treaty or congressional regulation. Manchester *v.* Massachusetts, 139 U. S. 240, 35 L. Ed. 159.

47. In interstate rivers.—A charter may doubtless be granted to a milling corporation to build a dam across a river whose whole course is within the state granting the franchise, "with a provision exempting the corporation from all obligation to construct such fishery for the free passage of the fish, as the enterprise of erecting a dam to create power to operate mills is so far public in its nature that it is competent for the legislature to exercise the power of eminent domain to accomplish the purpose if suitable provision is made to compensate the owners of the property or rights condemned under that power, but it may be more doubtful whether the legislature of a state can make a contract with such a corporation authorizing them to construct a dam across a river flowing through two or more states, which shall permanently exempt the grantees from all such obligation and destroy forever the rights of fishery in the river throughout its whole course from its source to its confluence with tidewaters." Holyoke Co. *v.* Lyman, 15 Wall. 500, 522, 21 L. Ed. 133.

48. Under compact between states.—No clause of the compact between Maryland and Virginia having given any right to Maryland to fish in Pocomoke River, there is no reason why Maryland should be allowed to interfere in any way by legislation or regulation for the preservation of its fish. Wharton *v.* Wise, 153 U. S. 155, 175, 38 L. Ed. 669.

49. Validity of compact between states.—Wharton *v.* Wise, 153 U. S. 155, 38 L. Ed. 669. See, generally, the title STATES.

FITTING OUT.—See note 1.
FIXED.—See note 2.

FIXTURES.

CROSS REFERENCES.

See the titles IMPROVEMENTS; MORTGAGES AND DEEDS OF TRUST.

The general rule of the common law undoubtedly is, that whatever is once annexed to the freehold, becomes part of it, and cannot be afterwards removed, except by him who is entitled to the inheritance.[3] This rule, however, never was inflexible; and without exceptions.[4] It was construed most strictly between executor and heir, in favor of the latter, and more liberally between tenant for life and in tail, and remainderman or reversioner, in favor of the former, and with much greater latitude between landlord and tenant, in favor of the tenant.[5] A more extensive exception to the rule has been, of fixtures erected for the purpose of trade.[6] Fixtures which were erected to carry on trade and manufactures

1. **Fitting out.**—Under the act of congress punishing **fitting out** of vessels with intent to employ them in the slave trade, any preparations for a slave voyage which clearly manifest or accompany the illegal intent, even though incomplete and imperfect, and before the departure of the vessel from port do yet constitute a **fitting out**, within the purview of the statute; and if the vessel actually sailed for the purpose of employment in the slave trade, her fitment was complete, for all purposes of the act. United States *v.* Gooding, 12 Wheat. 460, 472, 6 L. Ed. 693. See the title SLAVERY AND INVOLUNTARY SERVITUDE.

The conversion, within the United States, of a foreign merchant vessel into a cruiser to act against an enemy of the vessel's country, but one peaceful towards the United States, constitutes a **fitting out** of the vessel, within the meaning of the United States statute prohibiting any person to **fit out** and arm any ship or vessel with the intent to cruise upon a foreign power with whom the United States is at peace. United States *v.* Guinet, 2 Dall. 321, 328, 1 L. Ed. 398. See the title NEUTRALITY.

2. **Fixed by ordinance.**—The statute of April 10, 1872, of Illinois, authorized city councils to contract with any person or corporation to construct and maintain waterworks "at such rates as may be **fixed** by ordinance, and for a period not exceeding thirty years." It was held that the words "**fixed** by ordinance" might be construed to mean by ordinance once for all, to endure during the whole period of thirty years; or by ordinance from time to time as might be deemed necessary; and that of the two constructions, that must be adopted which is most favorable to the public, not that one which would so tie the hands of the council that the rates could not be adjusted as justice to both parties might require at a particular time. Freeport Water Co. *v.* Freeport City, 180 U. S. 587, 600, 45 L. Ed. 679.

3. Van Ness *v.* Pacard, 2 Pet. 137, 7 L. Ed. 374.

"If one erects a permanent building, like a dwelling house, upon the land of another voluntarily and without any contract with the owner, it becomes a part of the realty, and belongs to the owner of the soil." Kinkead *v.* United States, 150 U. S. 483, 491, 37 L. Ed. 1152.

4. Van Ness *v.* Pacard, 2 Pet. 137, 7 L. Ed. 374.

"Buildings may, by agreement of parties, be erected upon land without becoming affixed thereto." Kinkead *v.* United States, 150 U. S. 483, 484, 491, 37 L. Ed. 1152.

5. Van Ness *v.* Pacard, 2 Pet. 137, 7 L. Ed. 374. See, generally, the title LANDLORD AND TENANT.

"As between landlord and tenant, or one in temporary possession of lands under any agreement whatever for the use of the same, the law is extremely indulgent to the latter with respect to the fixtures annexed for a purpose connected with such temporary possession." Wiggins Ferry Co. *v.* Ohio, etc., R. Co., 142 U. S. 396, 415, 35 L. Ed. 1055.

Where a portion of a railroad is abandoned, the rails fastened to the roadbed may be removed by the company, where the road was built upon the land under a license and permission of the owner. Wiggins Ferry Co. *v.* Ohio, etc., R. Co., 142 U. S. 396, 416, 35 L. Ed. 1055. See, generally, the title RAILROADS.

6. Van Ness *v.* Pacard, 2 Pet. 137, 7 L. Ed. 374.

What constitutes fixtures for trade purposes.—The question whether fixtures erected for the purposes of trade, are or are not removable by the tenant, does not depend upon the form or size of the building; whether it has a brick foundation or not, or is one or two stories high; or has a brick or other chimney; the sole question is, whether it is designed for the purposes of trade, or not. Van Ness *v.* Pacard, 2 Pet. 137, 7 L. Ed. 374.

If the house were built principally for

were, from an early period of the law, allowed to be removed by the tenant, during his term, and were deemed personalty, for many other purposes.[6a]

FLAG.—As to legislation by congress as to use of the flag, see the title CONSTITUTIONAL LAW, vol. 4, p. 184. As to equal protection of the law, see CONSTITUTIONAL LAW, vol. 4, p. 364. As to power of states to prohibit misuse of national flag, see the title CONSTITUTIONAL LAW, vol. 4, p. 184. See, generally, the title STATES. As to whether or not a state statute prohibiting the use of the national flag for advertising purposes, constitutes a deprivation of liberty or property without due process of law, see the title POLICE POWER. As to a captured prize of war, being bound by her flag, see the title PRIZE. As to ships carrying flag of nation to which they belong, see title SHIPS AND SHIPPING. See note 1.

FLAGMAN.—As to duty of a railroad company to keep a flagman stationed at a crossing, see the title CROSSINGS, vol. 5, p. 150.

FLAT.—The term flat is synonymous with shore.[2]

FLEEING FROM JUSTICE.—See the title CRIMINAL LAW, vol. 5, p. 99. And see, generally, the title EXTRADITION.

FLIGHT.—See the title CRIMINAL LAW, vol. 5, p. 122.

FLOAT.—A float is a grant of a quantity of land, to be located within a certain tract or territory, whether of limited extent, marked by certain bounds, or anywhere in the state.[3]

FLOATING ELEVATOR.—Floating elevators are primarily boats. Some are scows, and have to be towed from place to place by steam tugs; but the majority are propellers. When the floating elevator arrives at the ship and makes fast alongside of her, the canal boat carrying the grain is made fast on the other side of the elevator. The machinery of the elevator is then set in motion, the grain is elevated out of the canal boat, received and weighed in the elevator, and discharged into the ship.[4]

FLOCKS.—The term "flocks," as used in the revenue laws, is defined as "woolen or cotton refuse, old rags, etc., reduced to a degree of fineness by machinery, and for stuffing upholstered furniture."[5]

FLOOD AS ACT OF GOD.—See the title CARRIERS, vol. 3, p. 594.

a dwelling house for the family, independently of carrying on a trade, then it would, doubtless, be deemed a fixture, falling under the general rule, and irremovable; but if the residence of the family were merely an accessory for the more beneficial exercise of the trade, and with a view to superior accommodation in this particular, then it is within the exception. Van Ness *v.* Pacard, 2 Pet. 137, 7 L. Ed. 374.

6a. Van Ness *v.* Parcard, 2 Pet. 137, 7 L. Ed. 374. See, also, Wiggins Ferry Co. *v.* Ohio, etc., R. Co., 142 U. S. 396, 35 L. Ed. 1055.

"Trade fixtures put up by the lessee, although real estate as between the lessor and himself, while annexed to the land, yet may, during the term of the lease, be severed by the lessee, or by one deriving title from him, and thus reconverted to their original condition of chattels. At any time before the expiration of the term, therefore, both the leasehold and the fixtures may be taken on execution against the lessee, like other personal property." Kutter *v.* Smith, 2 Wall. 491, 17 L. Ed. 830; Van Ness *v.* Pacard, 2 Pet. 137, 7 L. Ed. 374; Freeman *v.* Dawson, 110 U. S. 264, 270, 28 L. Ed. 141.

1. Definition.—The flag is an emblem of national sovereignty; the emblem of national power and national honor. The American people, acting through the legislative branch of the government, early in their history, prescribed a flag as symbolical of the existence and sovereignty of the nation. Halter *v.* Nebraska, 205 U. S. 34, 41, 51 L. Ed. 696.

Affirmance of flag.—A warship in time of peace is not bound by any universal rule of obligation to affirm her national flag by an appropriate gun when at sea, though the ceremony might be salutary and proper in periods of war, and suitable to its exigencies. The Marianna Flora, 11 Wheat. 1, 48, 6 L. Ed. 405.

2. Alabama *v.* Georgia, 23 How. 505, 513, 16 L. Ed. 556.

3. United States *v.* M'Laughlin, 127 U. S. 428, 32 L. Ed. 213. See, generally, the title PUBLIC LAND.

4. Budd *v.* New York, 143 U. S. 517, 529, 36 L. Ed. 247.

5. Patton *v.* United States, 159 U. S. 500, 503, 40 L. Ed. 233. See, generally, the title REVENUE LAWS.

FLOODS.—See the title WATERS AND WATERCOURSES.

FLOOR CLOTH CANVAS.—"Floor cloth canvas" as used in the revenue laws is the commercial term implying a well-known article of merchandise; it has a harder twist, is heavier, is a more expensive article than burlaps, and is not calendered as burlaps are; and the terms "oil cloth foundations" and "floor cloth canvas" as used in the revenue statutes mean in commerce the same thing.[1]

FLORIDA.—See the titles STATES; TERRITORIES. As to effect of admission upon right of appeal, see the title APPEAL AND ERROR, vol. 1, p. 528.

FOG.—See the title COLLISION, vol. 3, p. 918.

FOLIO CHARGE FOR MAKING RECORD.—See the title CLERKS OF COURT, vol. 3, p. 858.

FOOD.—As to appellate jurisdiction over circuit court on question arising out of pure food laws, see the title APPEAL AND ERROR, vol. 1, p. 485. As to denial of equal protection of the law under food statutes, see the title CONSTITUTIONAL LAW, vol. 4, pp. 367, 371, 372, 374, 375, 376. As to right of state to legislate against imitation and adulterated foods, see the title CONSTITUTIONAL LAW, vol. 4, p. 376. As to constitutionality of statute providing for the fixing of standard samples of imported tea by board appointed by secretary of the treasury, see the title CONSTITUTIONAL LAW, vol. 4, p. 289. As to delegation of power to regulate marks and brands for oleomargarine, see the title CONSTITUTIONAL LAW, vol. 4, p. 288. As to prohibition by a state of food used in a soldier's home under control of federal government, see the title CONSTITUTIONAL LAW, vol. 4, p. 206. As to excise upon artificially colored oleomargarine, see the title CONSTITUTIONAL LAW, vol. 4, p. 410. As to denial of equal protection of laws by a milk license, see the title CONSTITUTIONAL LAW, vol. 4, p. 370. As to prohibiting sale of milk as in conflict with the fourteenth amendment, see the title CONSTITUTIONAL LAW, vol. 4, p. 375. As to due process questions arising out of the act of congress preventing the importation of unwholesome tea, see the title DUE PROCESS OF LAW, vol. 5, p. 499. As to exclusion of evidence of adulteration, see the title EVIDENCE, vol. 5, p. 1004. As to prohibiting sale of adulterated foods and its effect upon commerce, see the title INTERSTATE AND FOREIGN COMMERCE. As to effect upon commerce of regulations of the sale of oleomargarine, see the title INTERSTATE AND FOREIGN COMMERCE. As to the police power, see the title POLICE POWERS.

FOR.—See note 2.

1. Arthur *v.* Cummings, 91 U. S. 362, 364, 23 L. Ed. 438. See, generally, the title REVENUE LAWS.

2. **For.**—The preposition **for** means of itself duration when it is put in connection with time and as all of us use it in that way in every day conversation, it cannot be presumed that the legislature did not mean to use it in the same way in making a statute that public notice of the time and place of sale of real property for taxes due to a city should be given by advertisement inserted in some city newspaper, "once in each week **for** at least twelve successive weeks," and in such case it must be advertised **for** twelve full weeks, or eighty-four days. Early *v.* Homans, 16 How. 610, 616, 14 L. Ed. 1079; Leach *v.* Burr, 188 U. S. 510, 512, 47 L. Ed. 567.

In the District of Columbia on probate of a will publication is required in case any party in interest is not found, the statute providing that the court shall order a publication at least twice a week **for** a period of not less than four weeks of a copy of the issues and notification of trial in some newspaper of general circulation in the District of Columbia, and may order such other publication as the case may require. It was held that two publications in each successive day from the date of the order of the court, which was Friday, was sufficient under the statute, the court saying: "But the language of this statute is not 'for four weeks,' but 'for a period of not less than four weeks,' and the words of the order must be construed in the light of the statute. A like difference was called to the attention of the court in Early *v.* Homans, 16 How. 610, 14 L. Ed. 1079, where the publication was to be 'once in each week, **for** at least twelve successive weeks,' and commenting thereon it was said (p. 617): 'The preposition **for** means of itself duration when it is put in connection with time, and as all of us use it in that way, in our everyday conversation, it cannot be presumed that the legislator, in making this statute, did not mean to use it in the same way. Twelve

FORBEARANCE.—As to the suspension of an existing demand constituting a forbearance, see the title CONTRACTS, vol. 4, p. 566.

FORCE.—See note 1.

FORCED SALES.—See the titles HOMESTEAD EXEMPTIONS; JUDICIAL SALES; SHERIFFS', CONSTABLES' AND MARSHALS' SALES.

FORCIBLE ENTRY AND DETAINER.

CROSS REFERENCES.

See the titles APPEAL AND ERROR, vol. 1, p. 333; LANDLORD AND TENANT.

Nature and Object of Statutes.—The general purpose of these statutes is, that, not regarding the actual condition of the title to the property, where any person is in the peaceable and quiet possession of it, he shall not be turned out by the strong hand, by force, by violence, or by terror. The party so using force and acquiring possession may have the superior title or may have the better right to the present possession, but the policy of the law in this class of cases is to prevent disturbances of the public peace, to forbid any person righting himself in a case of that kind by his own hand and by violence, and to require that the party who has in this manner obtained possession shall restore it to the party from whom it has been so obtained,[2] and then, when the parties are in statu quo, or in the same position as they were before the use of violence, the party out of possession must resort to legal means to obtain his possession, as he should have done in the first instance. This is the philosophy which lies at the foundation of all these actions of forcible entry and detainer, which are declared not to have relation to the condition of the title, or to the absolute right

successive weeks is as definite a designation of time, according to our division of it, as can be made. When we say that anything may be done in twelve weeks, or that it shall not be done for twelve weeks, after the happening of a fact which is to precede it, we mean that it may be done in twelve weeks or eighty-four days, or, as the case may be, that it shall not be done before.'" Leach *v.* Burr, 188 U. S. 510, 512, 47 L. Ed. 567. See the titles SUMMONS AND PROCESS; TIME.

For her use.—Where in a case of collision the injured boat was sunk, and the plaintiffs declared for a total loss; but it came out in evidence, that she was raised and repaired, and again commenced running the river and on this state of facts the jury was charged that damages should be given for raising the boat and for repairing her; also damages in addition, "for her use, during the time necessary to make the repairs and fit her for business," "the expression for her use, must mean either the clear profits of her probable earnings; or, how much she could have been hired for to others during the time of her detention." Williamson *v.* Barrett, 13 How. 101, 113, 14 L. Ed. 68, Justice Catron in a dissenting opinion.

For matter of form.—See FORM.

For the interest.—Where the bond of a railroad company providing that in case the net earnings should not in any one year be sufficient to enable the company to pay certain per cent. interest on outstanding bonds, then script might, at the option of the company, be issued for the interest, the term for the interest means in place of the interest, and under the terms of the bond the company was bound to pay the interest on the day it was due or else issue script, on the failure of the sufficiency of net earnings to pay the full interest. Texas, etc., Ry. Co. *v.* Marlor, 123 U. S. 687, 701, 31 L. Ed. 303.

For the use.—Where streets and public squares are declared to be conveyed "for the use of the United States forever," these words vest an absolute unconditional fee simple in the United States. They are the very words which by law are required to vest an absolute unconditional fee simple in the United States. They are the appropriate terms of art to express an unlimited use in the government. Potomac Steamboat Co. *v.* Upper Potomac Steamboat Co., 109 U. S. 672, 680, 27 L. Ed. 1070, citing Van Ness *v.* Washington, 4 Pet. 232, 7 L. Ed. 842.

1. **Force.**—As used in code of Louisiana, see Viterbo *v.* Friedlander, 120 U. S. 707, 728, 30 L. Ed. 776.

3. **Nature and object of statutes.**—Iron Mountain, etc., Railroad *v.* Johnson, 119 U. S. 608, 611, 30 L. Ed. 504.

Where a contractor has completed but has not received payment for a part of a railroad, and has been ejected with force and violence by the railroad company, he may recover the possession under the statutes of Arkansas relating to forcible entries and detainers, and questions as to the validity of the contract are immaterial. Iron Mountain, etc., Railroad *v.* Johnson, 119 U. S. 608, 30 L. Ed. 504.

of possession, but to compelling the party out of possession, who desires to recover it of a person in the peaceable possession, to respect and resort to the law alone to obtain what he claims.[2a]

Indictment and Inquisition.—It has been held that mere surplusage[3] or informality in expression will not vitiate an indictment or inquisition.[4]

Evidence.—Where the defendant in an action of unlawful detainer put in evidence a lease from the owner of the property, which lease had been assigned to him, the plaintiff may put in evidence a judgment canceling and setting aside the lease because made by one incompetent.[5]

Verdict.—In Oregon a verdict does not vitiate the judgment, which does not state, in terms, that the plaintiff is entitled to the possession of the property described in the complaint, or any part thereof; or does not state the nature or duration of his estate in the property.[6]

FOR COLLECTION.—As to endorsements "for collection," see the titles BANKS AND BANKING, vol. 3, p. 66; BILLS, NOTES AND CHECKS, vol. 3, p. 295.

FORECLOSURE.—See the titles CHATTEL MORTGAGES, vol. 3, p. 763; MECHANICS' LIENS; MORTGAGES AND DEEDS OF TRUST.

FOREIGN ASSOCIATIONS.—See the title BENEFICIAL AND BENEVOLENT ASSOCIATIONS, vol. 3, p. 212.

FOREIGN ATTACHMENT.—See the title ATTACHMENT AND GARNISHMENT, vol. 2, p. 666.

FOREIGN BILLS OF EXCHANGE.—See the title BILLS, NOTES AND CHECKS, vol. 3, p. 266.

FOREIGN COMMERCE.—See the title INTERSTATE AND FOREIGN COMMERCE.

2a. Iron Mountain, etc., Railroad *v.* Johnson, 119 U. S. 608, 30 L. Ed. 504.

3. **Indictment.**—In an early Pennsylvania case an indictment was objected to on two grounds: 1. For that the indictment stated, "that the prosecutor was seized in his demesne as of fee," without saying when he was seized; so that it might be he was seized at the time of the indictment found, and not at the time of the forcible entry. 2. For that the indictment stated, "that he was seized in his demesne as of fee," and "his peaceable possession thereof as aforesaid continued until, etc.," which is repugnant and inconsistent, inasmuch as he could not be both seized and possessed at the same time. But the court overruled both objections: And McKean, C. J., said, that the words, "his peaceable possession thereof as aforesaid," were surplusage, and ought to be rejected. Respublica *v.* Shryber, 1 Dall. 68, 1 L. Ed. 401. See the title INDICTMENTS, INFORMATIONS, PRESENTMENTS AND COMPLAINTS.

4. **Inquisition.**—In a Pennsylvania case an inquisition stated, "that N. B. was possessed in his demesne as of fee, etc., and continued so seized and possessed, until the defendant did enter, and him the said N. B. thereof disseised," etc. It was objected, that the prosecutor is stated to have been only possessed of the premises, whereas the evidence proved him to have been seised. But the court held that though there was some informality in the expressions, the stating that the prosecutor was disseised necessarily implied a previous seisin. Commonwealth *v.* Fitch, 4 Dall. 212, 1 L. Ed. 805.

5. **Evidence.**—Lehnen *v.* Dickson, 148 U. S. 71, 79, 37 L. Ed. 373. See, generally, the title EVIDENCE, vol. 5, p. 1004.

6. **Verdict.**—Bennett *v.* Harkrader, 158 U. S. 441, 446, 39 L. Ed. 1046. See, generally, the title VERDICT.

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As to antitrust laws, discriminations therein and proceedings thereunder, see the title MONOPOLIES AND CORPORATE TRUSTS. As to consolidation of foreign with domestic corporations, and effect thereof, see the titles CORPORATIONS, vol. 4, p. 621; MUNICIPAL, COUNTY, STATE AND FEDERAL AID; RAILROADS. As to rights of British corporations under treaty after revolution, see the title ALIENS, vol. 1, p. 238. As to rate of interest on loans, see the titles INTEREST; USURY. As to charter as contract, and other principles applicable to corporations generally, see the title CORPORATIONS, vol. 4, p. 621.

I. Definitions and General Considerations.

A. Definition.—All corporations in states other than the state of their creation are deemed to be foreign corporations.[1]

B. As Citizens.—Foreign corporations are not citizens within the meaning of the privilege and immunity clause of the federal constitution.[2]

C. As Persons.—See the titles CORPORATIONS, vol. 4, p. 644; COURTS, vol. 4, p. 949; REMOVAL OF CAUSES.

D. Officers and Agents.—A foreign corporation may, by its conduct, be held to have impliedly ratified the acts of its agent done in its behalf, although the agent may have exceeded the powers originally given him.[3]

E. Stock and Stockholders.—By subscribing to stock in a foreign corporation, defendant subjected itself to the laws of such foreign country in respect to the powers and obligations of such corporation.[4]

II. Extraterritorial Rights and Powers.

A. Existence Out of State Granting Charter, and Comity Rule.—1. **Definition.**—Horn Silver Min. Co. *v.* New York State, 143 U. S. 305, 314, 36 L. Ed. 164. See, also, the title CORPORATIONS, vol. 4, p. 621.

Foreign joint-stock associations.—See the title JOINT-STOCK COMPANIES.

Doing business.—As to meaning of "doing business," see post, "Discretion of Legislature," II, A, 4, a; "Filing Charter," II, A, 4, f; "Maintenance of Office and Agent for Service of Process," II, A, 4, c. See, also, the titles INSURANCE; SUMMONS AND PROCESS; TAXATION.

2. **As citizens.**—Blake *v.* McClung, 172 U. S. 239, 259, 43 L. Ed. 432, reaffirmed in Blake *v.* McClung, 176 U. S. 59, 65, 44 L. Ed. 371; Paul *v.* Virginia, 8 Wall. 168, 19 L. Ed. 357. See Pensacola Tel. Co. *v.* Western Union Tel. Co., 96 U. S. 1, 12, 24 L. Ed. 708; Hooper *v.* California, 155 U. S. 648, 39 L. Ed. 297; Noble *v.* Mitchell, 164 U. S. 367, 371, 41 L. Ed. 472.

A foreign corporation cannot demand as a constitutional right the privilege of contracting and engaging in business within a state upon the ground that the individuals of which it is composed are citizens of one of the United States, entitled to all the rights, privileges and immunities guaranteed by the federal constitution. Bank *v.* Earle, 13 Pet. 519, 10 L. Ed. 274. See post, "In General," II, A, 2, a. See the titles CONSTITUTIONAL LAW, vol. 4, pp. 468, 475; CORPORATIONS, vol. 4, p. 647.

Status for jurisdictional purposes.—See the titles COURTS, vol. 4, p. 949, et seq; REMOVAL OF CAUSES. See, also, the title CORPORATIONS, vol. 4, p. 647.

3. **Ratification of agency.**—Relief Fire Ins. Co. *v.* Shaw, 94 U. S. 574, 579, 24 L. Ed. 291. See, generally, the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

4. **Liabilities.**—Nashua Savings Bank *v.* Anglo-American Land, etc., Co., 189 U. S. 221, 230, 47 L. Ed. 782; Canada Southern R. Co. *v.* Gebhard, 109 U. S. 527, 27 L. Ed. 1020; Relfe *v.* Rundle, 103 U. S. 222, 26 L. Ed. 237. See, generally, the title STOCK AND STOCKHOLDERS.

EXISTENCE OUT OF STATE GRANTING CHARTER—a. *Principle Stated.*—A corporation can have no legal existence out of the boundaries of the sovereignty by which it was created.[5] Though it may do business in all places where its charter allows and the local laws do not forbid,[6] or the law of the state of its

5. Existence out of state granting charter.—"In Bank *v.* Earle, 13 Pet. 519, 588, 10 L. Ed. 274, Chief Justice Taney said: 'It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty.'" Shaw *v.* Quincy Min. Co., 145 U. S. 444, 449, 36 L. Ed. 768. See Bank *v.* Deveaux, 5 Cranch 61, 3 L. Ed. 38; Covington Drawbridge Co. *v.* Shepperd, 20 How. 227, 233, 15 L. Ed. 896; Runyan *v.* Coster, 14 Pet. 122, 10 L. Ed. 382; Marshall *v.* Baltimore, etc., R. Co., 16 How. 314, 328, 14 L. Ed. 953; Lafayette Ins. Co. *v.* French, 18 How. 404, 407, 15 L. Ed. 451; Dodge *v.* Woolsey, 18 How. 331, 371, 15 L. Ed. 401; Ohio, etc., R. Co. *v.* Wheeler, 1 Black 286, 17 L. Ed. 130; Paul *v.* Virginia, 8 Wall. 168, 181, 19 L. Ed. 357; Insurance Co. *v.* Francis, 11 Wall. 210, 216, 20 L. Ed. 77; St. Louis *v.* Ferry Co., 11 Wall. 423, 429, 20 L. Ed. 192; Galveston Railroad *v.* Cowdrey, 11 Wall. 459, 476, 20 L. Ed. 199; Railroad Co. *v.* Harris, 12 Wall. 65, 81, 20 L. Ed. 354; Railway Co. *v.* Whitton, 13 Wall. 270, 285, 20 L. Ed. 571; Tioga Railroad *v.* Blossburg, etc., Railroad, 20 Wall. 137, 148, 22 L. Ed. 331; Ex parte Schollenberger, 96 U. S. 369, 378, 24 L. Ed. 853; Pensacola Tel. Co. *v.* Western Union Tel. Co., 96 U. S. 1, 19, 24 L. Ed. 708; Cowell *v.* Springs Co., 100 U. S. 55, 25 L. Ed. 547; Railroad Co. *v.* Koontz, 104 U. S. 5, 12, 26 L. Ed. 643; Canada Southern R. Co. *v.* Gebhard, 109 U. S. 527, 537, 27 L. Ed. 1020; Nashua, etc., R. Corp. *v.* Boston, etc., R. Corp., 136 U. S. 356, 380, 34 L. Ed. 363; Waters-Pierce Oil Co. *v.* Texas, 177 U. S. 28, 45, 44 L. Ed. 657; Pinney *v.* Nelson, 183 U. S. 144, 149, 46 L. Ed. 125; Thomas *v.* Board of Trustees, 195 U. S. 207, 211, 49 L. Ed. 160; Old Wayne Mut. Life Ass'n *v.* McDonough, 204 U. S. 8, 22, 51 L. Ed. 345.

No state can confer corporate existence in another state, or add to or diminish the powers to be there exercised. Ohio, etc., R. Co. *v.* Wheeler, 1 Black 286, 17 L. Ed. 130; St. Joseph, etc., R. Co. *v.* Steele, 167 U. S. 659, 663, 42 L. Ed. 315.

"All that there is in the legal residence of a corporation in the state of its creation consists in the fact that by its laws the corporators are associated together and allowed to exercise as a body certain functions, with a right of succession in its members." St. Clair *v.* Cox, 106 U. S. 350, 355, 27 L. Ed. 222.

6. Doing business abroad.—Railroad Co. *v.* Koontz, 104 U. S. 5, 12, 26 L. Ed. 643; Canada Southern R. Co. *v.* Gebhard, 109 U. S. 527, 537, 27 L. Ed. 1020; St. Louis *v.* Ferry Co., 11 Wall. 423, 429, 20 L. Ed. 192, where it is said that it can exercise its franchises extraterritorially only so far as may be permitted by the policy or comity of other sovereignties. By such consent, express or implied, it may transact there any business not ultra vires, and, like a natural person, may have a special or constructive residence; Galveston Railroad *v.* Cowdrey, 11 Wall. 459, 476, 20 L. Ed. 199; Christian Union *v.* Yount, 101 U. S. 352, 25 L. Ed. 888; Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. 566, 19 L. Ed. 1029; Bank *v.* Earle, 13 Pet. 519, 10 L. Ed. 274; Pinney *v.* Nelson, 183 U. S. 144, 149, 46 L. Ed. 125; Runyan *v.* Coster, 14 Pet. 122, 10 L. Ed. 382; Lafayette Ins. Co. *v.* French, 18 How. 404, 407, 15 L. Ed. 451; Cowell *v.* Springs Co., 100 U. S. 55, 25 L. Ed. 547; Lafayette Ins. Co. *v.* French, 18 How. 404, 15 L. Ed. 451; Water-Pierce Oil Co. *v.* Texas, 177 U. S. 28, 45, 44 L. Ed. 657. See Railroad Co. *v.* Harris, 12 Wall. 65, 82, 20 L. Ed. 354; St. Clair *v.* Cox, 106 U. S. 350, 357, 27 L. Ed. 222; Adams Express Co. *v.* Ohio, 166 U. S. 185, 41 L. Ed. 965.

"But although it must live and have its being in that state only, yet it does not by any means follow that its existence there will not be recognized in other places; and its residence in one state creates no insuperable objection to its power of contracting in another. This statement has been often reaffirmed by this court, with some change of phrase, but always retaining the idea that the legal existence, the home, the domicile, the habitat, the residence, the citizenship of the corporation, can only be in the state by which it was created, although it may do business in other states whose laws permit it." Shaw *v.* Quincy Min. Co., 145 U. S. 444, 449, 36 L. Ed. 768, quoting from Bank *v.* Earle, 13 Pet. 519, 588, 10 L. Ed. 274; Runyan *v.* Coster, 14 Pet. 122, 10 L. Ed. 382; Cowell *v.* Springs Co., 100 U. S. 55, 25 L. Ed. 547; Christian Union *v.* Yount, 101 U. S. 352, 25 L. Ed. 888; Railroad Co. *v.* Koontz, 104 U. S. 5, 12, 26 L. Ed. 643; Canada Southern R. Co. *v.* Gebhard, 109 U. S. 527, 27 L. Ed. 1020; New York, etc., R. Co. *v.* Estill, 147 U. S. 591, 37 L. Ed. 292; Pinney *v.* Nelson, 183 U. S. 144, 149, 46 L. Ed. 125. See, also, post, "General Rule of Comity," II, A, 3; "Powers," II, B.

A corporation cannot change its residence or its citizenship. It can have its legal home only at the place where it is located by or under the authority of its

incorporation.[7]

b. *Reincorporation or License.*—This may be by virtue of being made a corporation of the state where it seeks to do business, or a license or special authority granted it by that state.[8]

2. Power to Exclude or Expel.—a. *In General.*—A corporation created by one state cannot, with some exceptions, do business in another state without the latter's consent, express or implied,[9] with certain limited exceptions, namely,

charter; but it may by its agents transact business anywhere, unless prohibited by its charter or excluded by local laws. Ex parte Schollenberger, 96 U. S. 369, 378, 24 L. Ed. 853.

"Unlike a natural person, it cannot change its domicile at will, and, although it may be permitted to transact business where its charter does not operate, it cannot on that account acquire a residence there." Insurance Co. *v.* Francis, 11 Wall. 210, 216, 20 L. Ed. 77. See Railroad Co. *v.* Koontz, 104 U. S. 5, 26 L. Ed. 643; New York, etc., R. Co. *v.* Estill, 147 U. S. 591, 610, 37 L. Ed. 292; Tioga Railroad *v.* Blossburg, etc., Railroad, 20 Wall. 137, 148, 22 L. Ed. 331. See post, "Power to Exclude, or Expel," II, A, 2.

7. Law of state of incorporation.—Korn *v.* Mutual Assur. Society, 6 Cranch 192, 3 L. Ed. 195. The circumstance, that the law of Virginia has limited a Virginia company to the bounds of the state, in performing its functions, could only prevent it from making new contracts in the District of Columbia, subsequent to the separation thereof, and until it had received additional powers, but could not release it from its liability to individuals with whom it had previously contracted there.

8. Reincorporation or license.—A corporation, created by the laws of one state, may carry on business in another, either by virtue of being created a corporation by the laws of the latter state also, as in Railroad Co. *v.* Vance, 96 U. S. 450, 24 L. Ed. 752; Memphis, etc., R. Co. *v.* Alabama, 107 U. S. 581, 27 L. Ed. 518; Clark *v.* Barnard, 108 U. S. 436, 27 L. Ed. 780; Stone *v.* Farmers' Loan, etc., Co., 116 U. S. 307, 29 L. Ed. 636, and Graham *v.* Boston, etc., R. Co., 118 U. S. 161, 30 L. Ed. 196. Or by virtue of a license, permission or authority, granted by the laws of the latter state, to act in that state under its charter from the former state. Martin *v.* Baltimore, etc., R. Co., 151 U. S. 673, 677, 38 L. Ed. 311; Railroad Co. *v.* Harris, 12 Wall. 65, 82, 20 L. Ed. 354; Railroad Co. *v.* Koontz, 104 U. S. 5, 26 L. Ed. 643; Pennsylvania R. Co. *v.* St. Louis, etc., R. Co., 118 U. S. 290, 30 L. Ed. 83; Goodlett *v.* Louisville, etc., Railroad, 122 U. S. 391, 30 L. Ed. 1230; Marye *v.* Baltimore, etc., R. Co., 127 U. S. 117, 32 L. Ed. 94. See post, "License, Deposit or Payment of Tax," II, A, 4, b.

By the concurrent acts of the legislature of Kentucky in 1846, and of the legislature of Ohio in 1849, the Covington, etc., Bridge Company was made a corporation of each state, and authorized to fix rates of toll. The original acts of incorporation constituted a contract between the corporation and both states, which could not be altered by the one state without the consent of the other, as by changing the rate of toll contrary to its provisions. Per the minority opinion of Justices Fuller, Field, Gray and White, concurring specially in the judgment in Covington, etc., Bridge Co. *v.* Kentucky, 154 U. S. 204, 223, 38 L. Ed. 962; Covington, etc., Elevated Co. *v.* Kentucky, 154 U. S. 224, 38 L. Ed. 970. As to dual incorporation and adoption of foreign corporation, see the title CORPORATIONS, vol. 4, p. 651.

9. Power of exclusion.—Pembina Consolidation Silver Min., etc., Co. *v.* Pennsylvania, 125 U. S. 181, 31 L. Ed. 650; Paul *v.* Virginia, 8 Wall. 168, 19 L. Ed. 357; Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. 566, 573, 19 L. Ed. 1029; Insurance Co. *v.* Morse, 20 Wall. 445, 458, 22 L. Ed. 365 (dissenting opinion); Pensacola Tel. Co. *v.* Western Union Tel. Co., 96 U. S. 1, 24 L. Ed. 708; Relfe *v.* Rundle, 103 U. S. 222, 225, 26 L. Ed. 237; Railroad Co. *v.* Koontz, 104 U. S. 5, 11, 26 L. Ed. 643; St. Clair *v.* Cox, 106 U. S. 350, 356, 27 L. Ed. 222; Canada Southern R. Co. *v.* Gebhard, 109 U. S. 527, 537, 27 L. Ed. 1020; Cooper Mfg. Co. *v.* Ferguson, 113 U. S. 727, 28 L. Ed. 1137; Philadelphia Fire Association *v.* New York, 119 U. S. 110, 119, 30 L. Ed. 342; Horn Silver Min. Co. *v.* New York State, 143 U. S. 305, 315, 36 L. Ed. 164; Ashley *v.* Ryan, 153 U. S. 436, 445, 38 L. Ed. 773; New York, etc., R. Co. *v.* Pennsylvania, 153 U. S. 628, 641, 38 L. Ed. 846, reaffirmed in Delaware, etc., Canal Co. *v.* Pennsylvania, 156 U. S. 200, 39 L. Ed. 396; Postal Tel. Cable Co. *v.* Charleston, 153 U. S. 692, 696, 38 L. Ed. 871; Waters-Pierce Oil Co. *v.* Texas, 177 U. S. 28, 43, 44 L. Ed. 657; Cable *v.* United States Life Ins. Co., 191 U. S. 288, 307, 48 L. Ed. 188; Security Mut. Life Ins. Co. *v.* Prewitt, 202 U. S. 246, 249, 50 L. Ed. 1013; National Council U. A. M. *v.* State Council, 203 U. S. 151, 163, 51 L. Ed. 132; Northwestern Nat. Life Ins. Co. *v.* Riggs, 203 U. S. 243, 255, 51 L. Ed. 168; Swing *v.* Western Lumber Co., 205 U. S. 275, 51 L. Ed. 799. See, also, Pensacola Tel. Co. *v.* Western Union Tel. Co., 96 U. S. 1, 12, 24 L. Ed. 708; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 209, 29 L. Ed. 158; Hooper *v.* California, 155 U. S. 648, 660, 39 L. Ed.

federal corporations or agencies, and corporations engaged in interstate or foreign commerce.[10] And it may discriminate between its own corporations and

297, per Harlan, J., dissenting; Noble *v.* Mitchell, 164 U. S. 367, 41 L. Ed. 472; Connecticut Mut. Life Ins. Co. *v.* Spratley, 172 U. S. 602, 621, 43 L. Ed. 569.

Without affecting property rights.—As a state has the power to exclude foreign corporations it cannot be said to deprive them of any property right by excluding them from doing business within the state National Council U. A. M. *v.* State Council, 203 U. S. 151, 163, 51 L. Ed. 132.

Nor is the case affected by the fact that the state has granted to a corporation of its own creation of a somewhat similar name and organized for a similar purpose the exclusive right of issuing charters to subordinate branches or councils within the state. Since the state has the right to exclude the foreign concern absolutely, it is of no consequence to that organization what powers the state may vest in its own creature. National Council U. A. M. *v.* State Council, 203 U. S. 151, 163, 51 L. Ed. 132.

10. Rule and exceptions stated.—"The principle that the right of a foreign corporation to engage in business within a state other than that of its creation, depends solely upon the will of such other state, has been long settled, and many phases of its application have been illustrated by the decisions of this court. Bank *v.* Earle, 13 Pet. 519, 10 L. Ed. 274; Lafayette Ins. Co. *v.* French, 18 How. 404, 15 L. Ed. 451; Society for Savings *v.* Coite, 6 Wall. 594, 18 L. Ed. 897; Provident Institution *v.* Massachusetts, 6 Wall. 611, 18 L. Ed. 907; Hamilton Co. *v.* Massachusetts, 6 Wall. 632, 18 L. Ed. 904; Paul *v.* Virginia, 8 Wall. 168, 19 L. Ed. 357; Ducat *v.* Chicago, 10 Wall. 410, 19 L. Ed. 972; State Tax on Railway Gross Receipts, 15 Wall. 284, 21 L. Ed. 164; Railroad Co. *v.* Peniston, 18 Wall. 5, 21 L. Ed. 787; The Delaware Railroad Tax, 18 Wall. 206, 21 L. Ed. 888; State Railroad Tax Cases, 92 U. S. 575, 23 L. Ed. 663; Philadelphia, etc., Steamship Co. *v.* Pennsylvania, 122 U. S. 326, 30 L. Ed. 1200; California *v.* Central Pac. R. Co., 127 U. S. 1, 32 L. Ed. 150; Home Ins. Co. *v.* New York State, 134 U. S. 594, 33 L. Ed. 1025; Maine *v.* Grand Trunk R. Co., 142 U. S. 217, 35 L. Ed. 994; Ashley *v.* Ryan, 153 U. S. 436, 445, 38 L. Ed. 773. Whilst there are exceptions to this rule, they embrace only cases where a corporation created by one state rests its right to enter another and to engage in business therein upon the federal nature of its business. As, for instance, where it has derived its being from an act of congress, and has become a lawful agency for the performance of governmental or quasi governmental functions, or where it is necessarily an instrumentality of interstate commerce, or its business constitutes such commerce, and is, therefore, solely within the paramount authority of congress. In these cases, the exceptional business is protected against interference by state authority. The reasons upon which the exceptions to the general rule are based have been often explained. Telegraph Co. *v.* Texas, 105 U. S. 460, 26 L. Ed. 1067; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 211, 29 L. Ed. 158; Philadelphia, etc., Steamship Co. *v.* Pennsylvania, 122 U. S. 326, 342, 30 L. Ed. 1200; McCall *v.* California, 136 U. S. 104, 110, 34 L. Ed. 391; Norfolk, etc., R. Co. *v.* Pennsylvania, 136 U. S. 114, 118, 34 L. Ed. 394; Pickard *v.* Pullman Southern Car Co., 117 U. S. 34, 29 L. Ed. 785; Robbins *v.* Shelby County Taxing District, 120 U. S. 489, 30 L. Ed. 694; Leloup *v.* Port of Mobile, 127 U. S. 640, 32 L. Ed. 311; Asher *v.* Texas, 128 U. S. 129, 32 L. Ed. 368; Stoutenburgh *v.* Hennick, 129 U. S. 141, 32 L. Ed. 637; Crutcher *v.* Kentucky, 141 U. S. 47, 35 L. Ed. 649. In the case last cited the precedents were fully reviewed, and the governing reasons of the law upon this subject were clearly elucidated." Hooper *v.* California, 155 U. S. 648, 652, 39 L. Ed. 297. See, also, New York State *v.* Roberts, 171 U. S. 658, 43 L. Ed. 323; Waters-Pierce Oil Co. *v.* Texas, 177 U. S. 28, 46, 44 L. Ed. 657; New York Life Ins. Co. *v.* Cravens, 178 U. S. 389, 397, 44 L. Ed. 1116; Marshall *v.* Baltimore, etc., R. Co., 16 How. 314, 352, 14 L. Ed. 953; Runyan *v.* Coster, 14 Pet. 122, 10 L. Ed. 382. See, also, Horn Silver Min. Co. *v.* New York State, 143 U. S. 305, 315, 36 L. Ed. 164; Allgeyer *v.* Louisiana, 165 U. S. 578, 583, 41 L. Ed. 832.

"The only limitation upon this power of the state to exclude a foreign corporation from doing business within its limits, or hiring officer for that purpose, or to exact conditions for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the federal government, or where its business is strictly commerce, interstate or foreign. The control of such commerce, being in the federal government, is not to be restricted by state authority." Pembina Consolidated Silver Min., etc., Co. *v.* Pennsylvania, 125 U. S. 181, 190, 31 L. Ed. 650. See Relfe *v.* Rundle, 103 U. S. 222, 225, 26 L. Ed. 237; Blake *v.* McClung, 172 U. S. 239, 255, 43 L. Ed. 432; S. C., 176 U. S. 59, 44 L. Ed. 371. See the titles INTERSTATE AND FOREIGN COMMERCE; UNITED STATES.

As to limitations on discretion in imposing terms, see post, "Discretion of Legislature," II, A, 4, a.

"These exceptions do not touch the general doctrine declared as to corporations not carrying on foreign or inter-

those of other states, or foreign countries.[11]

Expulsion.—Likewise the right to exclude a corporation from entering a state in the first instance includes the right of expulsion after it has once entered and a statute expelling such a corporation from the state does not, so far as the mere right of doing business within the state is concerned deprive it of any property right, for the simple reason that it cannot extend to any such right except with the consent of the state.[11a] And a single foreign corporation, especially one unique in character, may be expelled by special act.[12]

b. *Federal Corporations.*—A state, at least after it had given its consent to a federal corporation to enter into its territory and construct its road, and such consent had been acted on, could not, by hostile legislation, hamper and restrict that company in the management and control of its railroad, nor by judicial decisions of its courts transform a corporation formed by national legislation for national purposes and interstate commerce into one of local character, with

state commerce, or not employed by the government. As to these corporations, the doctrine of Paul *v.* Virginia applies." Pembina Consolidated Silver Min., etc., Co. *v.* Pennsylvania, 125 U. S. 181, 186, 31 L. Ed. 650. See, also, post, "General Rule of Comity," II, A, 3.

Has not citizenship rights of its members.—A foreign corporation cannot of right demand as a constitutional right the privilege of contracting and doing business in another state; the only rights it can claim are the rights which are given to it in its character as a corporation, and not the rights which belong to its members as citizens of a state. Bank *v.* Earle, 13 Pet. 519, 10 L. Ed. 274. See ante, "As Citizens," I, B.

11. Power of discrimination.—See Ducat *v.* Chicago, 10 Wall. 410, 19 L. Ed. 972, where it was said that "the power of a state to discriminate between her own corporations and those of other states desirous of transacting business within her jurisdiction being clearly established, it belonged to the state to determine as to the nature or degree of discrimination, 'subject only to such limitations on her sovereignty as may be found in the fundamental law of the Union.' Other cases to the same effect are Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. 566, 19 L. Ed. 1029; Doyle *v.* Continental Ins. Co., 94 U. S. 535, 24 L. Ed. 148, and Cooper Mfg. Co. *v.* Ferguson, 113 U. S. 727, 28 L. Ed. 1137." Philadelphia Fire Ass'n *v.* New York, 119 U. S. 110, 118, 30 L. Ed. 342. See, also, Pembina Consolidated Silver Min., etc., Co. *v.* Pennsylvania, 125 U. S. 181, 188, 31 L. Ed. 650; Bank *v.* Earle, 13 Pet. 519, 10 L. Ed. 274; Paul *v.* Virginia, 8 Wall. 168, 19 L. Ed. 357; Board of Education *v.* Illinois, 203 U. S. 553, 561, 51 L. Ed. 314.

There are no such limitations in this case. Ducat *v.* Chicago, 10 Wall. 410, 415, 19 L. Ed. 972. See, also, dissenting opinion of Brewer, J., in Blake *v.* McClung, 172 U. S. 239, 266, 43 L. Ed. 432.

"The state is not prohibited from discriminating in the privileges it may grant to foreign corporations as a condition of their doing business or hiring offices within its limits, provided always such discrimination does not interfere with any transaction by such corporations of interstate or foreign commerce. It is not every corporation, lawful in the state of its creation, that other states may be willing to admit within their jurisdiction or consent that it have offices in them; such, for example, as a corporation for lotteries. And even where the business of a foreign corporation is not unlawful in other states the latter may wish to limit the number of such corporations, or to subject their business to such control as would be in accordance with the policy governing domestic corporations of a similar character;" i. e., without denial of the equal protection of the laws to persons within its jurisdiction. Pembina Consolidated Silver Min., etc., Co. *v.* Pennsylvania, 125 U. S. 181, 189, 31 L. Ed. 650. See post, "Terms of Admission," II, A, 4.

11a. Expulsion.—National Council U. A. M. *v.* State Council, 203 U. S. 151, 163, 51 L. Ed. 132. See, also, Security Mut. Life Ins. Co. *v.* Prewitt, 202 U. S. 246, 50 L. Ed. 1013.

"**The state of Virginia** had the undoubted right to exclude a Pennsylvania corporation and to forbid its constituting branches within the Virginia boundaries. As it had that right before the corporation got in, so it had the right to turn it out after it got in. Security Mut. Life Ins. Co. *v.* Prewitt, 202 U. S. 246, 50 L. Ed. 1013. It follows that the state could impose the more limited restriction that simply forbade the granting of charters to 'subordinate councils, Junior Order United American Mechanics, in the State of Virginia.'" National Council U. A. M. *v.* State Council, 203 U. S. 151, 163, 51 L. Ed. 132.

12. Expulsion by special act.—National Council U. A. M. *v.* State Council, 203 U. S. 151, 163, 51 L. Ed. 132. See post, "Revocability of License and Change of Terms," II, A, 7.

Discrimination in application of inheritance taxes.—See the title SUCCESSION TAXES.

rights and powers restricted by views of policy applicable to state organizations.[13]

c. *Corporations Engaged in Interstate and Foreign Commerce.*—The power of a state to exclude foreign corporations from transacting business within its limits does not extend to corporations engaged in foreign and interstate commerce.[14]

Foreign Insurance Companies.—Insurance is not commerce. Therefore, a state may exclude foreign insurance companies from doing business within its limits.[15]

d. *Necessity for State Action to Exclude.*—**Admission.**—But no citizen of a state can enjoin a foreign corporation from pursuing its business. Until the state acts in its sovereign capacity, individual citizens cannot complain. The state must determine for itself when the public good requires that its implied assent to the admission shall be withdrawn.[16]

3. General Rule of Comity—a. *Rule Stated.*—By the doctrine of comity between states in relation to corporations, which has been steadily maintained, and has been recognized by the federal supreme court in many instances,[17] and which, in the absence of positive direction to the contrary, obtains through the states and territories of the United States, corporations created in one state or territory are permitted to carry on any lawful business in another.[18]

13. Federal corporation.—Roberts *v.* Northern Pac. R. Co., 158 U. S. 1, 19, 39 L. Ed. 873. See ante, "In General," II, A, 2, a.

The state through its judiciary cannot deprive that portion of the railroad within its borders of its national character, and declare the company to be a private corporation not engaged in promoting a public purpose. Roberts *v.* Northern Pac. R. Co., 158 U. S. 1, 21, 39 L. Ed. 873.

As to supreme court not following state decisions in such cases, see the title COURTS, vol. 4, p. 1076, et seq.

14. Foreign corporations engaged in foreign or interstate commerce.—Pensacola Tel. Co. *v.* Western Union Tel. Co., 96 U. S. 1, 12, 24 L. Ed. 708; Paul *v.* Virginia, 8 Wall. 168, 19 L. Ed. 357; Welton *v.* Missouri, 91 U. S. 275, 23 L. Ed. 347; County of Mobile *v.* Kimball, 102 U. S. 691, 26 L. Ed. 238; Cooper Mfg. Co. *v.* Ferguson, 113 U. S. 727, 736, 28 L. Ed. 1137; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 204, 29 L. Ed. 158; Philadelphia Fire Ass'n *v.* New York, 119 U. S. 110, 120, 30 L. Ed. 342; Norfolk, etc., R. Co. *v.* Pennsylvania, 136 U. S. 114, 118, 34 L. Ed. 394; Pembina Consolidated Silver Min., etc., Co. *v.* Pennsylvania, 125 U. S. 181, 184, 31 L. Ed. 650; Crutcher *v.* Kentucky, 141 U. S. 47, 35 L. Ed. 649; Horn Silver Min. Co. *v.* New York State, 143 U. S. 305, 36 L. Ed. 164; Postal Tel. Cable Co. *v.* Adams, 155 U. S. 688, 696, 39 L. Ed. 311. See the title INTERSTATE AND FOREIGN COMMERCE.

15. Insurance companies.—Paul *v.* Virginia, 8 Wall. 168, 19 L. Ed. 357; Pensacola Tel. Co. *v.* Western Union Tel. Co., 96 U. S. 1, 12, 24 L. Ed. 708; Crutcher *v.* Kentucky, 141 U. S. 47, 59, 35 L. Ed. 649. See the titles INSURANCE; INTERSTATE AND FOREIGN COMMERCE.

16. State action necessary.—Pensacola Tel. Co. *v.* Western Union Tel. Co., 96 U. S. 1, 13, 24 L. Ed. 708. See Dahl *v.* Montana Copper Co., 132 U. S. 264, 266, 33 L. Ed. 325.

Without deciding whether, in the absence of the act of congress of July 24, 1866, in relation to telegraph lines, the legislation of Florida of 1874 would have been sufficient to authorize a foreign corporation to construct and operate a telegraph line within the counties of Escambia and Santa Rosa in that state, the court holds that a telegraph company of another state, which has secured a right of way by private arrangement with the owner of the land, and duly accepted the restrictions and obligations required by that act, cannot be excluded by the Pensacola Telegraph Company. Pensacola Tel. Co. *v.* Western Union Tel. Co., 96 U. S. 1, 12, 24 L. Ed. 708. See, generally, post, "Effect of Noncompliance with Terms," II, A, 5.

17. Comity rule.—Bank *v.* Earle, 13 Pet. 519, 10 L. Ed. 274; Inglehart *v.* Inglehart, 204 U. S. 478, 487, 51 L. Ed. 575; Cowell *v.* Springs Co., 100 U. S. 55, 25 L. Ed. 547; Christian Union *v.* Yount, 101 U. S. 352, 25 L. Ed. 888; Pinney *v.* Nelson, 183 U. S. 144, 150, 46 L. Ed. 125; McDonogh *v.* Murdoch, 15 How. 367, 14 L. Ed. 732; Runyan *v.* Coster, 14 Pet. 122, 10 L. Ed. 382. See Townsend *v.* Jemison, 9 How. 407, 415, 13 L. Ed. 194.

18. Same.—Cowell *v.* Springs Co., 100 U. S. 55, 25 L. Ed. 547; Christian Union *v.* Yount, 101 U. S. 352, 25 L. Ed. 888. See, also, Bank *v.* Earle, 13 Pet. 519, 592, 10 L. Ed. 274; Barrow Steamship Co. *v.* Kane, 170 U. S. 100, 107, 42 L. Ed. 964; McDonogh *v.* Murdoch, 15 How. 367, 413; 14 L. Ed. 732; Pinney *v.* Nelson, 183 U. S. 144, 149, 46 L. Ed. 125; Nathan *v.* Louisiana, 8 How. 73, 81, 12 L. Ed. 992.

"It is well settled that a corporation may, by its agents, make contracts and

b. *Limitations.*—But this comity is presumed from the silent acquiescence of the state. Whenever a state sufficiently indicates that contracts which derive their validity from its comity are repugnant to its policy, or are considered as injurious to its interests, the presumption in favor of its adoption can no longer be made.[19]

c. *Charter as Law of Existence.*—But wherever it goes for business, it carries its charter, as that is the law of its existence.[20] No state need allow the cor-

transact business in another territory, and may sue and be sued therein." Galveston Railroad *v.* Cowdrey, 11 Wall. 459, 476, 20 L. Ed. 199.

"The comity of suit brings with it the comity of contract; and where the one is expressly adopted by its courts, the other must also be presumed, according to the usages of nations, unless the contrary can be shown." Bank *v.* Earle, 13 Pet. 519, 596, 10 L. Ed. 274.

19. Limitations of rule.—Bank *v.* Earle, 13 Pet. 519, 591, 10 L. Ed. 274; McDonogh *v.* Murdoch, 15 How. 367, 413, 14 L. Ed. 732.

"The recognition of its existence even by other states, and the enforcement of its contracts made thereon, depend purely upon the comity of those states—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy." Paul *v.* Virginia, 8 Wall. 168, 181, 19 L. Ed. 357; Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. 566, 19 L. Ed. 1029.

In harmony with the general law of comity among the states composing the Union, the presumption is to be indulged, that a corporation, if not forbidden by its charter, may exercise the powers thereby granted within other states, including the power of acquiring lands, unless prohibited therefrom, either in their direct enactments or by their public policy, to be deduced from the general course of legislation or the settled adjudications of their highest courts. Christian Union *v.* Yount, 101 U. S. 352, 25 L. Ed. 888; McDonogh *v.* Murdoch, 15 How. 367, 413, 14 L. Ed. 732; Pinney *v.* Nelson, 183 U. S. 144, 149, 46 L. Ed. 125; Bank *v.* Earle, 13 Pet. 519, 10 L. Ed. 274; Pensacola Tel. Co. *v.* Western Union Tel. Co., 96 U. S. 1, 13, 24 L. Ed. 708.

"Foreign corporations wishing to do business with our citizens, and localizing that business within our state through local boards, must comply with the laws of this state. They cannot, under such circumstances, enforce here stipulations in contracts allowed by the law of the state which created them, if these stipulations violate our laws or public policy. Such laws of such foreign states can have, ex proprio vigore, no extraterritorial effect." National Mut. Bldg., etc., Ass'n *v.* Brahan, 193 U. S. 635, 649, 48 L. Ed. 823, reaffirmed in National Mut. Bldg., etc., Ass'n *v.* Farnham, 194 U. S. 630, 48 L. Ed. 1158.

The case at bar is within the ruling of New York Life Ins. Co. *v.* Cravens, 178 U. S. 389, 44 L. Ed. 1116. The decision of the supreme court is, that plaintiff in error had become "localized" in the state, had accepted the laws of the state as a condition of doing business there, and could not, nor could defendant in error, "abrogate by attempted contract stipulations" those laws. See Hancock Mut. Life Ins. Co. *v.* Warren, 181 U. S. 73, 45 L. Ed. 755. In Chattanooga Nat. Bldg., etc., Ass'n *v.* Denson, 189 U. S. 408, 47 L. Ed. 870, "we recognized the right of a state to impose conditions upon foreign corporations doing business in the state to the extent of holding the contracts of the corporation void which were entered into in violation of the conditions. There is nothing inconsistent with these views in Bedford *v.* Eastern Bldg., etc., Ass'n, 181 U. S. 227, 45 L. Ed. 834. In that case there was a consummated contract, and we held invalid a law enacted subsequently that made the enforcement of the contract depend upon the performance of onerous conditions." National Mut. Bldg., etc., Ass'n *v.* Brahan, 193 U. S. 635, 650, 48 L. Ed. 823, reaffirmed in National Mut. Bldg., etc., Ass'n *v.* Farnham, 194 U. S. 630, 48 L. Ed. 1158. See post, "Terms of Admission," II, A, 4.

Rights of own citizens.—Or unless unjustly interfering with the rights of its own citizens. Pensacola Tel. Co. *v.* Western Union Tel. Co., 96 U. S. 1, 13, 24 L. Ed. 708.

The law of Ohio authorizing railroad companies to sell their own bonds and notes at such prices as they may deem expedient, is extended by comity to the companies of other states authorized to transact business in Ohio. Junction R. Co. *v.* Bank, 12 Wall. 226, 20 L. Ed. 385. See the title RAILROADS.

Foreign banking corporation.—See the title BANKS AND BANKING, vol. 3, p. 75.

Federal corporations and those plying interstate and foreign commerce.—See ante, "Power to Exclude or Expel," II, A, 2. See, also, generally, post, "Powers," II, B.

20. Charter as law of existence.—Railroad Co. *v.* Koontz, 104 U. S. 5, 11, 26 L. Ed. 643; Relfe *v.* Rundle, 103 U. S. 222, 226, 26 L. Ed. 237; Canada Southern R. Co. *v.* Gebhard, 109 U. S. 527, 537, 27 L. Ed. 1020; Paul *v.* Virginia, 8 Wall. 168, 19 L. Ed. 357. See Adams Express Co. *v.* Ohio, 166 U. S. 185, 224, 41 L. Ed. 965.

porations of other states to do business within its jurisdiction unless it chooses, with perhaps the exception of commercial corporations; but if it does, without limitation, express or implied, the corporation comes in as it has been created.[21] But this does not apply to provisions of law in statutes of the state of domicile, unless same are adopted and made a part of a contract with such foreign corporation. The lex loci contractu governs.[22] But a person dealing with a foreign corporation cannot be affected by verbal minutiæ in the charter of the company, without their being brought to his knowledge. The charter is a document on file in the office of the comptroller of another state, and a person dealing with the company, in his own state, cannot be expected to know its precise terms.[23]

4. Terms of Admission—a. *Discretion of Legislature*—(1) *General Rule.*—A state may impose upon a foreign corporation, as a condition to coming into or doing business within its territory, any terms, conditions, and restrictions, which it may think proper, that are not repugnant to the constitution or laws of the United States.[24] For the absolute power of exclusion includes the right

"Every corporation necessarily carries its charter wherever it goes, for that is the law of its existence. It may be restricted in the use of some of its powers while doing business away from its corporate home, but every person who deals with it everywhere is bound to take notice of the provisions which have been made in its charter for the management and control of its affairs both in life and after dissolution." Relfe *v.* Rundle, 103 U. S. 222, 226, 26 L. Ed. 237.

21. Same.—Relfe *v.* Rundle, 103 U. S. 222, 225, 26 L. Ed. 237.

"Whatever disabilities are placed upon the corporation at home it retains abroad, and whatever legislative control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere. A corporation of one country may be excluded from business in another country (Paul *v.* Virginia, 8 Wall. 168, 19 L. Ed. 357), but, if admitted, it must, in the absence of legislation equivalent to making it a corporation of the latter country, be taken, both by the government and those who deal with it, as a creature of the law of its own country, and subject to all the legislative control and direction that may be properly exercised over it at the place of its creation." Canada Southern R. Co. *v.* Gebhard, 109 U. S. 527, 537, 27 L. Ed. 1020. And see the title CORPORATIONS, vol. 4, p. 621.

"If they are recognized and permitted to do business without limitation, express or implied, they carry with them wherever they go all their chartered rights, and may claim all their chartered privileges which can be used away from their legal home. Their charters are the law of their existence, and are taken wherever they go. By doing business away from their legal residence they do not change their citizenship, but simply extend the field of their operations. They reside at home, but do business abroad." Railroad Co. *v.* Koontz, 104 U. S. 5, 11, 26 L. Ed. 643.

The policy of Alabama does not deny to the corporations of other states the ordinary comity between nations, but it permits such a corporation to make those contracts which from their nature and subject matter, are consistent with its policy, and are allowed to individuals. In making such contracts, a corporation, no doubt, exercises its corporate franchises. But it must do this, whenever it acts as a corporation, for its existence is a franchise. Bank *v.* Earle, 13 Pet. 519, 596, 10 L. Ed. 274.

22. Provisions of general law.—Mutual Life Ins. Co. *v.* Cohen, 179 U. S. 262, 45 L. Ed. 181. See the title INSURANCE.

Provision in charter for insolvency.—See post, "Insolvency, Winding Up, Dissolution and Reorganization," IV.

Reorganization under laws of domicile.—See the title CORPORATIONS, vol. 4, p. 786, et seq.

23. Verbal minutiæ.—Relief Fire Ins. Co. *v.* Shaw, 94 U. S. 574, 578, 24 L. Ed. 291. See the title CORPORATIONS, vol. 4, p. 621.

Restrictions in charter of insurance company.—See the title INSURANCE.

24. Discretion as to terms of admission.—"The cases of Bank *v.* Earle, 13 Pet. 519, 10 L. Ed. 274; Ducat *v.* Chicago, 10 Wall. 410, 19 L. Ed. 972; Paul *v.* Virginia, 8 Wall. 168, 19 L. Ed. 357, and Lafayette Ins. Co. *v.* French, 18 How. 404, 15 L. Ed. 451, establish the principle. * * * The point is elaborated at great length by Chief Justice Taney in the case first named, and by Mr. Justice Field in the case last named." Doyle *v.* Continental Ins. Co., 94 U. S. 535, 540, 24 L. Ed. 148. And, see to same effect, St. Louis *v.* Ferry Co., 11 Wall. 423, 429, 20 L. Ed. 192; Railroad Co. *v.* Harris, 12 Wall. 65, 82, 20 L. Ed. 354; Railway Co. *v.* Whitton, 13 Wall. 270, 285, 20 L. Ed. 571; Ex parte Schollenberger, 96 U. S. 369, 376, 24 L. Ed. 853; Railroad Co. *v.* Koontz, 104 U. S. 5, 11, 26 L. Ed. 643; St. Clair *v.* Cox, 106 U. S. 350, 356, 27 L. Ed. 222; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 29 L. Ed. 158; Pembina Consoli-

to allow a conditional and restricted exercise of its corporate powers within the state.[25] And its right is subject to the condition of obeying the lawful regulations of the state,[26] of which all persons dealing with the corporation are pre-

dated Silver Min., etc., Co. *v.* Pennsylvania, 125 U. S. 181, 186, 31 L. Ed. 650; Crutcher *v.* Kentucky, 141 U. S. 47, 59, 35 L. Ed. 649; Hooper *v.* California, 155 U. S. 648, 39 L. Ed. 297; Allgeyer *v.* Louisiana, 165 U. S. 578, 583, 41 L. Ed. 832; New York State *v.* Roberts, 171 U. S. 658, 661, 43 L. Ed. 323; Orient Ins. Co. *v.* Daggs, 172 U. S. 557, 566, 43 L. Ed. 552; Waters-Pierce Oil Co. *v.* Texas, 177 U. S. 28, 44 L. Ed. 657; New York Life Ins. Co. *v.* Cravens, 178 U. S. 389, 401, 44 L. Ed. 1116; Hancock Mut. Life Ins. Co. *v.* Warren, 181 U. S. 73, 75, 45 L. Ed. 755; Dayton Coal, etc., Co. *v.* Barton, 183 U. S. 23, 24, 46 L. Ed. 61; Cable *v.* United States Life Ins. Co., 191 U. S. 288, 307, 48 L. Ed. 188; Northwestern Nat. Life Ins. Co. *v.* Riggs, 203 U. S. 243, 255, 51 L. Ed. 168; Old Wayne Mut. Life Ass'n *v.* McDonough, 204 U. S. 8, 22, 51 L. Ed. 345; Swing *v.* Western Lumber Co., 205 U. S. 275, 51 L. Ed. 799. See, also, Ashley *v.* Ryan, 153 U. S. 436, 38 L. Ed. 773.

The right of the people of a state to prescribe generally by its constitution and laws the terms upon which a foreign corporation shall be allowed to carry on its business in the state, has been settled by the federal supreme court. Cooper Mfg. Co. *v.* Ferguson, 113 U. S. 727, 732, 28 L. Ed. 1137; Bank *v.* Earle, 13 Pet. 519, 10 L. Ed. 274; Paul *v.* Virginia, 8 Wall. 168, 19 L. Ed. 357; Ducat *v.* Chicago, 10 Wall. 410, 19 L. Ed. 972; Maine *v.* Grand Trunk R. Co., 142 U. S. 217, 228, 35 L. Ed. 994; Fritts *v.* Palmer, 132 U. S. 282, 288, 33 L. Ed. 317; Horn Silver Min. Co. *v.* New York State, 143 U. S. 305, 314, 36 L. Ed. 164; Blake *v.* McClung, 172 U. S. 239, 267, 43 L. Ed. 432, per Brewer, J., dissenting; Noble *v.* Mitchell, 164 U. S. 367, 41 L. Ed. 472; Nutting *v.* Massachusetts, 183 U. S. 553, 556, 46 L. Ed. 324; Fidelity Mut. Life Ass'n *v.* Mettler, 185 U. S. 308, 332, 46 L. Ed. 922, per Harlan, J., dissenting. Connecticut Mut. Life Ins. Co. *v.* Spratley, 172 U. S. 602, 621, 43 L. Ed. 569, reaffirmed in Mutual, etc., Co. *v.* Birch, 200 U. S. 612, 52 L. Ed. 620.

It was not decided in the case of Insurance Co. *v.* Morse, 20 Wall. 445, 22 L. Ed. 365, that the state of Wisconsin had not the power to impose terms and conditions as preliminary to the right of an insurance company to appoint agents, keep offices, and issue policies in that state. On the contrary, the case of Paul *v.* Virginia, 8 Wall. 168, 19 L. Ed. 357, where it is held that such conditions may be imposed, was cited with approval. Doyle *v.* Continental Ins. Co., 94 U. S. 535, 539, 24 L. Ed. 148.

If consistent with federal constitution.—Generally speaking, a state may prescribe conditions of admission of foreign corporation to do business, if consistent with the rights, privileges and immunities granted or protected by the federal constitution. Blake *v.* McClung, 172 U. S. 239, 269, 43 L. Ed. 432; Blake *v.* McClung, 176 U. S. 59, 44 L. Ed. 371. See ante, "Power to Exclude or Expel," II, A, 2; post, "Limitations," II, A, 4, a, (2).

25. Same.—Pembina Consolidated Silver Min., etc., Co. *v.* Pennsylvania, 125 U. S. 181, 186, 31 L. Ed. 650, citing Bank *v.* Earle, 13 Pet. 519, 10 L. Ed. 274; Lafayette Ins. Co. *v.* French, 18 How. 404, 15 L. Ed. 451; Ducat *v.* Chicago, 10 Wall. 410, 19 L. Ed. 972; St. Clair *v.* Cox, 106 U. S. 350, 27 L. Ed. 222; Philadelphia Fire Ass'n *v.* New York, 119 U. S. 110, 118, 30 L. Ed. 342; Horn Silver Min. Co. *v.* New York State, 143 U. S. 305, 315, 36 L. Ed. 164.

Such assent may, as a matter of course, be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion. Paul *v.* Virginia, 8 Wall. 168, 181, 19 L. Ed. 357; Pembina Consolidated Silver Min., etc., Co. *v.* Pennsylvania, 125 U. S. 181, 31 L. Ed. 650; Insurance Co. *v.* Morse, 20 Wall. 445, 455 22 L. Ed. 365 (see, also, dissenting opinion at p. 458); Philadelphia Fire Ass'n *v.* New York, 119 U. S. 110, 118, 30 L. Ed. 342; Pembina Consolidated Silver Min., etc., Co. *v.* Pennsylvania, 125 U. S. 181, 185, 31 L. Ed. 650; Horn Silver Min. Co. *v.* New York State, 143 U. S. 305, 315, 36 L. Ed. 164.

Equal protection of laws.—And this without any denial of the equal protection of the laws to persons within its jurisdiction. Pembina Consolidated Silver Min., etc., Co. *v.* Pennsylvania, 125 U. S. 181, 189, 31 L. Ed. 650; American Sugar Refining Co. *v.* Louisiana, 179 U. S. 89, 94, 45 L. Ed. 102; Norfolk, etc., R. Co. *v.* Pennsylvania, 136 U. S. 114, 34 L. Ed. 394. See, also, ante, "Power to Exclude or Expel," II, A, 2.

26. Obedience to lawful regulations.—The right of a foreign corporation to carry on business in a state, might be deemed subject to the condition of obeying the regulations prescribed in the legislation of the state. As was said in Orient Ins. Co. *v.* Daggs, 172 U. S. 557, 566, 43 L. Ed. 552, that "which a state may do with corporations of its own creation it may do with foreign corporations admitted into the state. * * * The power of a state to impose conditions upon foreign corporations is certainly as

sumed to have constructive notice.[27] And the power to impose comprehends the right to enforce, and to prevent its citizens from contracting, within its jurisdiction, with corporations not complying therewith.[28]

Means and Motive Immaterial.—As the state has the right to exclude such company, the means by which she causes such exclusion, or the motives of her action, are not the subject of judicial inquiry.[29]

"Doing Business" Construed.—The contention that the prohibition against the doing of any business in the state by a foreign corporation, except upon the prescribed condition, includes the doing of any single and isolated act of business whatever, thus broadly stated, cannot be sustained.[30]

(2) *Limitations.*—But such terms and conditions must not be repugnant to the constitution and laws of the United States, or the rules of public law between the states, or natural justice.[31] Any statute, requiring the foreign cor-

extensive as the power over domestic corporations, and is fully explained in Hooper *v.* California, 155 U. S. 648, 39 L. Ed. 297." Dayton Coal, etc., Co. *v.* Barton, 183 U. S. 23, 24, 46 L. Ed. 61; Stone *v.* Farmers' Loan, etc., Co., 116 U. S. 307, 347, 29 L. Ed. 636; Whitfield *v.* Ætna Life Ins. Co., 205 U. S. 489, 495, 51 L. Ed. 895. See post, "Regulation and Control," II, A, 8.

Transaction of business by agents.—"The state, having the power to impose conditions on the transaction of business by foreign insurance companies within its limits, has the equal right to prohibit the transaction of such business by agents of such companies, or by insurance brokers, who are to some extent the representatives of both parties." Nutting *v.* Massachusetts, 183 U. S. 553, 556, 46 L. Ed. 324; Hooper *v.* California, 155 U. S. 648, 39 L. Ed. 297; Allgeyer *v.* Louisiana, 165 U. S. 578, 41 L. Ed. 832.

27. Notice of terms.—Blake *v.* McClung, 172 U. S. 239, 264, 43 L. Ed. 432, per Brewer, J., dissenting.

28. Enforcement.—And as a necessary consequence it has the right to enforce any conditions imposed by its laws as preliminary to the transaction of business within its confines by a foreign corporation, whether the business is to be carried on through officers or through ordinary agents of the company, and also the further right to prohibit a citizen from contracting within its jurisdiction with any foreign company which has not acquired the privilege of engaging in business therein, either in his own behalf or through an agent empowered to that end. Hooper *v.* California, 155 U. S. 648, 656, 39 L. Ed. 297; Nutting *v.* Massachusetts, 183 U. S. 553, 556, 46 L. Ed. 324. See, also, Allgeyer *v.* Louisiana, 165 U. S. 578, 586, 41 L. Ed. 832; Noble *v.* Mitchell, 164 U. S. 367, 41 L. Ed. 472.

Yet the power does not and cannot extend to prohibiting a citizen from making contracts outside of the limits and jurisdiction of the state, and which are also to be performed outside of such jurisdiction. Allgeyer *v.* Louisiana, 165 U. S. 578, 591, 41 L. Ed. 832.

In such a case as the facts here present, the policy of the state in forbidding insurance companies which had not complied with the laws of the state from doing business within its limits cannot be so carried out as to prevent the citizen from writing such a letter of notification as was written by the plaintiffs in error in the state, when it is written pursuant to a valid contract made outside the state and with reference to a company which is not doing business within its limits. Allegeyer *v.* Louisiana, 165 U. S. 578, 593, 41 L. Ed. 832.

Illustrations.—A state has the right to impose conditions, not in conflict with the constitution or the laws of the United States, to the transaction of business within its territory by an insurance company chartered by another state, or to exclude such company from its territory, or, having given a license, to revoke it, with or without cause. Doyle *v.* Continental Ins. Co., 94 U. S. 535, 24 L. Ed. 148. See the title INSURANCE.

29. Means or motive immaterial.—Doyle *v.* Continental Ins. Co., 94 U. S. 535, 24 L. Ed. 148; Cable *v.* United States Life Ins. Co., 191 U. S. 288, 307, 48 L. Ed. 188.

30. "Doing business."—Cooper Mfg. Co. *v.* Ferguson, 113 U. S. 727, 733, 28 L. Ed. 1137. See, also, dissenting opinion in Hooper *v.* California, 155 U. S. 648, 661, 39 L. Ed. 297.

And the discounting by a corporation in its own state, of a note sent it from another state for such purpose, does not constitute carrying on business in such other state within the meaning of its laws relative to foreign corporations. Bamberger *v.* Schoolfield, 160 U. S. 149, 167, 40 L. Ed. 374. See, also, post, "Maintenance of Office, and Agent for Service of Process," II, A, 4, c; "Filing Charter," II, A, 4, f.

31. "A state has the right to prohibit a foreign corporation from doing business within its borders, unless such prohibition is so conditioned as to violate some provision of the federal constitution. Among the later authorities on that proposition are Hooper *v.* California, 155 U. S. 648, 39 L. Ed. 297; Allgeyer *v.* Louisiana, 165

poration, as a condition precedent to obtaining a permit to do business within the state, to surrender a right and privilege secured to it by the constitution and laws of the United States, is unconstitutional and void, and can give no validity or effect to any agreement or action of the corporation in obedience to its provisions.[32] And the power of the state to impose conditions upon foreign corporations doing business in the state, although recognized and affirmed many times, manifestly cannot be exercised to discharge the citizens of the state from their contract obligations.[33]

b. *License, Deposit, or Payment of Tax.*—The state may require a license to be obtained first, and a deposit of money or securities to be made; or a tax to be

U. S. 578, 583, 41 L. Ed. 832; Orient Ins. Co. *v.* Daggs, 172 U. S. 557, 43 L. Ed. 552; Waters-Pierce Oil Co. *v.* Texas, 177 U. S. 28, 44 L. Ed. 657; New York Life Ins. Co. *v.* Cravens, 178 U. S. 389, 395, 44 L. Ed. 1116; Hancock Mut. Life Ins. Co. *v.* Warren, 181 U. S. 73, 45 L. Ed. 755." Security Mut. Life Ins. Co. *v.* Prewitt, 202 U. S. 246, 249, 50 L. Ed. 1013.

"In all the cases in which this court has considered the subject of the granting by a state to a foreign corporation of its consent to the transaction of business in the state, it has uniformly asserted that no conditions can be imposed by the state which are repugnant to the constitution and laws of the United States." Barron *v.* Burnside, 121 U. S. 186, 200, 30 L. Ed. 915; Lafayette Ins. Co. *v.* French, 18 How. 404, 407, 15 L. Ed. 451; Ducat *v.* Chicago, 10 Wall. 410, 415, 19 L. Ed. 972; Insurance Co. *v.* Morse, 20 Wall. 445, 456, 22 L. Ed. 365; St. Clair *v.* Cox, 106 U. S. 350, 356, 27 L. Ed. 222; Philadelphia Fire Ass'n *v.* New York, 119 U. S. 110, 120, 30 L. Ed. 342. See Doyle *v.* Continental Ins. Co., 94 U. S. 535, 543, 24 L. Ed. 148, per Bradley, J., dissenting.

32. Same.—Southern Pac. Co. *v.* Denton, 146 U. S. 202, 207, 36 L. Ed. 943; Insurance Co. *v.* Morse, 20 Wall. 445, 22 L. Ed. 365; Barron *v.* Burnside, 121 U. S. 186, 30 L. Ed. 915.

Although, generally speaking, the state has the power to prescribe the conditions upon which foreign corporations may enter its territory for purposes of business, such a power cannot be exerted with the effect of defeating or impairing rights secured to citizens of the several states by the supreme law of the land. Blake *v.* McClung, 176 U. S. 59, 63, 44 L. Ed. 371, reaffirming S. C. 172 U. S. 239, 255, 43 L. Ed. 432. See, also, Hooper *v.* California, 155 U. S. 648, 664, 39 L. Ed. 297, per Harlan, J., dissenting; Fidelity Mut. Life Ass'n *v.* Mettler, 185 U. S. 308, 332, 46 L. Ed. 922, per Harlan, J., dissenting.

"As said by this court in Lafayette Ins. Co. *v.* French, 18 How. 404, 15 L. Ed. 451: 'These conditions must be deemed valid and effectual by other states and by this court, provided they are not repugnant to the constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense.'" St. Clair *v.* Cox, 106 U. S. 350, 356, 27 L. Ed. 222; Cable *v.* United States Life Ins. Co., 191 U. S. 288, 307, 48 L. Ed. 188; Waters-Pierce Oil Co. *v.* Texas, 177 U. S. 28, 44 L. Ed. 657. See, also, Insurance Co. *v.* Morse, 20 Wall. 445, 457, 22 L. Ed. 365.

Property rights.—"It is true, of course, that an unconstitutional law no more binds foreign corporations than it binds others. Carroll *v.* Greenwich Ins. Co., 199 U. S. 401, 409, 50 L. Ed. 246. And no doubt a law specially directed against a foreign corporation might be unconstitutional for instance, as depriving it of its property without due process of law. See Blake *v.* McClung, 172 U. S. 239, 260, 43 L. Ed. 432. But when the so-called property consists merely in the value that there might be in extending its business or membership into a state, that property, it hardly needs to be said, depends upon the consent of the state to let the corporation come into the state." National Council U. A. M. *v.* State Council, 203 U. S. 151, 162, 51 L. Ed. 132.

33. Contract obligations.—Bedford *v.* Eastern Bldg., etc., Ass'n, 181 U. S. 227, 241, 45 L. Ed. 834.

Such a right is acquired by a citizen of a state, by his subscription to the stock of a building and loan association lawfully doing business in the state under the laws then in force, which could not be invalidated or impaired by subsequent acts of the state legislature requiring the performance of certain acts by such corporation for the continuance of its business then, which were never complied with. Bedford *v.* Eastern Bldg., etc., Ass'n, 181 U. S. 227, 240, 45 L. Ed. 834, distinguished in Chattanooga Nat. Bldg., etc., Ass'n *v.* Denson, 189 U. S. 408, 47 L. Ed. 870. See the title BUILDING AND LOAN ASSOCIATIONS, vol. 3, p. 542.

Regulation of interstate or foreign commerce.—See the title INTERSTATE AND FOREIGN COMMERCE. See, also, ante, "Corporations Engaged in Interstate and Foreign Commerce," II, A, 2, c.

Corporation or agency of federal government.—See ante, "In General," II, A, 2, a.

paid for the privilege of doing business within its territory.[34]

c. *Maintenance of Office, and Agent for Service of Process.*—Constitutional or statutory provisions forbidding foreign corporations to do business in the state without having a known place of business, and a resident agent upon whom process might be served, are valid, except as affecting interstate or foreign com-

34. License tax.—It may make the grant or privilege dependent upon the payment of a specific license tax, or a sum proportioned to the amount of its capital used within the state. New York State *v.* Roberts, 171 U. S. 658, 661, 43 L. Ed. 323; Paul *v.* Virginia, 8 Wall. 168, 19 L. Ed. 357; Horn Silver Min. Co. *v.* New York State, 143 U. S. 305, 36 L. Ed. 164. See, also, Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 209, 29 L. Ed. 158; McCall *v.* California, 136 U. S. 104, 112, 34 L. Ed. 391; Crutcher *v.* Kentucky, 141 U. S. 47, 59, 35 L. Ed. 649.

Where a corporation does not come within any of the exceptions, therefore, the recognition of its existence even to the limited extent of allowing it to have an office within its limits for the use of its officers, stockholders, agents, and employees, was a matter dependent on the will of the state. It could make the grant of the privilege conditional upon the payment of a license tax, and fix the sum according to the amount of the authorized capital of the corporation. The absolute power of exclusion includes the right to allow a conditional and restricted exercise of its corporate powers within the state. Pembina Consolidated Silver Min., etc., Co. *v.* Pennsylvania, 125 U. S. 181, 186, 31 L. Ed. 650; Bank *v.* Earle, 13 Pet. 519, 10 L. Ed. 274; Lafayette Ins. Co. *v.* French, 18 How. 404, 15 L. Ed. 451; Ducat *v.* Chicago, 10 Wall. 410, 19 L. Ed. 972; St. Clair *v.* Cox, 106 U. S. 350, 27 L. Ed. 222; Maine *v.* Grand Trunk R. Co., 142 U. S. 217, 228, 35 L. Ed. 994; Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. 566, 19 L. Ed. 1029.

License and deposit.—A state statute which enacts that no insurance company not incorporated under the laws of the state passing the statute, shall carry on its business within the state without previously obtaining a license for that purpose; and that it shall not receive such license until it has deposited, with the treasurer of the state, bonds of a specified character to an amount varying from thirty to fifty thousand dollars, according to the extent of the capital employed, is not in conflict with that clause of the constitution of the United States which declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states," nor with the clause which declares that congress shall have power "to regulate commerce with foreign nations and among the several states." Paul *v.* Virginia, 8 Wall. 168, 19 L. Ed. 357. See, also, Doyle *v.* Continental Ins. Co., 94 U. S. 535, 539, 24 L. Ed. 148.

The case of Paul *v.* Virginia, 8 Wall. 168, 19 L. Ed. 357, affirmed and applied to a case where the state by certain statutes authorized the state officers to grant to foreign insurance companies, upon complying with certain terms, a license to transact the business of insurance within the state, and then, by other statutes incorporating cities, made it obligatory on such foreign companies transacting business within those cities to pay them a pro rata on all their premiums, and declaring it unlawful in the companies otherwise to do business in them, authorized those cities to sue and recover it from the companies for the city's use. Ducat *v.* Chicago, 10 Wall. 410, 19 L. Ed. 972. See the title INSURANCE.

"In Hooper *v.* California, 155 U. S. 648, 39 L. Ed. 297, conditions upon a foreign corporation were considered, and a statute of California sustained, making it a misdemeanor for a person in that state to procure insurance for a resident in the state from an insurance company not incorporated under its laws, and which had not filed a bond required by the law of the state." Waters-Pierce Oil Co. *v.* Texas, 177 U. S. 28, 46, 44 L. Ed. 657.

License and tax distinguished.—A license imposed by a municipal corporation upon a foreign corporation for the privilege of doing a purely city business, authority to impose same being conferred by state statute, is not a condition upon which the right to do business depends, but is a tax, as shown by the case of Home Ins. Co. *v.* City Council, 93 U. S. 116, 122, 23 L. Ed. 825, where it was held, citing License Tax Cases, 5 Wall. 462, 18 L. Ed. 497, that the license in question must be regarded as nothing more than a tax; and that the license, when issued, was only a receipt for the tax, and not a grant of an authority to conduct business on condition of paying the license. Postal Tel. Cable Co. *v.* Charleston, 153 U. S. 692, 695, 38 L. Ed. 871. See, also, the titles LICENSES; TAXATION.

Any doing of business sufficient.—And merely doing a portion of its business in the state subjects it to the taxing power of the state, and an admission, in an answer in equity of the foreign corporation, that it did carry on business in the state, is conclusive on the corporation. Horn Silver Min. Co. *v.* New York State, 143 U. S. 305, 316, 36 L. Ed. 164.

License fee exaction as restraint on commerce.—See the title INTERSTATE AND FOREIGN COMMERCE.

merce.[35] But they must be reasonable, and must provide for due notice to the corporation of the proceedings.[36] It may require a stipulation in writing to be filed to that effect.[37] Although a fee is required.[38] Such a provision is com-

35. Office and agent for service of process.—Fritts *v.* Palmer, 132 U. S. 282, 288, 33 L. Ed. 317; Barrow Steamship Co. *v.* Kane, 170 U. S. 100, 107, 42 L. Ed. 964; Cooper Mfg. Co. *v.* Ferguson, 113 U. S. 727, 732, 28 L. Ed. 1137; Wilson *v.* Seligman, 144 U. S. 41, 45, 36 L. Ed. 338; Connecticut Mut. Life Ins. Co. *v.* Spratley, 172 U. S. 602, 43 L. Ed. 569.

A condition that it shall accept as sufficient the service of process on its agents or persons specially designated, in actions and suits against it, may be express or implied, and assent thereto may be presumed from doing business in the state under such a requirement. St. Clair *v.* Cox, 106 U. S. 350, 356, 27 L. Ed. 222. See, also, Old Wayne Mut. Life Ass'n *v.* McDonough, 204 U. S. 8, 21, 51 L. Ed. 345; New York, etc., R. Co. *v.* Estill, 147 U. S. 591, 607, 37 L. Ed. 292; Merchants Heat, etc., Co. *v.* Clow, 204 U. S. 286, 289, 51 L. Ed. 488. See post, "Presumption and Effect of Acceptance of Terms," II, A, 6.

It may be admitted that any state may by its laws require, as a condition precedent to the right of a corporation to be organized, or to transact business, within its territory, that it shall appoint an agent there on whom process may be served; or even that every stockholder in the corporation shall appoint an agent upon whom, or designate a domicile at which, service may be made within the state, and that, upon his failure to make such appointment or designation, the service may be made upon a certain public officer, and that judgment rendered against the corporation after such service shall bind the stockholders, whether within or without the state. In such cases, the service is held binding because the corporation, or the stockholders, or both, as the case may be, must be taken to have consented that such service within the state shall be sufficient and binding; and no individual is bound by the proceedings who is not a stockholder. Wilson *v.* Seligman, 144 U. S. 41, 45, 36 L. Ed. 338, citing Lafayette Ins. Co. *v.* French, 18 How. 404, 15 L. Ed. 451; Ex parte Schollenberger, 96 U. S. 369, 24 L. Ed. 853; Pennoyer *v.* Neff, 95 U. S. 714, 735, 24 L. Ed. 565.

Where the state puts all nonresident domestic corporations, which elect to have their places of business and works outside of the state, and all foreign corporations coming into the state, on the same footing in respect of the service of process, and the law operates on all these alike, such a classification is reasonable and not open to constitutional objection. St. Mary's Franco-American Petroleum Co. *v.* West Virginia, 203 U. S. 183, 191, 51 L. Ed. 144, citing Orient Ins. Co. *v.* Daggs, 172 U. S. 557, 563, 43 L. Ed. 552; Central Loan, etc., Co. *v.* Campbell Commission Co., 173 U. S. 84, 43 L. Ed. 623; Waters-Pierce Oil Co. *v.* Texas, 177 U. S. 28, 43, 44 L. Ed. 657; National Council U. A. M. *v.* State Council, decided Nov. 19, 1906, 203 U. S. 151, 51 L. Ed. 132; Northwestern Nat. Life Ins. Co. *v.* Riggs, 203 U. S. 243, 51 L. Ed. 168; Brannon on Fourteenth Amendment, Chap. 16.

36. Must be reasonable.—Such condition must not, however, encroach upon that principle of natural justice which requires notice of a suit to a party before he can be bound by it. It must be reasonable, and the service provided for should be only upon such agents as may be properly deemed representatives of the foreign corporation. The decision of this court in Lafayette Ins. Co. *v.* French, 18 How. 404, 15 L. Ed. 451, sustains these views. St. Clair *v.* Cox, 106 U. S. 350, 356, 27 L. Ed. 222.

As the suit in the Pennsylvania court was upon a contract, a personal judgment against a foreign corporation, only upon notice to the insurance commissioner, without any legal notice to the defendant association and without its having appeared in person, or by attorney or by agent in the suit, is void as wanting in due process of law. Old Wayne Mut. Life Ass'n *v.* McDonough, 204 U. S. 8, 23, 51 L. Ed. 345.

37. Filing stipulation.—Old Wayne Mut. Life Ass'n *v.* McDonough, 204 U. S. 8, 21, 51 L. Ed. 345; St. Louis, etc., R. Co. *v.* Commercial Union Ins. Co., 139 U. S. 223, 35 L. Ed. 154.

"Undoubtedly, it was competent for Pennsylvania to declare that no insurance corporation should transact business within its limits without filing the written stipulation specified in its statute. Lafayette Ins. Co. *v.* French, 18 How. 404, 15 L. Ed. 451; Paul *v.* Virginia, 8 Wall. 168, 19 L. Ed. 357; Hooper *v.* California, 155 U. S. 648, 653, 39 L. Ed. 297, and authorities cited; Waters-Pierce Oil Co. *v.* Texas, 177 U. S. 28, 45, 44 L. Ed. 657." Old Wayne Mut. Life Ass'n *v.* McDonough, 204 U. S. 8, 21, 51 L. Ed. 345. See the title INSURANCE.

An affirmative provision requiring the filing by a foreign corporation, with the secretary of state, of a copy of its articles of incorporation, and of an authority for the service of process upon a designated officer or agent in the state, might not be an unreasonable or objectionable requirement, if standing alone, but it should not be coupled with an illegal stipulation. Barron *v.* Burnside, 121 U. S. 186, 197, 30 L. Ed. 915. See the title SUMMONS AND PROCESS.

38. Fee requirement.—Nor does the re-

plied with by designating the "general manager" as such agent residing at its principal place of business, without giving his name.[39] But a single act or contract does not constitute carrying on business within the state under such a statute;[40] nor a transaction coming within the definition of commerce between the states.[41]

d. *Consent to Be Sued.*—See post "Liability to Suit," III, B. One of the conditions upon which a foreign corporation may be admitted to do business within a state, is, that it consent to be used in its courts.[42]

e. *Condition against Removal of Actions to Federal Courts.*—A state may require a foreign corporation doing business therein by its sufferance, to forego its right to resort to the federal courts, under penalty of revocation of its license if it resorts to such courts,[43] although the requirement of an agreement to abstain from resort to such courts, as a condition precedent to admission to do

quirement of the payment of ten dollars to the auditor for the use of the state, as a fee for such service, amount to a taking of property without due process, or an unjust discrimination. St. Mary's Franco-American Petroleum Co. *v.* West Virginia, 203 U. S. 183, 192, 51 L. Ed. 144.

39. General manager as agent.—The death or resignation of the incumbent would not long interfere with the bringing of suits against the corporation. Had there been, when the certificate was filed, no such officer of the corporation as a general manager, there would have been ground to contend that it had not performed the condition essential to its authority to do business in the state. Goodwin *v.* Colorado Mortgage Investment Co., 110 U. S. 1, 6, 28 L. Ed. 47.

40. What constitutes doing business in state.—A constitutional provision forbidding foreign corporations to carry on business in the state unless they have one or more known places of business within the state, and resident agents upon whom process may be served, contemplates some continuity of transactions, and does not refer to a single act or contract. Cooper Mfg. Co. *v.* Ferguson, 113 U. S. 727, 733, 28 L. Ed. 1137.

And it was held in Pennsylvania Lumbermen's Mut. Fire Ins. Co. *v.* Meyer, 197 U. S. 407, 415, 49 L. Ed. 810, that a fire insurance company which issues its policies upon real estate and personal property situated in another state is as much engaged in its business when its agents are there under its authority adjusting the losses covered by its policies as it is when engaged in making contracts to take such risks. See the title INSURANCE.

But under the state decisions of Alabama, any act in the exercise of corporate functions is forbidden to a foreign corporation not complying with the law. The taking of a note and mortgage for a loan, by a foreign building and loan association, held to constitute a doing of business in the exercise of corporate functions, regardless of the form and terms of the papers, where the loan was negotiated and carried into effect in Alabama. Chattanooga Nat. Bldg., etc., Ass'n *v.* Denson, 189 U. S. 408, 47 L. Ed. 870. See, also, ante, "Discretion of Legislature," II, A, 4, a; post, "Effect of Noncompliance with Terms," II, A, 5.

In Board of Trade *v.* Hammond Elevator Co., 198 U. S. 424, 49 L. Ed. 1111, it was held that the evidence showed that there was a doing of business within the state. See the title SUMMONS AND PROCESS.

41. Interstate commerce.—Where a merchant doing business in Alabama made a note to a Tennessee firm to which he was indebted and sent the note to Tennessee, where it was discounted by a corporation which had succeeded to the firm, such discount there by the Tennessee corporation did not constitute a carrying on of business in Alabama by such foreign corporation without a known place of business and authorized agent therein, contrary to § 2, art. 14, of the Alabama Constitution, and the Act of 1886-7, pp. 102, 104, as they did not and could not interfere with matters of commerce between the states and do not apply to such transactions as this. Bamberger *v.* Schoolfield, 160 U. S. 149, 167, 40 L. Ed. 374. See the title INTERSTATE AND FOREIGN COMMERCE.

Change of provision.—See post, "Revocablity of License and Change of Terms," II, A, 7.

As to federal courts.—See post, "Jurisdiction," III, C.

42. Consent to suit.—Lafayette Ins. Co. *v.* French, 18 How. 404, 405, 15 L. Ed. 451; Railroad Co. *v.* Harris, 12 Wall. 65, 81, 20 L. Ed. 354; Ex parte Schollenberger, 96 U. S. 369, 376, 24 L. Ed. 853; Old Wayne Mut. Life Ass'n *v.* McDonough, 204 U. S. 8, 22, 51 L. Ed. 345; New York, etc., R. Co. *v.* Estill, 147 U. S. 591, 608, 37 L. Ed. 292; Philadelphia Fire Ass'n *v.* New York, 119 U. S. 110, 123, 30 L. Ed. 342.

43. Condition against removing causes to federal courts.—Doyle *v.* Continental Ins. Co., 94 U. S. 535, 24 L. Ed. 148. See Cable *v.* United States Life Ins. Co., 191 U. S. 288, 307, 48 L. Ed. 188, where it is queried whether the Doyle case had been shaken by the subsequent cases of Barron *v.*

business, is illegal, and such agreement void.[44]

f. *Filing Charter.*—A state may require of foreign corporations as a condition precedent to doing business within it, the filing of a copy of the charter with

Burnside, 121 U. S. 186, 199, 30 L. Ed. 915; Blake *v.* McClung, 172 U. S. 239, 254, 43 L. Ed. 432, and Dayton Coal, etc., Co. *v.* Barton, 183 U. S. 23, 25, 46 L. Ed. 61, and said to be immaterial there to discuss it.

The legislature of Wisconsin enacted that if any foreign insurance company transferred a suit brought against it from the state courts to the federal courts, the secretary of state should revoke and cancel its license to do business within the state. An injunction to restrain him from so doing, because such a transfer is made, cannot be sustained. The suggestion that the intent of the legislature is to accomplish an illegal result, to wit, the prevention of a resort to the federal courts, is not accurate. The effect of this decision is that the company must forego such resort, or cease its business in the state. The latter result is here accomplished. Doyle *v.* Continental Ins. Co., 94 U. S. 535, 24 L. Ed. 148.

The corporation, said the court, in Railroad Co. *v.* Harris, 12 Wall. 65, 20 L. Ed. 354, "cannot migrate, but may exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place. One of these conditions may be that it shall consent to be sued there. If it do business there, it will be presumed to have assented, and will be bound accordingly." Railway Co. *v.* Whitton, 13 Wall. 270, 285, 20 L. Ed. 571; Ex parte Schollenberger, 96 U. S. 369, 376, 24 L. Ed. 853; Old Wayne Mut. Life Ass'n *v.* McDonough, 204 U. S. 8, 22, 51 L. Ed. 345.

It was held in Railroad Co. *v.* Harris, 12 Wall. 65, 20 L. Ed. 354, that a foreign corporation may be suable in the District of Columbia where it has in effect consented to be sued there, in consideration of its being permitted by congress to exercise therein its corporate powers and privileges. Then, after an examination of the statute granting the right to extend the road, it was said (p. 84): "We entertain no doubt that it made the company liable to suit where this suit was brought, in all respects as if it had been an independent corporation of the same locality." This language was cited with approbation, and adopted as a correct exposition of the law by Mr. Justice Field, speaking for the court, in Railway Co. *v.* Whitton, 13 Wall. 270, 20 L. Ed. 571. See, also, Lafayette Ins. Co. *v.* French, 18 How. 404, 15 L. Ed. 451; Ex parte Schollenberger, 96 U. S. 369, 376, 24 L. Ed. 853. See, also, post, "Liability to Suit," III, B.

It was said in Barron *v.* Burnside, 121 U. S. 186, 199, 30 L. Ed. 915, that the point of the decision in the Doyle case seems to have been that, as the state had granted the license, its officers would not be restrained by injunction, by a court of the United States, from withdrawing it. All that there is in the case beyond this, and all that is said in the opinion which appears to be in conflict with the adjudication in Insurance Co. *v.* Morse, 20 Wall. 445, 22 L. Ed. 365, must be regarded as not in judgment.

But the quære in the Cable case is answered in the negative by the decision of the court in Security Mut. Life Ins. Co. *v.* Prewitt, 202 U. S. 246, 255, 50 L. Ed. 1013, reaffirming the Doyle case and distinguishing the Barron case.

44. As condition precedent.—Doyle *v.* Continental Ins. Co., 94 U. S. 535, 24 L. Ed. 148.

The court reaffirms the decision in Insurance Co. *v.* Morse, 20 Wall. 445, 22 L. Ed. 365, that an agreement to abstain in all cases from resorting to the courts of the United States is void as against public policy, and that a statute of Wisconsin, requiring such an agreement, is in conflict with the constitution of the United States. Doyle *v.* Continental Ins. Co., 94 U. S. 535, 24 L. Ed. 148. See, also, Southern Pac. Co. *v.* Denton, 146 U. S. 202, 207, 36 L. Ed. 943; Cable *v.* United States Life Ins. Co., 191 U. S. 288, 307, 48 L. Ed. 188; Blake *v.* McClung, 172 U. S. 239, 255, 43 L. Ed. 432; Barrow Steamship Co. *v.* Kane, 170 U. S. 100, 111, 42 L. Ed. 964; Goldey *v.* Morning News, 156 U. S. 518, 523, 37 L. Ed. 517; Martin *v.* Baltimore, etc., R. Co., 151 U. S. 673, 684, 38 L. Ed. 311; Security Mut. life Ins. Co. *v.* Prewitt, 202 U. S. 246, 255, 50 L. Ed. 1013.

A corporation is a citizen of the state by which it is created, and in which its principal place of business is situated, so far as its right to sue and be sued in the federal courts is concerned, and within the clause of the constitution extending the jurisdiction of the federal courts to controversies between citizens of different states. The right to remove a cause into the federal courts upon the same terms and under like circumstances as to foreign corporations as citizens, is a right guaranteed to it by the constitution of the United States, and a state statute which requires of a foreign corporation, as a condition precedent to the right to transact business within the state, a stipulation that it would not remove into the federal court certain suits, which it would follow, by the laws of the United States, it otherwise had a right to remove, is unconstitutional and void. And if this invalid provision is not separable from the remainder, the whole is void. Barron *v.* Burnside, 121 U. S. 186, 30 L. Ed. 915, approving Insurance Co. *v.* Morse, 20 Wall. 445, 22 L. Ed. 365, distinguishing Doyle *v.* Continental Ins. Co., 94 U. S. 535, 24 L. Ed.

the secretary of state, or other officer, and also the payment of a fee therefor.[45]

5. Effect of Noncompliance with Terms.—As to removal of actions, see ante, "Condition against Removal of Actions to Federal Courts," II, A, 4, e. Unless the conditions imposed by a state upon the doing of business by foreign corporations within its borders be complied with, the prohibition may be absolute.[46]

Imposition of Personal Liability.—A state may validly impose a personal liability upon the officers and agents of foreign corporations doing business therein without complying with its lawful requirements.[47]

Effect on Contracts.—The highest court of a state (Alabama) having held that any act in the exercise of corporate functions is forbidden to a foreign corporation which has not complied with the constitution and statute as to admission, and that the contracts hence resulting are illegal and cannot be enforced in the courts, the federal court should follow it.[48]

148. See the title REMOVAL OF CAUSES.

45. Filing copy of charter.—Diamond Glue Co. *v.* United States Glue Co., 187 U. S. 611, 47 L. Ed. 328.

As to effect of noncompliance, see post, "Power to Sue," III, A.

The validity of such a statute is not affected by the fact that it applied to partnerships as well as corporations, if that part of it was void, as it was separable and independent. Diamond Glue Co. *v.* United States Glue Co., 187 U. S. 611, 617, 47 L. Ed. 328.

As to proof of filing, see the title CORPORATIONS, vol. 4, pp. 767, 768.

"Doing business."—A contract by which it was agreed that a foreign corporation should supervise the plans for a glue factory in Wisconsin, to be built by the other party on a site to be selected within sixty days; that it should have the management of the manufacturing in the same and should operate it, etc., and should furnish and keep it supplied with a superintendent, etc., called for a carrying on of business in Wisconsin by the plaintiff at a time when to carry it on without filing a copy of the plaintiff's charter was forbidden by the laws of the state. Diamond Glue Co. *v.* United States Glue Co., 187 U. S. 611, 613, 47 L. Ed. 328. See Connecticut Mut. Ins. Co. *v.* Spratley, 172 U. S. 602, 611, 43 L. Ed. 569.

A prohibition of the doing of business after a statute goes into effect is not retroactive with regard to that business, even though the business be done in pursuance of an earlier contract, and the statute does not impair the obligation of a contract made after its enactment but before it went into effect. Diamond Glue Co. *v.* United States Glue Co., 187 U. S. 611, 614, 47 L. Ed. 328.

46. In general.—The state can impose such conditions as it pleases upon the doing of any business by foreign companies within its borders, and unless the conditions be complied with the prohibition may be absolute. The cases upon this subject are cited in the opinion of the court in Hooper *v.* California, 155 U. S. 648, 39 L. Ed. 297. Allgeyer *v.* Louisiana, 165 U. S. 578, 583, 41 L. Ed. 832.

Where a state statute provides for the forfeiture of the permit of a foreign corporation which may violate any of the provisions of the statute, and the act in force when the appellant entered the state informed it that for a violation of its terms the permit to do business here would be forfeited, this provision of the law was as much a part of the obligation, and as binding upon the corporation, as if it had been expressly made part of the permit. Waters-Pierce Oil Co. *v.* Texas, 177 U. S. 28, 47, 44 L. Ed. 657.

The Texas statute of 1889, so providing, was a condition upon the plaintiff in error within the power of the state to impose, and whatever its limitations were upon the power of contracting, whatever its discriminations were, they became conditions of the permit and were accepted with it, and the statute was not repealed by the act of 1895. Waters-Pierce Oil Co. *v.* Texas, 177 U. S. 28, 47, 44 L. Ed. 657.

47. Personal liability.—The provisions of the constitution and statutes of the state of Colorado, that no foreign corporation should do business in the state without having a known place of business and a resident agent upon whom process might be served, and that all officers and agents of such corporations doing business within the state without having complied with the requirements of the state constitution and statutes should be personally liable, jointly and severally, upon all contracts entered into on behalf of such corporation, were held to be valid so far as they did not directly affect foreign or interstate commerce. Fritts *v.* Palmer, 132 U. S. 282, 288, 33 L. Ed. 317; Cooper Mfg. Co. *v.* Ferguson, 113 U. S. 727, 732, 28 L. Ed. 1137.

48. Contracts.—Chattanooga Nat. Bldg., etc., Ass'n *v.* Denson, 189 U. S. 408, 414, 47 L. Ed. 870; Diamond Glue Co. *v.* United States Glue Co., 187 U. S. 611, 47 L. Ed.

Conveyance of Property.—But a conveyance of land to the corporation in the state in which it is so doing business, is not necessarily invalid.[49]

Effect on Right to Sue.—See post, "Power to Sue," III, A.

6. Presumption and Effect of Acceptance of Terms.—The acceptance by a foreign corporation of the terms prescribed by the law of the state may be presumed from the fact of its doing business there, and it will be bound ac-

328. See, also, the title COURTS, vol. 4, p. 861.

Fritts *v.* Palmer, 132 U. S. 282, 33 L. Ed. 317, was but the interpretation of a particular statute, and there is not a word in it which denies or questions the power of a state to make void the contracts of a foreign corporation which is doing business in the state in violation of its laws. Chattanooga Nat. Bldg., etc., Ass'n *v.* Denson, 189 U. S. 408, 416, 47 L. Ed. 870.

"It is urged by petitioner that it thought it had complied with the law of Alabama, and it was not an intentional offender against it, and, therefore, should not be 'repelled from court.' But the latter consequence has been decided to result from noncompliance with the statute, and we cannot grant an exemption from it. The statute makes no distinction between an inadvertent and a conscious violation of its provisions, and a familiar legal maxim precludes a defense based on that distinction. Nor can the payment of the license fee be urged as a justification for omitting to comply with the statute. Such payment was one condition to be performed by a foreign corporation; the designation of a known place of business and an authorized agent was another, and was of so much importance as to be enjoined by the constitution of the state." Chattanooga Nat. Bldg., etc., Ass'n *v.* Denson, 189 U. S. 408, 416, 47 L. Ed. 870.

Exclusion of penalty by implication.—But usually, where no penalty for noncompliance was provided, except the suspension of civil remedies in the state, none others will be implied, and the purpose will be construed to be, not to avoid contracts, but to provide effective supervision and control of the foreign corporation. Fritts *v.* Palmer, 132 U. S. 282, 33 L. Ed. 317; Allen *v.* Alleghany Co., 196 U. S. 458, 465, 49 L. Ed. 551.

No penalty is imposed upon foreign corporations by Rev. Stat. of Arisona (1887) for failure to file the appointment of an agent under § 348, though in the next section, 349, it is declared that "every act done by it, prior to the filing thereof, shall be utterly void," and the only disability which such failure entails is its incompetence to enforce its rights by suit. Henrietta Min., etc., Co. *v.* Johnson, 173 U. S. 221, 224, 43 L. Ed. 675.

Time of making of contract.—Where, by the clear terms of a state statute, the invalidity of a contract of a foreign corporation doing business within the state without complying with its provisions, does not depend upon the place where, or the time when, it is to be performed, but upon its being "made in this state after Jan. 1, 1899," a contract made before that date is valid although to be performed afterwards; and a contract made elsewhere than in the state is valid, although to be performed in the state. Holder *v.* Aultman, 169 U. S. 81, 89, 42 L. Ed. 669.

Where a contract of a foreign corporation, after being drawn up and signed by its local agent in the state, and assented to and signed by the other party in the state, contained a distinct stipulation that it was not to be valid unless not only countersigned by the corporation's general manager in that state, but also approved at its principal office in its home state, the contract became a valid and binding one between the parties for the first time when it was so approved at such principle home office. It cannot be considered as "made" within the meaning of the statute in question, at any earlier time or other place, so as to be avoided thereby. Holder *v.* Aultman, 169 U. S. 81, 91, 42 L. Ed. 669.

Right to sue thereon.—See post, "Power to Sue," III, A.

49. Acquisition of land.—Fritts *v.* Palmer, 132 U. S. 283, 288, 33 L. Ed. 317.

The constitution of Colorado relating to foreign corporations declares that "no foreign corporation shall do any business in this state without having one or more known places of business, and an authorized agent or agents in the same, upon whom process may be served." Art. XV, § 10. And it is provided by statute that foreign corporations shall, before they are authorized or permitted to do any business in Colorado, take certain steps, and no foreign or domestic corporation established or maintained in any way for pecuniary profit of its stockholders or members shall purchase or hold real estate in the state, except as provided for in this act. Thus the acquisition of real estate is not prohibited by these provisions, and they do not declare absolutely or wholly void, as to all persons, and for every purpose, a conveyance of real estate to a foreign corporation which has not previously done what is required before it can rightfully carry on business in the state. Nor do they declare that the title to such property shall remain in the grantor, despite his conveyance. The only penalty imposed by the statutes of Colorado upon a foreign corporation carrying on business in the state before acquiring the right to do so, being a personal liability upon

cordingly.[50] And where a corporation entered a state as vested with the corporate power to do so, and contracted as in the possession of the power as a corporation existing in and under the laws of the state, and the state appears to have been content, the contract, not being necessarily beyond the scope of the powers of the corporation, must, in the absence of proof to the contrary, be deemed valid.[51]

7. Revocability of License and Change of Terms.—**Revocability.**—A license to a foreign corporation to enter a state does not involve a permanent right to remain. Subject to the laws and constitution of the United States, full power and control over its territories, its citizens, and its business, belong to

the officers, agents and stockholders, that must be presumed exclusive of all others. Fritts *v.* Palmer, 132 U. S. 282, 289, 33 L. Ed. 317. See, also, Allen *v.* Alleghany Co., 196 U. S. 458, 464, 49 L. Ed. 551.

Precisely what was meant by the words "except as provided for in this act," is difficult to tell, since the act does not indicate any particular mode in which a foreign corporation may acquire real estate in Colorado. But perhaps the reasonable interpretation of the statute is that a foreign corporation shall not purchase or hold real estate in Colorado, for purposes of its business, until it first acquires, in the mode prescribed by the local law, the right to do business in that state. Fritts *v.* Palmer, 132 U. S. 282, 288, 33 L. Ed. 317.

One who asserts title under a quitclaim deed from the corporation's grantor, made after the property had passed, by the sale under the deed of trust, from the corporation, cannot, in law, occupy any better position than the original grantor would have done if he had himself brought this action. If the legislature had intended to declare that no title should pass under a conveyance to a foreign corporation purchasing real estate before it acquires the right to engage in business in the state, and that such a conveyance should be an absolute nullity as between the grantor and grantee, leaving the grantor to deal with the property as if he had never sold it, that intention would have been clearly manifested. Fritts *v.* Palmer, 132 U. S. 282, 289, 33 L. Ed. 317.

See quære as to the validity and force of the provisions of the law of congress requiring a foreign corporation to take certain steps before doing business in a territory (congress having permitted corporations, whether formed within or without that territory, to explore for and hold mining claims on the public domain. McKinley *v.* Wheeler, 130 U. S. 630, 32 L. Ed. 1048), or whether, if they were valid, any parties except the government of the territory can allege a disregard of them, to defeat the title of the corporation to its property (Fritts *v.* Palmer, 132 U. S. 282, 33 L. Ed. 317). It is sufficient in this case to say that such incompetency cannot be considered unless set up in the pleadings in the court below. A failure to comply with the provision of the law will not be presumed in the absence of any allegation on the subject. The objection cannot be urged for the first time in the federal supreme court. Dahl *v.* Montana Copper Co., 132 U. S. 264, 266, 33 L. Ed. 325. See post, "To Acquire, Hold and Transfer Property," II, B, 2.

50. Presumptive acceptance of terms.—Railway Co. *v.* Whitton, 13 Wall. 270, 285, 20 L. Ed. 571; St. Clair *v.* Cox, 106 U. S. 350, 27 L. Ed. 222. See, also, Philadelphia Fire Ass'n *v.* New York, 119 U. S. 110, 123, 30 L. Ed. 342, per Harlan, J., dissenting; Ex parte Schollenberger, 96 U. S. 369, 24 L. Ed. 853; New York, etc., R. Co. *v.* Estill, 147 U. S. 591, 608, 37 L. Ed. 292; Ashley *v.* Ryan, 153 U. S. 436, 38 L. Ed. 773; Merchants Heat, etc., Co. *v.* Clow, 204 U. S. 286, 289, 51 L. Ed. 488; Old Wayne Mut. Life Ass'n *v.* McDonough, 204 U. S. 8, 51 L. Ed. 345; Connecticut Mut. Life Ins. Co. *v.* Spratley, 172 U. S. 602, 43 L. Ed. 569, reaffirmed in Mutual Reserve Life Ins. Co. *v.* Birch, 200 U. S. 612, 50 L. Ed. 620; Mutual Reserve Fund Life Ass'n *v.* Phelps, 190 U. S. 147, 47 L. Ed. 987.

Whatever the limitations on the power of contracting, whatever the discriminations, contained in a statute imposing conditions on the doing of business by a foreign corporation within the state, they are conditions of the permit and were accepted with it. Hancock Mut. Life Ins. Co. *v.* Warren, 181 U. S. 73, 76, 45 L. Ed. 755; Waters-Pierce Oil Co. *v.* Texas, 177 U. S. 28, 44 L. Ed. 657; New York Life Ins. Co. *v.* Cravens, 178 U. S. 389, 397, 44 L. Ed. 1116.

But while the highest considerations of public policy demand that a foreign corporation, entering a state in defiance of a statute which lawfully prescribes the terms upon which it may exert its powers there, should be held to have assented to such terms as to business there transacted by it, it would be going very far to imply such assent as to business transacted in another state, although citizens of the former state may be interested in such business, and it is not implied. Old Wayne Mut. Life Ass'n *v.* McDonough, 204 U. S. 8, 22, 51 L. Ed. 345.

51. Same.—Union Pac. R. Co. *v.* Chicago, etc., R. Co., 163 U. S. 564, 591, 41 L. Ed. 265. See, also, ante, "Necessity for State

the state,[52] and the state legislature has power at any time to repeal or modify the act granting such permission, having due regard to rights of property already acquired, where no contract existed.[53]

Change of Terms.—And the legislature may alter the terms or conditions of admission at pleasure.[54] The state, having the power to exclude entirely, has the power to change the condition of admission at any time, for the future, and to impose as a condition the payment of a new tax, or a further tax, as a

Action to Exclude," II, A, 2, d; "Consent to Be Sued," II, A, 4, d.

On consolidation with domestic corporation.—See the title CORPORATIONS, vol. 4, p. 662.

52. **Revocability of license.**—Doyle *v.* Continental Ins. Co., 94 U. S. 535, 541, 24 L. Ed. 148. See, also, Cable *v.* United States Life Ins. Co., 191 U. S. 288, 307, 48 L. Ed. 188.

"The power of the state as to foreign corporations does not depend upon their being outside of its jurisdiction. Those within the jurisdiction, in such sense as they ever can be said to be within it, do not acquire a right not to be turned out except by general laws. A single foreign corporation, especially one unique in character, like the national council of a beneficial organization, might be expelled from a state by a special act of the legislature. It equally could be restricted in the more limited way. National Council U. A. M. *v.* States Council, 203 U. S. 151, 163, 51 L. Ed. 132, citing Security Mut. Life Ins. Co. *v.* Prewitt, 202 U. S. 246, 50 L. Ed. 1013.

53. **Same.**—Statutes prescribing the terms upon which a foreign corporation may do business in a state, reflect and execute the general policy of the state upon matters of public interest, and each subsequent legislature has equal power to legislate upon the same subject. The legislature has power at any time to repeal or modify the act granting such permission, making proper provision when necessary in regard to the rights of property of the company already acquired, and protecting such rights from any illegal interference or injury. Douglas *v.* Kentucky, 168 U. S. 488, 42 L. Ed. 553. The cases showing the right of a state to grant or refuse permission to a foreign corporation of this kind (insurance) to do business within its limits are collected in Hooper *v.* California, 155 U. S. 648, 652, 39 L. Ed. 297. Connecticut Mut. Life Ins. Co. *v.* Spratley, 172 U. S. 602, 621, 43 L. Ed. 569, reaffirmed in Mutual Reserve Life Ins. Co. *v.* Birch, 200 U. S. 612, 50 L. Ed. 620.

And a permit or license to do business within the state is not in itself a contract inviolable against subsequent legislation by the state. Waters-Pierce Oil Co. *v.* Texas, 177 U. S. 28, 46, 44 L. Ed. 657. See ante, "Effect of Noncompliance with Terms," II, A, 5.

54. **Alteration of terms.**—Connecticut Mut. Life Ins. Co. *v.* Spratley, 172 U. S. 602, 621, 43 L. Ed. 569, reaffirmed in Mutual Reserve Life Ins. Co. *v.* Birch, 200 U. S. 612, 50 L. Ed. 620. See Doyle *v.* Continental Ins. Co., 94 U. S. 535, 541, 24 L. Ed. 148.

"As these statutes involve public interests, legislation regarding them are necessarily public laws, and as stated in Newton *v.* Commissioners, 100 U. S. 548, 559, 25 L. Ed. 710: 'Every succeeding legislature possesses the same jurisdiction and power with respect to them as its predecessors. The latter have the same power of repeal and modification which the former had of enactment, neither more nor less. All occupy, in this respect, a footing of perfect equality. This must necessarily be so in the nature of things. It is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies touching the subject involved may require. A different result would be fraught with evil.'" Connecticut Mut. Life Ins. Co. *v.* Spratley, 172 U. S. 602, 621, 43 L. Ed. 569, reaffirmed in Mutual Reserve Life Ins. Co. *v.* Birch, 200 U. S. 612, 50 L. Ed. 620.

"The same principle is found in the following cases: Fertilizing Co. *v.* Hyde Park, 97 U. S. 659, 24 L. Ed. 1036; Butchers' Union, etc., Co. *v.* Crescent City, etc., Co., 111 U. S. 746, 28 L. Ed. 585; Boyd *v.* Alabama, 94 U. S. 645, 24 L. Ed. 302; Douglas *v.* Kentucky, 168 U. S. 488, 42 L. Ed. 553." Connecticut Mut. Life Ins. Co. *v.* Spratley, 172 U. S. 602, 622, 43 L. Ed. 569, reaffirmed in Mutual Reserve Life Ins. Co. *v.* Birch, 200 U. S. 612, 50 L. Ed. 620.

As to appointment of resident agent.—When the legislature of a state therefore permitted a foreign company to do business within the state on appointing an agent therein upon whom process might be served, and when in pursuance of such provisions the company entered the state and appointed the agent, no contract was thereby created which would prevent the state from thereafter passing another statute in regard to service of process, and making such statute applicable to a company already doing business in the state. In other words, no contract was created by the fact that the company availed itself of the permission to do business within the state under the provisions of the first act. Connecticut Mut. Life Ins. Co. *v.* Spratley, 172 U. S. 602, 622, 43 L. Ed. 569.

license fee;[55] unless the terms of the license or admission to do business are such as to constitute a contract between the state and the corporation.[56]

8. Regulation and Control.—Every corporation within the territorial limits of a state is, while there, subject to the constitutional authority of the state

55. New or further tax.—Indeed, the cases illustrating this doctrine are too numerous for review, and need only to be referred to. Ashley *v.* Ryan, 153 U. S. 436, 445, 38 L. Ed. 773, citing Philadelphia Fire Ass'n *v.* New York, 119 U. S. 110, 119, 30 L. Ed. 342; Society for Savings *v.* Coite, 6 Wall. 594, 18 L. Ed. 897; Provident Institution *v.* Massachusetts, 6 Wall. 611, 18 L. Ed. 907; Hamilton Co. *v.* Massachusetts, 6 Wall. 632, 18 L. Ed. 904; State Tax on Railroad Gross Receipts, 15 Wall. 284, 21 L. Ed. 164; Railroad Co. *v.* Peniston, 18 Wall. 5, 21 L. Ed. 787; The Delaware Railroad Tax, 18 Wall. 206, 21 L. Ed. 888; State Railroad Tax Cases, 92 U. S. 575, 23 L. Ed. 663; Philadelphia, etc., Steamship Co. *v.* Pennsylvania, 122 U. S. 326, 30 L. Ed. 1200; California *v.* Central Pac. R. Co., 127 U. S. 1, 32 L. Ed. 150; Home Ins. Co. *v.* New York State, 134 U. S. 594, 33 L. Ed. 1025; Maine *v.* Grand Trunk R. Co., 142 U. S. 217, 35 L. Ed. 994.

56. License and contract distinguished.—American Smelting, etc., Co. *v.* Colorado, 204 U. S. 103, 111, 51 L. Ed. 393.

The state statute in this case, § 499 (Mills Annotated Statutes of Colorado), after making provision for the performance of certain conditions by a foreign corporation entering the state, continued: "and such corporations shall be subject to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the general laws of this state, and shall have no other or greater powers." A filing fee was required, proportionate to the capital stock, but no annual license tax was then provided for. American Smelting, etc., Co. *v.* Colorado, 204 U. S. 103, 105, 51 L. Ed. 393.

"A provision in a statute of this nature subjecting a foreign corporation to all the liabilities, etc., of a domestic one of like character must mean that it shall not be subjected to any greater liabilities than are imposed upon such domestic corporation. The power to impose different liabilities was with the state at the outset. It could make them greater or less than in case of a domestic corporation, or it could make them the same. Having the general power to do as it pleased, when it enacted that the foreign corporation upon coming in the state should be subjected to all the liabilities of domestic corporations, it amounted to the same thing as if the statute has said the foreign corporation should be subjected to the same liabilities. In other words the liabilities, restrictions and duties imposed upon domestic corporations constitute the measure and limit of the liabilities, restrictions and duties which might thereafter be imposed upon the corporation thus admitted to do business in the state. It was not a mere license to come in the state and do business therein upon payment of a sum named, liable to be revoked or the sum increased at the pleasure of the state, without further limitation. It was a clear contract that the liabilities, etc., should be the same as the domestic corporation, and the same treatment in that regard should be measured out to both. If it were desired to increase the liabilities of the foreign, it could only be done by increasing those of the domestic, corporation at the same time and to the same extent." American Smelting, etc., Co. *v.* Colorado, 204 U. S. 103, 113, 51 L. Ed. 393.

By the admission of the foreign corporation into the state, with its rights to do business therein by the payment of the amount of money required for such purpose under the then existing law, a contract between the state and itself was thereby made that it should be permitted to remain therein during the term of life which the state by law allowed to corporations created by it (which was twenty years), without being again subjected to further exaction of money for what it had once paid for, viz, the right to remain and transact business in that state. Undoubtedly, if the corporation violated the laws of the state properly applicable to it, or if otherwise it gave just cause for its expulsion, it could not insist upon such a contract as a defense. American Smelting, etc., Co. *v.* Colorado, 204 U. S. 103, 111, 51 L. Ed. 393.

"Nor is this a case where the power given by the state constitution to the general assembly to alter, amend or annul a charter is applicable. The act does not alter the charter or annul or amend it. It simply increases the taxation which up to the time of its enactment had been imposed on all foreign corporations doing business in the state." American Smelting, etc., Co. *v.* Colorado, 204 U. S. 103, 114, 51 L. Ed. 393.

See, however, Connecticut Mut. Life Ins. Co. *v.* Spratley, 172 U. S. 602, 620, 43 L. Ed. 569, where the act prescribing the terms as to appointment of agent for service of process, etc., was held to create no contract on acceptance by the foreign corporation, but to constitute a mere license given by the state, which it was entirely competent to change at any time.

Act incorporating rival association. See the title CORPORATIONS, vol. 4, pp. 663, 664.

government.[57] The state has the clear right to regulate its own creations, and, a fortiori, foreign corporations permitted to transact business within its borders.[58] The power to exclude embraces the power to regulate, to enact and enforce all legislation in regard to things done within the territory of the state which may be directly or incidentally requisite in order to render the enforcement of the conceded power efficacious to the fullest extent, subject always, of course, to the paramount authority of the constitution of the United States.[59] But the regulations must be reasonable.[60]

Conveying and Encumbering Property.—But when a corporation sells or encumbers its property, incurs debts or gives securities, it does business, and a statute regulating such transactions does not regulate the internal affairs of the corporation. And it is certainly within the power of a state to say what reme-

57. **Control in general.**—Railroad Commission Cases, 116 U. S. 307, 334, 29 L. Ed. 636; New York Life Ins. Co. *v.* Fletcher, 117 U. S. 519, 29 L. Ed. 934. See the title CORPORATIONS, vol. 4, p. 651, et seq.

58. **Same.**—St. Mary's Franco-American Petroleum Co. *v.* West Virginia, 203 U. S. 183, 191, 51 L. Ed. 144; Hancock Mut. Life Ins. Co. *v.* Warren, 181 U. S. 73, 76, 45 L. Ed. 755; Dayton Coal, etc., Co. *v.* Barton, 183 U. S. 23, 46 L. Ed. 61; Northwestern Nat. Life Ins. Co. *v.* Riggs, 203 U. S. 243, 255, 51 L. Ed. 168; Railroad Commission Cases, 116 U. S. 307, 334, 29 L. Ed. 636.

"The power of a state over foreign corporations is not less than the power of a state over domestic corporations. No case declares otherwise. We said in Orient Ins. Co. *v.* Daggs, 172 U. S. 557, 43 L. Ed. 552: 'That which a state may do with corporations of its own creation it may do with foreign corporations admitted into the state. This seems to be denied, if not generally, at least as to plaintiff in error. The denial is extreme and cannot be maintained. The power of a state to impose conditions upon foreign corporations is certainly as extensive as the power over domestic corporations, and is fully explained in Hooper *v.* California, 155 U. S. 648, 39 L. Ed. 297, and need not be repeated.'" New York Life Ins. Co. *v.* Cravens, 178 U. S. 389, 401, 44 L. Ed. 1116. See, also, Dayton Coal, etc., Co. *v.* Barton, 183 U. S. 23, 24, 46 L. Ed. 61; Northwestern Nat. Life Ins. Co. *v.* Riggs, 203 U. S. 243, 255, 51 L. Ed. 168; Hancock Mut. Life Ins. Co. *v.* Warren, 181 U. S. 73, 76, 45 L. Ed. 755.

Obedience to regulations.—See ante, "General Rule," II, A, 4, a, (1).

59. **Scope of power.**—Hooper *v.* California, 155 U. S. 648, 656, 39 L. Ed. 297. See Noble *v.* Mitchell, 164 U. S. 367, 370, 41 L. Ed. 472. See, also, ante, "Revocability of License and Change of Terms," II, A, 7.

A private corporation of another state has no right to do business in Pennsylvania without the permission of that state, and it is, therefore, subject at all times to such reasonable regulations as may be prescribed by Pennsylvania, whether those regulations relate to taxation or to the business or property of the company in that commonwealth. New York, etc., R. Co. *v.* Pennsylvania, 153 U. S. 628, 641, 38 L. Ed. 846, reaffirmed in Delaware, etc., Canal Co. *v.* Pennsylvania, 156 U. S. 200, 39 L. Ed. 396.

60. **Reasonableness.**—But it is said that while regulations prescribed after the construction of the road, applicable to railroad companies doing business in the state, should be deemed to have been within the contemplation of the parties when those acts were passed, and, therefore, not in violation of the agreement under which the company entered the state for the purpose of transacting business there, and that it should not be assumed that the state intended to surrender or bargain away its authority to establish such regulations, such regulations must be reasonable. New York, etc., R. Co. *v.* Pennsylvania, 153 U. S. 628, 644, 38 L. Ed. 846, reaffirmed in Delaware, etc., Canal Co. *v.* Pennsylvania, 156 U. S. 200, 39 L. Ed. 396.

To compel a foreign corporation to act, in the state of its creation, as an assessor and collector of taxes due in another state from residents of that state, is unreasonable. New York, etc., R. Co. *v.* Pennsylvania, 153 U. S. 628, 645, 38 L. Ed. 846, reaffirmed in Delaware, etc., Canal Co. *v.* Pennsylvania, 156 U. S. 200, 39 L. Ed. 396.

If one state in order to collect taxes assessed upon bonds issued by its own corporations and held by its resident citizens, could require those corporations to deduct the required amount from the interest when the coupons are presented by holders known, at the time by the corporation paying the interest, to be residents of that state—and it may be admitted, in this case, that the state, if not restrained by a valid contract to which it was a party, could establish such a regulation—it does not follow that the state may impose upon foreign corporations, because of their doing business in that state with its permission given for a valuable consideration, any duty in respect to the mode in which they shall perform their obligations in other states. New York, etc., R. Co. *v.* Pennsylvania, 153 U. S. 628, 646, 38 L. Ed. 846, reaffirmed in Delaware,

dies creditors or corporations shall have over property situated within the state.[61]

B. Powers—1. In General.—Dependent on Laws of State Where Exercised.—Every power which a corporation exercises in another state depends for its validity upon the laws of the sovereignty in which it was exercised, and a corporation can make no valid contract, without the sanction, express or implied, of such sovereignty, unless a case should be presented in which the right claimed by the corporation should appear to be secured by the constitution of the United States.[62] But if its laws or policy do not forbid, such powers may be freely exercised.[63] A contrary public policy must be expressed in some affirmative way, and is not to be inferred from silence.[64]

etc., Canal Co. *v.* Pennsylvania, 156 U. S. 200, 39 L. Ed. 396.

In Bell's Gap R. Co. *v.* Pennsylvania, 134 U. S. 232, 33 L. Ed. 892, reaffirmed in Jennings *v.* Coal Ridge Improvement, etc., Co., 147 U. S. 147, 37 L. Ed. 117, the corporations which complained of the tax assessed, under a Pennsylvania statute, upon their loans held by residents of Pennsylvania, were Pennsylvania corporations. No question arose in either of those cases as to the authority of Pennsylvania to make a corporation of another state an assessor or collector of taxes assessed by or under the authority of Pennsylvania against residents of Pennsylvania. Nor does the present case involve any question as to the extent to which the state may tax property within its limits belonging to the railroad company. New York, etc., R. Co. *v.* Pennsylvania, 153 U. S. 628, 648, 38 L. Ed. 846, reaffirmed in Delaware, etc., Canal Co. *v.* Pennsylvania, 156 U. S. 200, 39 L. Ed. 396. See, generally, the title TAXATION.

61. Mode of conveying property.—Williams *v.* Gaylord, 186 U. S. 157, 165, 46 L. Ed. 1102.

There is no doubt of the power of the state to so prescribe the mode of ratification by the stockholders of a corporate mortgage, not only from its power over the manner of conveyance and the disposition of property situated within the state, but from its power over foreign corporations doing business within the state. Castner *v.* Coffman, 178 U. S. 168, 176, 44 L. Ed. 1021; Hooper *v.* California, 155 U. S. 648, 39 L. Ed. 297. Nor can we contest that power though we might, if we were permitted to exercise an independent judgment, construe the statute as only illustrative and not as exhaustive of the manner of ratification. Williams *v.* Gaylord, 186 U. S. 157, 167, 46 L. Ed. 1102. See the title MORTGAGES AND DEEDS OF TRUST.

62. Laws of state controlling.—Runyan *v.* Coster, 14 Pet. 122, 129, 10 L. Ed. 382; Bank *v.* Earle, 13 Pet. 519, 588, 10 L. Ed. 274. See, also, Holder *v.* Aultman, 169 U. S. 81, 89, 42 L. Ed. 669. And see post, "Effect of Noncompliance with Terms," II, A, 5

"By the laws of Alabama, a contract made in that state by the agents of a corporation created by the law of another state is valid. This point was fully considered and decided in the case of the Bank *v.* Earle, 13 Pet. 519, 10 L. Ed. 274, and cannot now be considered as open for argument in this court." Tombigbee R. Co. *v.* Kneeland, 4 How. 16, 17, 11 L. Ed. 855.

63. Comity rule.—There is no reason for excluding from the protection of the law the contracts of foreign corporations, when they are not contrary to the known policy of the state nor injurious to its interest; it is nothing more than the admission of the existence of an artificial person, created by the law of another state, and clothed with the power of making certain contracts; it is but the usual comity of recognizing the laws of another state. Bank *v.* Earle, 13 Pet. 519, 10 L. Ed. 274; Ruyan *v.* Coster, 14 Pet. 122, 10 L. Ed. 382; Pinney *v.* Nelson, 183 U. S. 144, 149, 46 L. Ed. 125. See ante, "General Rule of Comity," II, A, 3.

The prohibition of certain specified contracts by foreign corporations, contained in the state laws, is, by necessary implication, an admission that other contracts may be made by foreign corporations within the state, and that no legislative permission is necessary to give the validity. Bank *v.* Earle, 13 Pet. 519, 591, 10 L. Ed. 274. See ante, "Existence Out of State Granting Charter, and Comity Rule," II, A, where this question was necessarily treated.

64. Prohibition must be express.—"If the policy of the state or territory does not permit the business of the foreign corporation in its limits, or allow the corporation to acquire or hold real property, it must be expressed in some affirmative way; it cannot be inferred from the fact that its legislature has made no provision for the formation of similar corporations, or allows corporations to be formed only by general law. Telegraph companies did business in several states before their legislatures had created or authorized the creation of similar corporations; and numerous corporations existing by special charter in one state are now engaged, without question, in business in states where the creation of corporations by special enactment is forbidden." Cowell *v.* Springs Co., 100 U. S. 55, 59, 25 L. Ed.

Limited by Incorporating Act.—The limitation of the powers of a domestic corporation, both in extent and manner of execution, to those conferred by the incorporating act, has even a broader application to foreign corporations.[65]

Extraterritorial Action of Directors.—See the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

Repeal of Prohibition against Taking Realty Mortgage as Impairment of Contract or Vested Right.—See the titles CONSTITUTIONAL LAW, vol. 4, p. 418; IMPAIRMENT OF OBLIGATION OF CONTRACTS.

2. TO ACQUIRE, HOLD, AND TRANSFER PROPERTY.—**In General.**—Foreign corporations are, by general comity, permitted to acquire, hold and transfer property equally with individuals.[66]

Land.—A corporation may hold land in another territory so long as the local authorities do not object.[67]

547; Christian Union *v.* Yount, 101 U. S. 352, 356, 25 L. Ed. 888.

Rule of construction.—When a court is called upon to declare that contracts entered into within the state by a foreign corporation are void, upon the ground that they conflict with the policy of the state, the line of that policy should be very clear and distinct, to justify the court in sustaining the defense. Bank *v.* Earle, 13 Pet. 519, 597, 10 L. Ed. 274. See ante, "Limitations," II, A, 3, b.

65. Charter limitations.—Waters-Pierce Oil Co. *v.* Texas, 177 U. S. 28, 43, 44 L. Ed. 657. See, also, Canada Southern R. Co. *v.* Gebhard, 109 U. S. 527, 27 L. Ed. 1020; Hancock Mut. Life Ins. Co. *v.* Warren, 181 U. S. 73, 76, 45 L. Ed. 755; Relfe *v.* Rundle, 103 U. S. 222, 226, 26 L. Ed. 237; New York Life Ins. Co. *v.* Cravens, 178 U. S. 389, 401, 44 L. Ed. 1116; Bank *v.* Earle, 13 Pet. 519, 10 L. Ed. 274. See the title CORPORATIONS, vol. 4, p. 714, et seq., as to these powers and their scope.

66. Property rights.—Cowell *v.* Springs Co., 100 U. S. 55, 25 L. Ed. 547; Christian Union *v.* Yount, 101 U. S. 352, 25 L. Ed. 888. See, also, Inglehart *v.* Inglehart, 204 U. S. 478, 487, 51 L. Ed. 575, where it is said that trusts of the same kind as those permitted to domestic corporations, will not be interferred with, although to be carried out in a foreign state by a foreign corporation in regard to property within the District of Columbia.

"The general power of a corporation to hold property in states other than the one which incorporated it (in the absence of statutory prohibition in such states), is firmly established." United Lines Tel. Co. *v.* Boston Safe Deposit, etc., Co., 147 U. S. 431, 447, 37 L. Ed. 231.

The Code of Louisiana in 1853, declared "that all persons may dispose of or receive by donations, inter vivos or mortis causa, except such as the law declares expressly incapable." C. C., 1456. There is no distinction between corporations and natural persons in the power to receive by donation, nor do we find any discrimination between domestic and foreign corporations, except, perhaps in a single article. "Donations may be made in favor of a stranger, when the laws of his country do not prohibit similar dispositions in favor of a citizen of his state." C. C., 1477. Semble, that this article does not apply to all the citizens or corporations of the states of the Union. The constitutional relations between the citizens of the different states are those of equality, in reference to the subject of this article. McDonogh *v.* Murdoch, 15 How. 367, 413, 14 L. Ed. 732, citing Bank *v.* Earle, 13 Pet. 519, 520, 10 L. Ed. 274.

67. Land.—Galveston Railroad *v.* Cowdrey, 11 Wall. 459, 476, 20 L. Ed. 199; Christian Union *v.* Yount, 101 U. S. 352, 25 L. Ed. 888; Society for the Propagation of the Gospel *v.* New Haven, 8 Wheat. 464, 482, 5 L. Ed. 662. See, also, Julian *v.* Central Trust Co., 193 U. S. 93, 107, 48 L. Ed. 629; dissenting opinion of Brown, J., in Blake *v.* McClung, 172 U. S. 239, 267, 43 L. Ed. 432.

Thus a New York corporation created for the express purpose of purchasing and holding coal lands in the state of Pennsylvania can only hold the lands so purchased by and with the consent, express or implied, of the state of Pennsylvania. Runyan *v.* Coster, 14 Pet. 122, 130, 10 L. Ed. 382, cited approvingly in McDonogh *v.* Murdoch, 15 How. 367, 413, 14 L. Ed. 732.

But a foreign corporation, forbidden by the laws of the state creating it, to acquire lands there, by devise, could not, by that mode, take lands in Illinois, in the absence of a statute of that state assenting thereto. Christian Union *v.* Yount, 101 U. S. 352, 359, 25 L. Ed. 888.

See Society for the Propagation of the Gospel *v.* Pawlett, 4 Pet. 480, 7 L. Ed. 927, where it was held that in the record, there was abundance to establish the right of the corporation to hold the land in controversy; it was given to them by the royal charter of 1761, which created the town of Pawlet; the society was named among the grantees, as "the Society for Propagating the Gospel in Foreign Parts," to whom one share was given. This was a plain recognition by the crown of the existence of the corporation, and

Effect of Division of Country.—The property rights of a British corporation in America were unaffected by the Revolution, where the rights of an individual in the same circumstances would have been unaffected.[68]

Right of Objection.—But if there is any defect of power in a foreign corporation to acquire real estate, only the state can raise the question.[69]

III. Actions and Suits by and against.

In federal courts, see the title COURTS, vol. 4, p. 861.

A. Power to Sue.—While a state has the power to restrict the right of a foreign corporation to sue in its courts,[70] and it is plain that the New York restriction upon suits by foreign corporations against foreign corporations is not affected by either § 1 or §. 2 of Article IV,[71] unless so restricted a foreign corporation may sue in the courts of a state.[72] Again, a corporation, created by the

of its capacity to take; it would confer the power to take the land, even if it had not previously existed.

Foreign religious corporation.—See the titles CHARITIES, vol. 3, p. 681; RELIGIOUS SOCIETIES.

Regulating mode of conveyance and encumbrance.—See ante, "Regulation and Control," II, A, 8.

Forfeiture.—See post, "Jurisdiction," III, C.

68. Unaffected by division of country.—Society for the Propagation of the Gospel *v.* New Haven, 8 Wheat. 464, 482, 5 L. Ed. 662. See the title ALIENS, vol. 1, p. 214, et seq.

69. State alone can object.—"It is not necessary to inquire into the right of the plaintiff as a foreign corporation to take and hold title to real estate in Colorado, a question which, in some of its aspects, was before this court in the case of Fritts *v.* Palmer, 132 U. S. 282, 33 L. Ed. 317, for if, by so doing, any laws of the state are violated, the state is the one to challenge the act (Delvin on Deeds, § 127, and cases cited in note), and it does not lie in the mouth of the agent of the corporation to raise the question." Seymour *v.* Slide, etc., Gold Mines, 153 U. S. 523, 525, 38 L. Ed. 807. See the title CORPORATIONS, vol. 4, p. 621.

Where land in Illinois was conveyed to a New York corporation, the children and heirs at law of the grantor, who file their bill to set aside the conveyance upon the ground that it was against the public policy of Illinois, cannot raise the question that the grantee acquired a larger quantity of lands than its charter allowed. Christian Union *v.* Yount, 101 U. S. 352, 25 L. Ed. 888, distinguishing Carroll *v.* City of East St. Louis, 67 Ill. 568 and Starkweather *v.* American Bible Society, 72 Id. 50.

The supreme court of Pennsylvania having decided, that a corporation has, in that state, a right to purchase, hold and convey land, until some act is done by the government, according to its own laws, to vest the estate in itself, the estate may remain in a corporation so purchasing or holding lands; but such estate is defeasible by the commonwealth. This being the law of Pennsylvania, it must govern in a case where land in Pennsylvania had been purchased by a corporation created by the legislature of New York, for the purpose of supplying coal from Pennsylvania to the city of New York. Fairfax *v.* Hunter, 7 Cranch 603, 621, 3 L. Ed. 453, cited with approbation. Runyan *v.* Coster, 14 Pet. 122, 10 L. Ed. 382.

Where terms of admission not complied with.—See ante, "Effect of Noncompliance with Terms," II, A, 5.

70. Restrictions.—"The general power of a state to restrict the right of a foreign corporation to sue in its courts is assumed in Bank *v.* Earle, 13 Pet. 519, 591, 10 L. Ed. 274. As to discrimination against nonresidents, see Chemung Canal Bank *v.* Lowery, 93 U. S. 72, 23 L. Ed. 806." Anglo-American Provision Co. *v.* Davis Provision Co. No. 1, 191 U. S. 373, 375, 48 L. Ed. 225. See, also, Runyan *v.* Coster, 14 Pet. 122, 10 L. Ed. 382, where an action of ejectment by a foreign corporation was allowed to be maintained without objection.

71. Same—New York.—Anglo-American Provision Co. *v.* Davis Provision Co. No. 1, 191 U. S. 373, 375, 48 L. Ed. 225.

Article IV, § 1, of the federal constitution establishes a rule of evidence rather than of jurisdiction. Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265, 291, 32 L. Ed. 239; Andrews *v.* Andrews, 188 U. S. 14, 36, 47 L. Ed. 366. The constitution does not require the state of New York to give jurisdiction to the supreme court against its will. If the plaintiff can find a court into which it has a right to come, then the effect of the judgment is fixed by the constitution and the act in pursuance of it which congress has passed. Rev. Stat., § 905. But the constitution does not require the state to provide such a court. Anglo-American Provision Co. *v.* Davis Provision Co. No. 1, 191 U. S. 373, 374, 48 L. Ed. 225. See Missouri *v.* Lewis, 101 U. S. 22, 30, 25 L. Ed. 989.

72. Right when unrestricted.—Bank *v.* Earle, 13 Pet. 519, 590, 10 L. Ed. 274; Runyan *v.* Coster, 14 Pet. 122, 10 L. Ed. 382; Galveston Railroad *v.* Cowdrey, 11 Wall. 459, 476, 20 L. Ed. 199; Lafayette

laws of another state, can sue in Alabama, upon a contract made in that state.[73] And the right to sue may be made conditional on compliance with certain requirements as to filing a copy of the charter, etc.[74]

B. Liability to Suit.—In General.—It is well settled that a corporation of one state doing business in another is suable where its business is done, if the laws make provision to that effect. It has been so held many times.[75] This has resulted from statutes passed, to remedy the inconvenience and injustice of compelling persons dealing with foreign corporations to resort to the courts of distant states when suits against them became necessary.[76] And the liability of a

Ins. Co. *v.* French, 18 How. 404, 407, 15 L. Ed. 451. See, also, ante, "Extraterritorial Rights and Powers," II.

"In England, the right of a foreign corporation doing business in England to sue in the English courts was long ago recognized." Barrow Steamship Co. *v.* Kane, 170 U. S. 100, 109, 42 L. Ed. 964. See Bank *v.* Earle, 13 Pet. 519, 590, 10 L. Ed. 274.

73. **Alabama.**—Tombigbee R. Co. *v.* Kneeland, 4 How. 16, 11 L. Ed. 855.

74. **Failure to comply with terms.**—A state statute (Wisconsin) which forbade corporations organized otherwise than under the laws of that state to transact business in the state until they should have filed a copy of their charter with the secretary of state, made a failure to comply with any of the provisions of the section subject the corporation to a fine, and provided further that every contract made by such corporation affecting the personal liability thereof or relating to property within the state before compliance with the section should be wholly void on its behalf, but should be enforceable against it. A fee of twenty-five dollars was to be paid for filing the charter. It did not impair or affect the obligation of a contract of such foreign corporation which had not complied therewith made subsequent to its taking effect and involving necessarily the transaction of business in such state; and it could not sue upon the same, but the defense of its noncompliance with the law was valid and effectual as a bar to the action. Diamond Glue Co. *v.* United States Glue Co., 187 U. S. 611, 613, 47 L. Ed. 328.

75. **Liability to suit.**—Railroad Co. *v.* Koontz, 104 U. S. 5, 10, 26 L. Ed. 643, citing Lafayette Ins. Co. *v.* French, 18 How. 404, 15 L. Ed. 451; Railroad Co. *v.* Harris, 12 Wall. 65, 20 L. Ed. 354; Ex parte Schollenberger, 96 U. S. 369, 24 L. Ed. 853. See, also, New England Mut. Life Ins. Co. *v.* Woodworth, 111 U. S. 138, 146, 28 L. Ed. 379; Martin *v.* Baltimore, etc., R. Co., 151 U. S. 673, 38 L. Ed. 311; Southern Pac. Co. *v.* Denton, 146 U. S. 202, 207, 36 L. Ed. 943; Memphis, etc., R. Co. *v.* Alabama, 107 U. S. 581, 27 L. Ed. 518; New York, etc., R. Co. *v.* Estill, 147 U. S. 591, 609, 37 L. Ed. 292, where it is held that, under the Missouri statute, § 3481, a foreign corporation, doing business in the state, is a nonresident and suable in any county. See, also, the title VENUE.

A corporation, existing only by virtue of a law of one state, cannot be deemed to pass personally beyond the limits of that state. Bank *v.* Earle, 13 Pet. 519, 10 L. Ed. 274. But it does not necessarily follow that a valid judgment could be recovered against it only in that state. A corporation may sue in a foreign state, by its attorney there; and if it fails in the suit, be subject to a judgment for costs. And so if a corporation, though in Indiana, should appoint an attorney to appear, in an action brought in Ohio, and the attorney should appear, the court would have jurisdiction to render a judgment, in all respects as obligatory as if the defendant were within the state. The inquiry is, not whether the defendant was personally within the state, but whether he, or someone authorized to act for him in reference to the suit, had notice and appeared; or, if he did not appear, whether he was bound to appear or suffer a judgment by default. Lafayette Ins. Co. *v.* French, 18 How. 404, 407, 15 L. Ed. 451.

Suit by public administrator.—See the title EXECUTORS AND ADMINISTRATORS, ante, p. 119.

76. **Same—Cause of change.**—St. Clair *v.* Cox, 160 U. S. 350, 354, 27 L. Ed. 222; Barrow Steamship Co. *v.* Kane, 170 U. S. 100, 107, 42 L. Ed. 964; New England Mut. Life Ins. Co. *v.* Woodworth, 111 U. S. 138, 144, 28 L. Ed. 379. See, also, Lafayette Ins. Co. *v.* French, 18 How. 404, 407, 15 L. Ed. 451; Pennsylvania Lumbermen's Mut. Fire Ins. Co. *v.* Meyer, 197 U. S. 407, 418, 49 L. Ed. 810; Connecticut Mut. Life Ins. Co. *v.* Spratley, 172 U. S. 602, 619, 43 L. Ed. 569.

"Formerly it was held that a foreign corporation could not be sued in an action for the recovery of a personal demand outside of the state by which it was chartered. The principle that a corporation must dwell in the place of its creation, and cannot, as said by Mr. Chief Justice Taney, migrate to another sovereignty, coupled with the doctrine that an officer of the corporation does not carry his functions with him when he leaves his state, prevented the maintenance of personal actions against it. There was no mode of compelling its appearance in the foreign jurisdiction. Legal proceedings there against it were, therefore, necessarily confined to the disposition of such property belonging to it as could be there found; and to authorize them legislation was

foreign corporation to be sued in a particular jurisdiction need not be distinctly expressed in the statutes of that jurisdiction, but may be implied from a grant of authority in those statutes to carry on its business there.[77]

Effect of Withdrawal or Expulsion.—And the withdrawal of the corporation from the state, accompanied by withdrawal of the authority conferred on an officer or person in the state to accept service of process, or the involuntary cancellation of its license to do business in the state, will not prevent it from being sued in the state courts, on causes of action arising out of its business therein, after such withdrawal or ouster, and service on such officer or person is sufficient.[78]

Personal Judgment.—But in a suit where no property of a corporation is within the state, and the judgment sought is a personal one, it is a material inquiry to ascertain whether the foreign corporation is engaged in doing business within the state.[79]

necessary." St. Clair *v.* Cox, 106 U. S. 350, 354, 27 L. Ed. 222.

"This doctrine of the exemption of a corporation from suit in a state other than of its creation was the cause of much inconvenience, and often of manifest injustice. * * * To meet and obviate this inconvenience and injustice, the legislatures of several states interposed, and provided for service of process on officers and agents of foreign corporations doing business therein. Whilst the theoretical and legal view, that the domicile of a corporation is only in the state where it is created, was admitted, it was perceived that when a foreign corporation sent its officers and agents into other states and opened offices, and carried on its business there, it was, in effect, as much represented by them there as in the state of its creation. As it was protected by the laws of those states, allowed to carry on its business within their borders, and to sue in their courts, it seemed only right that it should be held responsible in those courts to obligations and liabilities there incurred." St. Clair *v.* Cox, 106 U. S. 350, 355, 27 L. Ed. 222.

As to character of service necessary, see ante, "Maintenance of Office, and Agent for Service of Process," II, A, 4, c. See, also, the titles, JUDGMENTS AND DECREES; SUMMONS AND PROCESS.

Appearance and effect.—See the title APPEARANCES, vol. 2, p. 429.

"The state of Michigan permits foreign corporations to transact business within her limits. Either by express enactment, as in the case of insurance companies, or by her acquiescence, they are as free to engage in all legitimate business as corporations of her own creation. Her statutes expressly provide for suits being brought by them in her courts; and for suits by attachment being brought against them in favor of residents of the state." St. Clair *v.* Cox, 106 U. S. 350, 357, 27 L. Ed. 222.

In England, the liability of a foreign corporation doing business in England to be subjected to suit in those courts, by service made upon one of its principal officers residing and representing it within the realm, has been fully established by recent decisions. Barrow Steamship Co. *v.* Kane, 170 U. S. 100, 109, 42 L. Ed. 964.

Tennessee act construed.—"On the 29th of March, 1887, an act was passed by the legislature of Tennessee, entitled 'An act to subject foreign corporations to suit in this state' (Acts 1887, p. 386), which defendant in error contends should control here; but in Telephone Co. *v.* Turner, 88 Tennessee (4 Pickle) 265, it was held that this act did not apply to foreign corporations having an office and resident agent in the state, and already subject to suit, but only to such foreign corporations as engaged in business in the state without such office and agent; that it was not a limitation but an enlargement of the jurisdiction over foreign corporations; and that §§ 2831, 2832, 2833 and 2834 of the code regulated the mode in which corporations might be sued, and applied equally to domestic and foreign corporations having an office or agency and a resident local agent in the county in which suit was brought. We perceive no reason for declining to accept the conclusions of the supreme court of the state upon this subject, and the act of 1887 need not, therefore, be considered." Kansas City, etc., R. Co. *v.* Daughtry, 138 U. S. 298, 304, 34 L. Ed. 963.

77. **Implied liability from admission.**—Barrow Steamship Co. *v.* Kane, 170 U. S. 100, 108, 42 L. Ed. 964. See ante, "Consent to Be Sued," II, A, 4, d.

Dual incorporation.—See the title CORPORATIONS, vol. 4, p. 651, et seq.

78. **Withdrawal or ouster.**—Mutual Reserve Fund Life Ass'n *v.* Phelps, 190 U. S. 147, 158, 47 L. Ed. 987; Connecticut Mut. Life Ins. Co. *v.* Spratley, 172 U. S. 602, 43 L. Ed. 569, reaffirmed in Mutual Reserve Life Ins. Co. *v.* Birch, 200 U. S. 612, 5 L. Ed. 620. See the title SUMMONS AND PROCESS

79. **Same.**—Connecticut Mut. Life Ins. Co. *v.* Spratley, 172 U. S. 602, 610, 43 L. Ed. 569, reaffirmed in Mutual Reserve Life

Attachment.—And the state laws usually provide for attachment in favor of residents against foreign corporations, as in Michigan.[80]

Dissolved Corporation.—No suit can be maintained against a dissolved foreign corporation, except under some special statute.[81]

Exemption from Statutes of Limitation.—See the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION.

C. Jurisdiction.—Federal Circuit Courts.—Many states have provided by statute that a foreign corporation making contracts within the state shall appoint an agent residing therein, upon whom process may be served in actions upon such contracts. The federal supreme court has often held that wherever such a statute exists, service upon an agent so appointed is sufficient to support jurisdiction of an action against the foreign corporation, either in the courts of the state, or, when consistent with the acts of congress, in the courts of the United States held within the state; but it has never held the existence of such a statute to be essential to the jurisdiction of the circuit courts of the United States.[82]

D. Allegation and Proof of Incorporation.—See the titles CORPORATIONS, vol. 4, p. 621; COURTS, vol. 4, p. 861; PLEADING; REMOVAL OF CAUSES.

Proof of Incorporation.—As the statutes under which a foreign (British) corporation was incorporated were the basis of the plaintiff's corporate existence, and its right to bring this action, they must undoubtedly be proved as facts.[83]

E. Parties.—The general principle that all parties to be affected by the decision must be made parties, either actually or by representation, applies to suits against a foreign corporation.[84]

Ins. Co. *v.* Birch, 200 U. S. 612, 50 L. Ed. 620, citing Goldey *v.* Morning News, 156 U. S. 518, 519, 37 L. Ed. 517.

The doctrine of Pennoyer *v.* Neff applies, in all its force, to personal judgments of state courts against foreign corporations. The courts rendering them must have acquired jurisdiction over the party by personal service or voluntary appearance, whether the party be a corporation or a natural person. St. Clair *v.* Cox, 106 U. S. 350, 353, 27 L. Ed. 222. See the titles COURTS, vol. 4, p. 861; JUDGMENTS AND DECREES; SUMMONS AND PROCESS. See the latter title as to necessity and mode of service of process.

"Where a foreign corporation is not doing business in a state, and the president or any officer is not there transacting business for the corporation and representing it in the state, it cannot be said that the corporation is within the state, so that service can be made upon it." Fitzgerald, etc., Const. Co. *v.* Fitzgerald, 137 U. S. 98, 106, 34 L. Ed. 608, citing St. Clair *v.* Cox, 106 U. S. 350, 27 L. Ed. 222; New England Mut. Life Ins. Co. *v.* Woodworth, 111 U. S. 138, 28 L. Ed. 379; Ex parte Schollenberger, 96 U. S. 369, 24 L. Ed. 853.

80. **Attachment.**—St. Clair *v.* Cox, 106 U. S. 350, 352, 27 L. Ed. 222; Societe Fonciere, etc., *v.* Milliken, 135 U. S. 304, 34 L. Ed. 208. See, generally, the title ATTACHMENT AND GARNISHMENT, vol. 2, p. 660.

As to form of affidavit, see the title ATTACHMENT AND GARNISHMENT, vol. 2, p. 677.

81. **Dissolved corporation.**—Mumma *v.* Potomac Co., 8 Pet. 281, 8 L. Ed. 945. See the title CORPORATIONS, vol. 4, p. 796.

82. **Jurisdiction of federal circuit court.**—Barrow Steamship Co. *v.* Kane, 170 U. S. 100, 107, 42 L. Ed. 964, citing Lafayette Ins. Co. *v.* French, 18 How. 404, 15 L. Ed. 451; Ex parte Schollenberger, 96 U. S. 369, 24 L. Ed. 853; New England Mut. Life Ins. Co. *v.* Woodworth, 111 U. S. 138, 146, 28 L. Ed. 379; Shaw *v.* Quincy Min. Co., 145 U. S. 444, 452, 36 L. Ed. 768. See the titles COURTS, vol. 4, p. 861; SUMMONS AND PROCESS.

83. **Proof of incorporation.**—Nashua Savings Bank *v.* Anglo-American Land, etc., Co., 189 U. S. 221, 228, 47 L. Ed. 782; Liverpool, etc., Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 445, 32 L. Ed. 788.

84. **Parties.**—Where a bill in equity is filed by a state against a foreign corporation to enjoin it from acquiring, contrary to a state law, ownership and control of domestic and competing railroad corporations, as the domestic corporations and their stockholders and bondholders must be affected by a decision of the controversy, all of whom are not represented by the foreign corporation defendant, it was held that such domestic corporations are indispensable parties, without whose presence the court, acting as a court of equity, cannot proceed. Minnesota *v.* Northern Securities Co., 184 U. S. 199, 247, 46 L. Ed. 499. See, generally, the titles CORPORATIONS, vol. 4, p. 766; PARTIES.

IV. Insolvency, Winding Up, Dissolution and Reorganization.

A. Jurisdiction.—To Decree a Forfeiture against Foreign Corporation.—Neither the courts of this country, nor the local legislature where the lands lie, can adjudge a forfeiture of the franchises of the foreign corporation, or of its property.[85]

B. Control over Assets within Jurisdiction.—A state may, by its courts, retain within its limits the assets of a foreign corporation, in order that justice may be done to its own citizens; and, by appropriate action of its judicial tribunals, see to it that its own citizens are not unjustly discriminated against by reason of the administration in other states of the assets there of an insolvent corporation doing business within its limits. But it may not discriminate against citizens of other states.[86]

C. Effect of Charter Provisions.—Charter provisions as to its dissolution bind all persons dealing with a foreign corporation doing business in their state, and upon its dissolution they must submit thereto.[87]

D. Reorganization.—Every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting the powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes.[88]

V. Taxation.

See the title TAXATION.

85. **To forfeit foreign (British) corporate charter.**—Society for the Propagation of the Gospel *v.* New Haven, 8 Wheat. 464, 5 L. Ed. 662.

The act of legislature of Vermont, of the 30th of October, 1794, granting the lands in that state, belonging to "The Society for Propagating the Gospel in Foreign Parts," to the respective towns in which the lands lie, is void, and conveys no title under it. Society for the Propagation of the Gospel *v.* New Haven, 8 Wheat. 464, 5 L. Ed. 662.

Were the courts or a state to exercise it, and decree a forfeiture of the franchises of the corporation, or the removal of the trustees, the plaintiffs would not be less a corporation, clothed with all its corporate rights and franchises. But this exemption of the corporation from the jurisdiction of a foreign court to forfeit its franchises, or to interfere in its management of the charity, cannot destroy, or in any manner affect, its civil rights, or its capacity to hold and enjoy the property legally vested in it. Society for the Propagation of the Gospel *v.* New Haven, 8 Wheat. 464, 482, 5 L. Ed. 662. See, generally, the title CORPORATIONS, vol. 4, p. 621.

86. **Control and administration of assets within jurisdiction.**—Blake *v.* McClung, 172 U. S. 239, 257, 43 L. Ed. 432, reaffirmed in Blake *v.* McClung, 176 U. S. 59, 61, 44 L. Ed. 371.

Preference of citizens of state in distribution of assets of foreign corporation as denial of privilege of citizens of other states.—See the title CONSTITUTIONAL LAW, vol. 4, p. 475, et seq.

But foreign corporations who are creditors cannot complain of such discrimination, as they are not citizens in the meaning of this clause of the federal constitution. As to them such discrimination is legal. Blake *v.* McClung, 172 U. S. 239, 259, 43 L. Ed. 432, reaffirmed in Blake *v.* McClung, 176 U. S. 59, 65, 44 L. Ed. 371. See the title CORPORATIONS, vol. 4, p. 647.

87. **Binding force of charter provisions.**—Where, by the charter of a corporation, if a dissolution was decreed, its property passed by operation of law to the superintendent of the insurance department of the state, and he was charged with the duty of winding up its affairs, every policy holder and creditor in another state is charged with notice of this charter right which all interested in the affairs of the corporation can insist shall be regarded. When they contracted with the Missouri corporation, impliedly they agreed that if the corporation was dissolved under the Missouri laws, the superintendent of the insurance department of the state should represent the company in all suits instituted by them affecting the winding up of its affairs. Relfe, therefore, became, by operation of law, the successor of the corporation in the litigation these appellees instituted in Louisiana. Relfe *v.* Rundle, 103 U. S. 222, 226, 26 L. Ed. 237.

88. **Reorganization under foreign law.**—Canada Southern R. Co. *v.* Gebhard, 10 U. S. 527, 537, 27 L. Ed. 1020.

"It follows, therefore, that anything done at the legal home of the corporation, under the authority of such laws, which discharges it from liability there, discharges it everywhere." Canada Southern R. Co. *v.* Gebhard, 109 U. S. 527, 537, 27 L. Ed. 1020. See, also, Glenn *v.* Liggett, 135 U. S. 533, 544, 34 L. Ed. 262; Hawkins *v.* Glenn, 131 U. S. 319, 332, 33 L. Ed. 184; Nashua Savings Bank *v.* An-

FOREIGN COUNTRY, ETC.—See note 1.

FOREIGN DIVORCE.—See the title DIVORCE AND ALIMONY, vol. 5, p. 416.

FOREIGNER.—See the title ALIENS, vol. 1, pp. 210, 229.

FOREIGN EXECUTORS AND ADMINISTRATORS.—See the title EXECUTORS AND ADMINISTRATORS.

FOREIGN GOODS.—See note 2.

FOREIGN GUARDIAN.—See the title GUARDIAN AND WARD.

glo-American Land, etc., Co., 189 U. S. 221, 47 L. Ed. 782; Pinney *v.* Nelson, 183 U. S. 144, 46 L. Ed. 125.

See the title CORPORATIONS, vol. 4, p. 621, where the reorganization of foreign corporations is treated for convenience. As to liability of stockholders, see the title STOCK AND STOCKHOLDERS.

1. **Foreign country.**—"If we look to lexicographers, as well as approved writers, for the use of the term **foreign**, it may be applied with strictest propriety to the Cherokee nation. In the general sense, it is applied to any person or thing belonging to an entire nation or country. * * * In a political sense, we call every country **foreign**, which is not within the jurisdiction of the same government. * * * And it may be laid down as a general rule, that when used in relation to countries, in a political sense, it refers to the jurisdiction or government of the country." Cherokee Nation *v.* Georgia, 5 Pet. 1, 56, 8 L. Ed. 25.

By the conquest and military occupation of a portion of the territory of the United States, by a public enemy, that portion is to be deemed a **foreign country**, so far as respects our revenue laws; and goods imported into it, are not imported into the United States; and are subject to such duties only as the conquerors may impose. United States *v.* Rice, 4 Wheat. 246, 4 L. Ed. 562.

Porto Rico.—The term **foreign country**, defined by Chief Justice Marshall to be one exclusively within the sovereignty of the foreign nation, and without the sovereignty of the United States, no longer included the Island of Porto Rico after the ratification of its cession to the United States; and an imported cargo of sugar from Porto Rico was not subject to duty under the Dingley Act, declaring that "there shall be levied, collected, and paid upon all articles imported from **foreign countries**" certain duties therein specified, though congress had not embraced Porto Rico within the Customs Union. De Lima *v.* Bidwell, 182 U. S. 1, 45 L. Ed. 1041.

2. **Foreign goods.**—In a commerical sense, we call goods coming from any country, not within out own jurisdiction, **foreign goods.** Cherokee Nation *v.* Georgia, 5 Pet. 1, 56, 8 L. Ed. 25.

FOREIGN JUDGMENTS, RECORDS AND JUDICIAL PROCEEDINGS.

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CROSS REFERENCES.

See the titles APPEAL AND ERROR, vol. 1, p. 650; APPEARANCES, vol. 2, p. 429; ASSUMPSIT, vol. 2, p. 636; CONFLICT OF LAWS, vol. 3, p. 1020; COURTS, vol. 4, p. 861; DEBT, THE ACTION OF, vol. 5, p. 205; FOREIGN LAWS; JUDGMENTS AND DECREES; JURISDICTION; LIMITATION OF ACTIONS AND ADVERSE POSSESSION; PARTIES; PLEADING; RECORDS; RES ADJUDICATA; SUMMONS AND PROCESS.

I. Scope of Title.

In this title, for the purpose of convenience in treatment, and to avoid confusion, the subject of foreign judgments has been divided into two general classes. In the first of these are included judgments rendered in the courts of a state of this country, or of a federal court sitting in such state; and it is intended to treat generally thereunder the conclusiveness and effect of such judgments, especially when sued upon in other tribunals of this country; the manner of authenticating such judgments, and the method of enforcement. In the second class, or foreign judgments proper, the same treatment is intended to be given to the judgments of foreign countries. For a full treatment of the effect of such judgments, of either class, as res adjudicata, see the title RES ADJUDICATA.

II. Judgments, Records and Judicial Proceedings of Courts of Other States.

A. Status as Distinguished from Domestic Judgments or Judgments of Foreign Countries.—Cases may be found in which it held that the judgment of a state court when introduced as evidence in the tribunals of another state, are to be regarded in all respects as domestic judgments. On the other hand, another class of cases are to be found in which it is held that such judgments in the courts of another state are foreign judgments, and that as such the judgment is open to every inquiry to which other foreign judgments may be subjected under the rules of the common law.[1] It would seem however, that neither of these lines of decisions are entirely correct. Such judgments are certainly not foreign judgments under the constitutional and statutory provisions giving them due faith and credit in other courts within the United States,[2] and their exemption from re-examination on the merits or impeachment for fraud in obtaining them would seem to furnish the only points of difference between them and judgments recovered in a foreign country.[3] Nor are they domestic judgments in every sense, because they are not the proper foundation of final process, except in the state where they were rendered;[4] and also because they are open to inquiry as to the jurisdiction of the court and notice to the defendant.[5] In all other respects, however, such judgments have the same faith and credit as domestic judgments.[6]

B. Operation and Conclusiveness—1. In Absence of Constitutional and Statutory Provisions.—The decisions of the United States supreme court have clearly recognized that judgments of a foreign state are prima facie evidence only,[7] and that, but for the constitutional and legislative provisions, now existing, judgments of a state of the Union, when sued upon in another state, would have no greater effect.[8]

1. **Judgments of state courts considered either as purely domestic or foreign judgments.**—Christmas *v.* Russell, 5 Wall. 290, 18 L. Ed. 475. See post, "Judgments of Foreign Countries," III.

2. **Distinguished from foreign judgments by reason of provisions as to due faith and credit.**—Christmas *v.* Russell, 5 Wall. 290, 18 L. Ed. 475. See post, "Provisions Stated," II, B, 2, a.

3. **Differ from judgments of foreign countries only in not being re-examinable on merits nor impeachable for fraud.**—Hanley *v.* Donoghue, 116 U. S. 1, 29 L. Ed. 535; Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265, 32 L. Ed. 239; Hilton *v.* Guyot, 159 U. S. 113, 40 L. Ed. 95; Simmons *v.* Saul, 138 U. S. 439, 34 L. Ed. 1054. See, also, Thompson *v.* Whitman, 18 Wall. 457, 21 L. Ed. 897; Christmas *v.* Russell, 5 Wall. 290, 18 L. Ed. 475; D'Arcy *v.* Ketchum, 11 How. 165, 13 L. Ed. 648; McElmoyle *v.* Cohen, 13 Pet. 312, 10 L. Ed. 177. See post, "Fraud as Ground for Impeachment," II, B, 2, b, (4), (d).

"Judgments recovered in one state of the Union, when proved in the courts of another government, whether state or national, within the United States, differ from judgments recovered in the foreign country in no other respect than in not being re-examinable on their merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties. Hanley *v.* Donoghue, 116 U. S. 1, 29 L. Ed. 535." Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265, 32 L. Ed. 239.

4. **Not proper foundation of final process in other states.**—Christmas *v.* Russell, 5 Wall. 290, 18 L. Ed. 475. See post, "General Statement as to Purpose and Effect," II, B, 2, b, (1).

5. **Open to inquiry as to jurisdiction and notice.**—Christmas *v.* Russell, 5 Wall. 290, 18 L. Ed. 475. See post, "Inquiry as to Jurisdiction," II, B, 2, b, (4), (b).

As to definition and nature of domestic judgments generally, see the title JUDGMENTS AND DECREES.

6. **Entitled otherwise to same faith and credit as domestic judgments.**—Christmas *v.* Russell, 5 Wall. 290, 18 L. Ed. 475. See, also, D'Arcy *v.* Ketchum, 11 How. 165, 13 L. Ed. 648; Webster *v.* Reid, 11 How. 437, 13 L. Ed. 716. See post, "Extent of Faith and Credit Required to Be Given," II, B, 2, b, (3).

7. **Foreign judgments prima facie evidence only.**—Hilton *v.* Guyot, 159 U. S. 113, 40 L. Ed. 95; D'Arcy *v.* Ketchum, 11 How. 165, 13 L. Ed. 648; Michaels *v.* Post, 21 Wall. 398, 22 L. Ed. 520. See post, "Conclusiveness and Effect," III, A.

8. **Of same effect as foreign judgments in absence of constitutional and statutory provisions.**—Hilton *v.* Guyot, 159 U. S. 113, 40 L. Ed. 95.

"The law upon this subject, as understood in the United States, at the time of

2. Under Provisions in Articles of Confederation, Constitution and Federal Statutes as to Full Faith and Credit—a. *Provisions Stated.*—**Provisions in Articles of Confederation.**—After the War of the Revolution and the Declaration of Independence, when the confederation was being formed, it was foreseen by the framers of that document that the powers necessary to be given to the confederacy, and the rights to be given to the citizens of each state, in all the states, would produce such intimate relations between the states and citizens that the former would no longer be foreign to each other, in the sense that they had been, as dependent provinces; and that, for the prosecution of rights in courts, it was proper to put an end to the uncertainty upon the subject of the effect of judgments obtained in the different states. Accordingly, in the articles of confederation, there was this clause: "Full faith and credit shall be given in each of these states to the records, acts and judicial proceedings of the courts and magistrates of every other state."[9]

Constitutional Provisions.—When the present constitution of the United States was formed the same clause was introduced into it, with but a slight variation, making it more comprehensive, to the effect that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state; and congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."[10]

their separation from the mother country, was clearly set forth by Chief Justice Parsons, speaking for the supreme judicial court of Massachusetts, in 1813, and by Mr. Justice Story in his commentaries on the constitution of the United States, published in 1833. Both those eminent jurists declared that by the law of England the general rule was that foreign judgments were only prima facie evidence of the matter which they purported to decide; and that by the common law, before the American Revolution, all the courts of the several colonies and states were deemed foreign to each other, and consequently judgments rendered by any one of them were considered as foreign judgments and their merits re-examinable in another colony, not only as to the jurisdiction of the court which pronounced them, but also as to the merits of the controversy, to the extent to which they were understood to be re-examinable in England. And they noted that, in order to remove that inconvenience, statutes had been passed in Massachusetts, and in some of the other colonies, by which judgments rendered by a court of competent jurisdiction in a neighboring colony could not be impeached. Bissell *v.* Briggs, 9 Mass. 462, 465; Mass. Stat. 1773-4, c. 16, 5 Prov. Laws, 323, 369; Story on the Constitution (1st Ed.), §§ 1301, 1302; (4th Ed.), §§ 1306, 1307." Hilton *v.* Guyot, 159 U. S. 113, 181, 40 L. Ed. 95.

"In the case of Hitchcock *v.* Aicken, 1 Caines 460, all the judges seem to have treated those judgments as foreign in the courts of New York; and the only point of difference between them grew out of the construction of the first section of the fourth article of the constitution of the United States, and the act of congress of the 26th of May, 1790, ch. 38, respecting the effects of those judgments, and the credit to be given to them in the courts of the sister states. It would seem, from a note to the case of Bartlet *v.* Knight, 1 Mass. 430, where a collection of state decisions on the same subject is given, that these judgments had, generally, if not universally, been considered as foreign by the courts of many of the states." Buckner *v.* Finley, 2 Pet. 586, 7 L. Ed. 528.

A judgment was obtained in a court of Massachusetts in a foreign attachment. An action of debt was brought on this judgment in Pennsylvania between the same parties. It was held by the Pennsylvania supreme court that this judgment was not conclusive evidence of the debt. Phelps *v.* Holker, 1 Dall. 261, 264, 1 L. Ed. 128.

9. Provision in articles of confederation of 1777, article 4, § 3.—McElmoyle *v.* Cohen, 13 Pet. 312, 10 L. Ed. 177; Hilton *v.* Guyot, 159 U. S. 113, 40 L. Ed. 95. And see James *v.* Allen, 1 Dall. 188, 1 L. Ed. 93.

10. Provisions of the United States constitution, article 4, § 1, as to full faith and credit.—Armstrong *v.* Carson, 2 Dall. 302, 1 L. Ed. 391; Mills *v.* Duryee, 7 Cranch 481, 3 L. Ed. 411; Darby *v.* Mayer, 10 Wheat. 465, 6 L. Ed. 367; McElmoyle *v.* Cohen, 13 Pet. 312, 10 L. Ed. 177; Mitchell *v.* Lenox, 14 Pet. 49, 10 L. Ed. 349; Bank *v.* Dalton, 9 How. 522, 13 L. Ed. 242; D'Arcy *v.* Ketchum, 11 How. 165, 13 L. Ed. 648; Booth *v.* Clark, 17 How. 322, 15 L. Ed. 164; Lafayette Ins. Co. *v.* French, 18 How. 404, 15 L. Ed. 451; Christmas *v.* Russell, 5 Wall. 290, 18 L. Ed. 475; Green *v.* Van Buskirk, 5 Wall. 307, 18 L. Ed. 599; Cheever *v.* Wilson, 9 Wall. 108, 19 L. Ed. 604; Caperton *v.* Ballard, 14 Wall. 238, 20 L. Ed. 885; Crapo *v.* Kelly, 16 Wall. 610, 21 L. Ed. 430; Board of Public Works *v.* Columbia

Provisions of Federal Statute in Pursuance of Power Conferred by Constitution.—The act of congress of May 26, 1790, now § 905 of the United States Revised Statutes, passed in pursuance of the express authority of the first section of the fourth article of the constitution of the United States, prescribes the manner in which the records and judicial proceedings of the courts of any state shall be authenticated and proved,[11] and enacts that "the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."[12]

b. *Provisions Construed and Applied*—(1) *General Statement as to Purpose and Effect.*—The provision of the constitution above set forth, like the less perfect provision on the subject in the articles of confederation, as observed by Mr. Justice Story, "was intended to give the same conclusive effect to judgments of all the states, so as to promote uniformity, as well as certainty in the rule among

College, 17 Wall. 521, 21 L. Ed. 687; Thompson *v.* Whitman, 18 Wall. 457, 21 L. Ed. 897; Dupasseur *v.* Rochereau, 21 Wall. 130, 22 L. Ed. 588; Hall *v.* Lanning, 91 U. S. 160, 23 L. Ed. 271; United States *v.* Reese, 92 U. S. 214, 23 L. Ed. 563; Turnbull *v.* Payson, 95 U. S. 418, 24 L. Ed. 437; Pennoyer *v.* Neff, 95 U. S. 714, 24 L. Ed. 565; Embry *v.* Palmer, 107 U. S. 3, 27 L. Ed. 346; Hanley *v.* Donoghue, 116 U. S. 1, 29 L. Ed. 535; Renaud *v.* Abbott, 116 U. S. 277, 29 L. Ed. 629; Chicago, etc., R. Co. *v.* Wiggins Ferry Co., 119 U. S. 615, 30 L. Ed. 519; Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265, 32 L. Ed. 239; Grover, etc., Sewing Machine Co. *v.* Radcliffe, 137 U. S. 287, 34 L. Ed. 670; Reynolds *v.* Stockton, 140 U. S. 254, 35 L. Ed. 464; Huntington *v.* Attrill, 146 U. S. 657, 36 L. Ed. 1123; Goldey *v.* Morning News, 156 U. S. 518, 39 L. Ed. 517; Hilton *v.* Guyot, 159 U. S. 113, 40 L. Ed. 95; Laing *v.* Rigney, 160 U. S. 531, 40 L. Ed. 525; Great Western Tel. Co. *v.* Purdy, 162 U. S. 329, 40 L. Ed. 986; Cooper *v.* Newell, 173 U. S. 555, 43 L. Ed. 808; Thormann *v.* Frame, 176 U. S. 350, 44 L. Ed. 500; Hancock Nat. Bank *v.* Farnum, 176 U. S. 640, 44 L. Ed. 619; Clarke *v.* Clarke, 178 U. S. 186, 44 L. Ed. 1028; Atherton *v.* Atherton, 181 U. S. 155, 45 L. Ed. 794; Lynde *v.* Lynde, 181 U. S. 183, 45 L. Ed. 810; Jacobs *v.* Marks, 182 U. S. 583, 45 L. Ed. 1241; Andrews *v.* Andrews, 188 U. S. 14, 47 L. Ed. 366; Mutual Life Ins. Co. *v.* McCrew, 188 U. S. 291, 47 L. Ed. 480; Commercial Pub. Co. *v.* Beckwith, 188 U. S. 567, 47 L. Ed. 598; Anglo-American Provision Co. *v.* Davis Provision Co., No. 1, 191 U. S. 373, 48 L. Ed. 225; Rogers *v.* Alabama, 192 U. S. 226, 48 L. Ed. 417; Minnesota *v.* Northern Securities Co., 194 U. S. 48, 48 L. Ed. 870; National Exchange Bank *v.* Wiley, 195 U. S. 257, 49 L. Ed. 184; Abraham *v.* Casey, 179 U. S. 210, 45 L. Ed. 156; Harding *v.* Harding, 198 U. S. 317, 49 L. Ed. 1066; Abraham *v.* Casey, 179 U. S. 210, 45 L. Ed. 156; Jaster *v.* Currie, 198 U. S. 144, 49 L. Ed. 988; Haddock *v.* Haddock, 201 U. S. 562, 50 L. Ed. 867; Old Wayne Mut. Life Ass'n *v.* McDonough, 204 U. S. 8, 51 L. Ed. 345; Wetmore *v.* Karrick, 205 U. S. 141, 51 L. Ed. 745.

11. Manner of authentication.—Renaud *v.* Abbott, 116 U. S. 277, 29 L. Ed. 629. See post, "Authentication and Proof," II, C.

12. Provision of act of congress of May 26, 1790, ch. 11, 1 stat. 122 (now § 905 of Revised Statute).—Mills *v.* Duryee, 7 Cranch 481, 3 L. Ed. 411; McElmoyle *v.* Cohen, 13 Pet. 312, 10 L. Ed. 177; Stacy *v.* Thrasher, 6 How. 44, 12 L. Ed. 337; Bank *v.* Dalton, 9 How. 522, 13 L. Ed. 242; D'Arcy *v.* Ketchum, 11 How. 165, 13 L. Ed. 648; Booth *v.* Clark, 17 How. 322, 15 L. Ed. 164; Lafayette Ins. Co. *v.* French, 18 How. 404, 15 L. Ed. 451; Christmas *v.* Russell, 5 Wall. 290, 18 L. Ed. 475; Green *v.* Van Buskirk, 5 Wall. 307, 18 L. Ed. 599; Green *v.* Van Buskirk, 7 Wall. 139, 19 L. Ed. 109; Caperton *v.* Ballard, 14 Wall. 238, 20 L. Ed. 885; Crapo *v.* Kelly, 16 Wall. 610, 21 L. Ed. 430; Thompson *v.* Whitman, 18 Wall. 457, 21 L. Ed. 897; Hall *v.* Lanning, 91 U. S. 160, 23 L. Ed. 271; South Ottawa *v.* Perkins, 94 U. S. 260, 24 L. Ed. 154; Pennoyer *v.* Neff, 95 U. S. 714, 24 L. Ed. 565; Insurance Co. *v.* Harris, 97 U. S. 331, 24 L. Ed. 959; Embry *v.* Palmer, 107 U. S. 3, 27 L. Ed. 346; Robertson *v.* Pickrell, 109 U. S. 608, 27 L. Ed. 1049; Hanley *v.* Donoghue, 116 U. S. 1, 29 L. Ed. 535; Renaud *v.* Abbott, 116 U. S. 277, 29 L. Ed. 629; Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265, 32 L. Ed. 239; Cole *v.* Cunningham, 133 U. S. 107, 33 L. Ed. 538; Grover, etc., Sewing Machine Co. *v.* Radcliffe, 137 U. S. 287, 34 L. Ed. 670; Huntington *v.* Attrill, 146 U. S. 657, 36 L. Ed. 1123; Goldey *v.* Morning News, 156 U. S. 518, 39 L. Ed. 517; Hilton *v.* Guyot, 159 U. S. 113, 40 L. Ed. 95; Great Western Tel. Co. *v.* Purdy, 162 U. S. 329, 40 L. Ed. 986; Cooper *v.* Newell, 173 U. S. 555, 43 L. Ed. 808; Hancock Nat. Bank *v.* Farnum, 176 U. S. 640, 44 L. Ed. 619; Atherton *v.* Atherton, 181 U. S. 155, 45 L. Ed. 794; Lynde *v.* Lynde, 181 U. S. 183, 45 L. Ed. 810; Andrews *v.* Andrews, 188 U. S. 14, 47 L. Ed. 366; Mutual Life Ins. Co. *v.* McGrew, 188 U. S. 291, 47 L. Ed. 480; Wetmore *v.* Karrick, 205 U. S. 141, 51 L. Ed. 745.

them;"[13] and had three distinct objects: First, to declare, and by its own force establish, that full faith and credit should be given to the judgments of every other state; second, to authorize congress to prescribe the manner of authenticating them; and third, to authorize congress to prescribe their effect when so authenticated.[14] These provisions of the constitution and of the laws of the United States, in the exercise of the powers conferred by such constitutional provision, are necessarily to be read in the light of some established principles which they were not intended to overthrow. They give no effect to judgments of a court which had no jurisdiction of the subject matter or of the parties.[15] They confer no new jurisdiction on the courts of any state; and therefore do not authorize them to take jurisdiction of a suit or prosecution of such a penal nature, that it cannot, on settled rules of public and international law, be entertained by the judiciary of any other state than that in which the penalty was incurred.[16] Such provisions establish a rule of evidence rather than of jurisdiction;[17] and

13. **Intended to promote uniformity and certainty.**—Huntington *v.* Attrill, 146 U. S. 657, 36 L. Ed. 1123. See, also, McElmoyle *v.* Cohen, 13 Pet. 312, 10 L. Ed. 177; Hilton *v.* Guyot, 159 U. S. 113, 40 L. Ed. 95; Atherton *v.* Atherton, 181 U. S. 155, 45 L. Ed. 794; D'Arcy *v.* Ketchum, 11 How. 165, 13 L. Ed. 648.

14. **Objects of constitutional provision.**—Huntington *v.* Attrill, 146 U. S. 657, 36 L. Ed. 1123, citing Story on the Constitution, §§ 1307, 1308.

In Minnesota *v.* Northern Securities Co., 194 U. S. 48, 48 L. Ed. 870, the court in speaking of article 4 of the constitution, said: "It only prescribes a rule by which courts, federal and state, are to be guided when a question arises in the progress of a pending suit as to the faith and credit to be given by the court to the public acts, records and judicial proceedings of a state other than that in which the court is sitting."

Faith and credit given by constitution of its own force, and independently of legislation.—When the constitution of the United States declares that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, and provides that congress may, by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof, the latter clause, as it relates to judgments, was intended to provide the means of giving to them the conclusiveness of judgments upon the merits, when it is sought to carry them into judgments, by suits in the tribunals of another state. The authenticity of the judgment, and its effect, depend upon the law made in pursuance of the constitution; the faith and credit due to it as the judicial proceeding of a state, is given by the constitution, independently of all legislation. McElmoyle *v.* Cohen, 13 Pet. 312, 10 L. Ed. 177.

15. **Give no effect to judgments of courts not having jurisdiction.**—Huntington *v.* Attrill, 146 U. S. 657, 36 L. Ed. 1123. See post, "Inquiry as to Jurisdiction," II, B, 2, b, (4), (b). And see, generally, the title JUDGMENTS AND DECREES.

16. **Confer no new jurisdiction, etc.**—Huntington *v.* Attrill, 146 U. S. 657, 36 L. Ed. 1123. See post, "Judgments for Penalties," II, B, 2, b, (5), (b).

"In the words of Mr. Justice Story, cited and approved by Mr. Justice Bradley speaking for this court, 'the constitution did not mean to confer any new power upon the states, but simply to regulate the effect of their acknowledged jurisdiction over persons and the things within their territory. It did not make the judgments of other state domestic judgments to all intents and purposes, but only gave a general validity, faith and credit to them as evidence. No execution can issue upon such judgments without a new suit in the tribunals of other states. And they enjoy not the right of priority or lien which they have in the state where they are pronounced, but that only which the lex fori gives to them by its own laws in their character of foreign judgments.' Story's Conflict of Laws, § 609; Thompson *v.* Whitman, 18 Wall. 457, 21 L. Ed. 897." Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265, 32 L. Ed. 239. See, also, Cole *v.* Cunningham, 133 U. S. 107, 33 L. Ed. 538.

17. **Establish a rule of evidence rather than of jurisdiction.**—Anglo-American Provision Co. *v.* Davis Provision Co., No. 1, 191 U. S. 373, 48 L. Ed. 225; Andrews *v.* Andrews, 188 U. S. 14, 47 L. Ed. 366; Minnesota *v.* Northern Securities Co., 194 U. S. 48, 48 L. Ed. 870; Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265, 32 L. Ed. 239; National Exchange Bank *v.* Wiley, 195 U. S. 257, 49 L. Ed. 184; Thompson *v.* Whitman, 18 Wall. 457, 21 L. Ed. 897.

"The legislation of congress amounts to this, that the judgment of another state shall be record evidence of the demand, and that the defendant, when sued on the judgment, cannot go behind it and controvert the contract, or other cause of action, on which the judgment is founded; that it is evidence of an established demand, which standing alone, is conclusive between the parties to it. This is the whole extent to which congress has gone. As to what further 'effect' congress may give to judgments rendered in one state

while making such judgments a debt of record, not examinable on the merits,[18] do not put the judgments of other states upon the footing of domestic judgments, to be enforced by execution;[19] but they leave the manner in which such judgments may be enforced to the law of the state in which they are sued on, pleaded, or offered in evidence.[20] But when duly pleaded and proved in a court of that state, they have the effect of being not merely prima facie evidence, but conclusive proof, of the rights thereby adjudicated;[21] and a refusal to give them the force and effect, in this respect, which they had in the state in which they were rendered, denies to the party a right secured to him by the constitution and laws of the United States.[22]

(2) *By Whom and to What Records and Judicial Proceedings Faith and Credit Must Be Accorded*—(a) *In General.*—Under the constitution and the federal statute in pursuance thereof, the measure of faith and credit therein provided for is to be accorded in every court within the United States to the records and judicial proceedings of the courts of any state or territory, or of any country

and sued on in another does not belong to this inquiry; we have to deal with the law as we find it, and not with the extent of power congress may have to legislate further in this respect." Bank *v.* Dalton, 9 How. 522, 13 L. Ed. 242.

Application of similar construction to provision in articles of confederation.—In James *v.* Allen, 1 Dall. 188, 1 L. Ed. 93, the court of common pleas of Philadelphia County, in passing upon the question whether the discharge of the person of the defendant from imprisonment in another state under the insolvent law of such state, would entitle him to a like discharge in a Pennsylvania court, said: "The articles of confederation, which direct that full faith and credit shall be given in one state to the records, acts and judicial proceedings of the others, will not admit of the construction contended for, otherwise executions might issue in one state upon the judgments given in another; but seem chiefly intended to oblige each state to receive the records of another as full evidence of such acts and judicial proceedings."

18. Effect as making judgment a debt of record.—McElmoyle *v.* Cohen, 13 Pet. 312, 10 L. Ed. 177; Metcalf *v.* Watertown, 153 U. S. 671, 38 L. Ed. 861; Lynde *v.* Lynde, 181 U. S. 183, 45 L. Ed. 810.

"McElmoyle *v.* Cohen, 13 Pet. 312, 327, 10 L. Ed. 177, is an early and leading case on the subject cited, and largely quoted from by counsel for defendant. The statute of limitations of Georgia involved in that case required 'actions of debt upon judgments obtained in courts other than the courts of this state' to be brought 'within five years next after the judgments shall have been obtained,' and an action having been brought in the circuit court of the United States for the District of Georgia upon a judgment rendered in a court of the state of South Carolina, it was held that the statute could be pleaded in bar thereof. Mr. Justice Wayne delivered the opinion of the court, and after stating that judgments recovered in one state 'are record evidence of a debt, or judgments of record, to be contested only in such way as judgments of record may be, and consequently are conclusive upon the defendant in every state, except for such causes as would be sufficient to set aside the judgment in the courts of the state in which it was rendered;' but that a plea of the statute of limitations was 'well settled to be a plea to the remedy, and consequently that the lex fori must prevail.'" Metcalf *v.* Watertown, 153 U. S. 671, 38 L. Ed. 861.

19. Do not make judgments of other states domestic judgments enforceable by execution.—Huntington *v.* Attrill, 146 U. S. 657, 36 L. Ed. 1123; Andrews *v.* Andrews, 188 U. S. 14, 47 L. Ed. 366; Lynde *v.* Lynde, 181 U. S. 183, 45 L. Ed. 810; McElmoyle *v.* Cohen, 13 Pet. 312, 10 L. Ed. 177. See, generally, the titles EXECUTIONS, ante, p. 84; JUDGMENTS AND DECREES.

In the payment of the debts of a testator, or intestate, in Georgia, the judgment of another state, whatever may have been the subject matter of the suit, cannot be put upon the footing of judgments rendered in the state; it can only rank as a simple-contract debt, in the appropriation of the assets of the estate of a deceased person to the payment of debts. McElmoyle *v.* Cohen, 13 Pet. 312, 10 L. Ed. 177.

20. Manner of enforcement dependent on laws of state in which sued on, pleaded, or offered in evidence.—Huntington *v.* Attrill, 146 U. S. 657, 36 L. Ed. 1123; McElmoyle *v.* Cohen, 13 Pet. 312, 10 L. Ed. 177; Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265, 32 L. Ed. 239; Lynde *v.* Lynde, 181 U. S. 183, 45 L. Ed. 810. See post, "Enforcement," II, D.

21. Conclusive when duly pleaded and proved.—Huntington *v.* Attrill, 146 U. S. 657, 36 L. Ed. 1123.

22. Refusal to give due force and effect a denial of constitutional right.—Harris *v.* Balk, 198 U. S. 215, 49 L. Ed. 1023. See post, "Enforcement of Provisions by United States Supreme Court," II, B, 2, c.

subject to the jurisdiction of the United States, when properly authenticated.[23] In other words, the local effect of such records and judicial proceedings must be recognized everywhere throughout the United States.[24]

(b) *Judgments of State Courts in Other States or Territories.*—**In General.**—Under the constitutional and statutory provisions already set out, full faith and credit is required by the very words thereof to be given to the judgments of a state or territory in all the other states,[25] or territories,[26] subject to the qualification that such judgments are open to inquiry as to the jurisdiction of the court which gave them, and as to notice to the defendant.[27]

23. **By whom and to what records, etc., faith and credit required to be given.**—Mills *v.* Duryee, 7 Cranch 481, 3 L. Ed. 411; Embry *v.* Palmer, 107 U. S. 3, 27 L. Ed. 346. See ante, "Provisions Stated," II, B, 2, a.

The act of May 26, 1790 (1 U. S. Stat. 122), as it originally stood, after providing the mode by which they should be authenticated, declared that "the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage, in the courts of the state from which the said records are, or shall be taken." By the supplementary act of March 27, 1804, § 2 (2 U. S. Stat. 298), it is declared, that the provisions of the original act of May 26th, 1790, shall apply as well to the records and courts of the respective territories of the United States and countries subject to the jurisdiction of the United States as to the records and courts of the several states. Mills *v.* Duryee, 7 Cranch 481, 3 L. Ed. 411.

A judgment of a parish court of Louisiana, rendered within the sphere of its jurisdiction, is binding upon the courts of the several states and of the United States. Simmons *v.* Saul, 138 U. S. 439, 458, 34 L. Ed. 1054.

Application to courts of District of Columbia.—In Mills *v.* Duryee, 7 Cranch 481, 3 L. Ed. 411, which was a case of error to the circuit court for the District of Columbia, in an action of debt upon a judgment of the supreme court of the state of New York, it was objected that the act of congress relating to the full faith and credit to be given to records and judicial proceedings did not apply to courts of the District of Columbia. It was held, however, that the words of the act afforded a decisive answer to this objection, as they extended "to every court within the United States."

24. **Local effect of proceedings must be recognized throughout the United States.**—Hancock Nat. Bank *v.* Farnum, 176 U. S. 640, 44 L. Ed. 619. See ante, "General Statement as to Purpose and Effect," II, B, 2, b, (1). And see post, "Extent of Faith and Credit Required to Be Given," II, B, 2, b, (3).

Generally, as to collateral attack on judgments or decrees, see the title JUDGMENTS AND DECREES.

25. **Judgment of state courts in other states or territories.**—United States *v.* Reese, 92 U. S. 214, 23 L. Ed. 563; Harding *v.* Harding, 198 U. S. 317, 49 L. Ed. 1066. See ante, "Provisions Stated," II, B, 2, a.

Where a judgment is rendered in a state court which has jurisdiction to give the judgment, it should be recognized in the courts of all states and a refusal to recognize such judgment is a denial of the clause of the constitution that "full faith and credit" be given the laws and judgments, etc., of each state. Harris *v.* Balk, 198 U. S. 215, 221, 49 L. Ed. 1023.

Meaning of "state" as used in constitution.—"'Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings, of every other state.' Art. 4, § 1. Full faith shall be given in or throughout the territory of each state. By whom? By the sovereign state, by its agencies and authorities. To what is faith and credit to be given? To the acts of the political organization known as the state. Not only this, but to all its agencies, to the acts of its executive, to the acts of its courts of record. The expression 'state,' in this connection, refers to and includes all these agencies; and it is to these agencies that the legislation of congress under this authority has been directed, and it is to the question arising upon the agencies of the courts that the questions have been judicially presented. Hampton *v.* McConnell, 3 Wheat. 234, 4 L. Ed. 378; Green *v.* Sacramento, 3 W. C. C. 17; Bank *v.* Dalton, 9 How. 522, 528, 13 L. Ed. 242. The judicial proceedings of a state mean the proceedings of the courts of the state. It has never been doubted, that, under the constitutional authority to provide that credit should be given to the records of a 'state,' it was lawful to provide that credit should be given to the records of the courts of a state. For this purpose, the court is the state." United States *v.* Reese, 92 U. S. 214, 250, 23 L. Ed. 563.

26. **Judgments of state courts in territorial courts.**—See Maxwell *v.* Stewart, 22 Wall. 77, 22 L. Ed. 564, in which case a suit was brought in a court of New Mexico on a judgment recovered in the court of the state of Kansas.

27. **Qualification of rule.**—Christmas *v.* Russell, 5 Wall. 290, 18 L. Ed. 475. See post, "Inquiry as to Jurisdiction," II, B, 2, b, (4), (b).

(c) *Judgments of State Courts in Federal Courts.*—While the courts of the United States are not foreign tribunals in their relations to the state courts, they are tribunals of a different sovereignty,[28] and under the constitution and the federal statute they are bound to give to the judgments of the state courts the same faith and credit, and only the same, that the courts of one state are bound to give to the judgments of the courts of her sister states.[29] The same rule applies to each, and the question of jurisdiction is open to inquiry even when the judgment of the court of a state comes under consideration in a court of the United States sitting in the same state.[30]

(d) *Judgments of Federal Courts in State Courts.*—The judgments of the courts of the United States have invariably been recognized as upon the same footing, so far as concerns the obligation created by them, with the domestic judgments of the states, wherever rendered and wherever sought to be en-

28. Federal and state courts tribunals of different sovereignty.—Pennoyer *v.* Neff, 95 U. S. 714, 24 L. Ed. 565; Cooper *v.* Newell, 173 U. S. 555, 43 L. Ed. 808.

29. Effect of judgments of state courts in federal courts.—Pennoyer *v.* Neff, 95 U. S. 714, 24 L. Ed. 565; Chicago, etc., R. Co. *v.* Wiggins Ferry Co., 108 U. S. 18, 27 L. Ed. 636; Chase *v.* Curtis, 113 U. S. 452, 28 L. Ed. 1038; Minneapolis Ass'n *v.* Canfield, 121 U. S. 295, 30 L. Ed. 962; Robinson *v.* Fair, 128 U. S. 53, 32 L. Ed. 415; Scotland County *v.* Hill, 132 U. S. 107, 33 L. Ed. 261; Forsyth *v.* Hammond, 166 U. S. 506, 41 L. Ed. 1095; Cooper *v.* Newell, 173 U. S. 555, 43 L. Ed. 808; Covington *v.* First Nat. Bank, 198 U. S. 100, 49 L. Ed. 963; Caldwell *v.* Carrington, 9 Pet. 86, 9 L. Ed. 60; Parker *v.* Kane, 22 How. 1, 16 L. Ed. 286; Parrish *v.* Ferris, 2 Black 606, 17 L. Ed. 317; Miles *v.* Caldwell, 2 Wall. 35, 17 L. Ed. 755; Nichols *v.* Levy, 5 Wall. 433, 18 L. Ed. 596; Caujolle *v.* Ferrie, 13 Wall. 465, 20 L. Ed. 507; Galpin *v.* Page, 18 Wall. 350, 21 L. Ed. 959. See post, "Extent of Faith and Credit Required to Be Given," II, B, 2, b, (3).

"If there has been an adjudication which binds the plaintiff, that adjudication, whether it was right or wrong, concludes him until it has been reversed or otherwise set aside in some direct proceeding for that purpose. It cannot be disregarded any more in the courts of the United States than in those of the state." Scotland County *v.* Hill, 132 U. S. 107, 33 L. Ed. 261.

The courts of the United States in a special statutory proceeding will give to a judgment of a state court no other or greater effect, either as a matter of evidence, or as ground of action, than must be lawfully given to it in the courts of the state, whose laws are invoked to enforce it. Chase *v.* Curtis, 113 U. S. 452, 460, 28 L. Ed. 1038.

"The case of Deposit Bank *v.* Frankfort, 191 U. S. 499, 48 L. Ed. 276, was only concerned with the effect to be given to a federal judgment adjudicating a contract right, when pleaded in a state court. We are now dealing with the weight to be attached to a state judgment when pleaded as res judicata in a federal court. That was the very question decided by this court in the case of Union, etc., Bank *v.* Memphis, 189 U. S. 71, 47 L. Ed. 713, wherein it was held that the federal courts were not required to give to such judgments any greater force or effect than was awarded to them by the courts of the state where they were rendered." Covington *v.* First Nat. Bank, 198 U. S. 100, 49 L. Ed. 963.

According to the constitution and laws of the United States, and the decisions of this court, the regular proceedings and decrees of a county court of Virginia are allowed the same full faith and credit in Kentucky that they would receive in Virginia; if such a decree would be enforced in Virginia, or if such a decree pronounced in Kentucky, would be enforced in Kentucky, the decree of the circuit court of the United States, sitting in Kentucky, enforcing it was correct. Caldwell *v.* Carrington, 9 Pet. 86, 9 L. Ed. 60.

"The Revised Statutes of Missouri of 1855, concerning the action of ejectment, say: 'A judgment, except of nonsuit, in an action authorized by this act, shall be a bar to any other action between the same parties, or those claiming under them, as to the same subject matter.' We hold this enactment to be binding on the federal courts as well as those of the state. It is a rule of property. It concerns the stability of titles to land, and it would be highly improper to adopt in the federal courts a rule tending to increase litigation and unsettle those titles, which is in conflict with the one prescribed by the lawmaking power of the state. It is a matter which involves something more than a mere rule of practice. It is a question whether a matter, which is conclusive of the title to land in the state courts, shall have the same effect in the federal courts. It is our opinion that it should." Miles *v.* Caldwell, 2 Wall. 35, 17 L. Ed. 755.

30. Inquiry as to jurisdiction where judgment of state court under consideration in federal court.—Cooper *v.* Newell, 173 U. S. 555, 43 L. Ed. 808. See post, "Inquiry as to Jurisdiction," II, B, 2, b, (4), (b).

forced;[31] and it is conceded that the judgments and decrees of a court of the United States, sitting in a particular state, in the courts of that state, are to be accorded such effect, and such effect only, as would be accorded in similar circumstances to the judgments and decrees of a state tribunal of equal authority.[32]

(3) *Extent of Faith and Credit Required to Be Given.*—**In General.**— At an

31. Judgments of federal courts on same footing as judgments of the states.—Embry *v.* Palmer, 107 U. S. 3, 27 L. Ed. 346; Deposit Bank *v.* Frankfort, 191 U. S. 499, 48 L. Ed. 276.

Judgments and decrees of a circuit court of the United States are to be accorded in the state courts the same effect as would be accorded to the judgments and decrees of a state tribunal of equal authority. Pendleton *v.* Russell, 144 U. S. 640, 644, 36 L. Ed. 574.

"Circuit and district courts of the United States certainly cannot be considered as foreign in any sense of the term, either in respect to the state courts in which they sit, or as respects the circuit or district court of another circuit or district." Turnbull *v.* Payson, 95 U. S. 418, 24 L. Ed. 437.

Judgment of supreme court of District of Columbia.—In Embry *v.* Palmer, 107 U. S. 3, 27 L. Ed. 346, the court held that the rule for determining what effect should be given to the judgment of the supreme court of the District of Columbia, when suit is brought thereon in a state court, is that declared in respect to the faith and credit to be given to the judgment of state courts in courts of other states.

32. Effect in state court of judgment of federal court sitting in particular state.—Hancock Nat. Bank *v.* Farnum, 176 U. S. 640, 44 L. Ed. 619; Pittsburg, etc., R. Co. *v.* Long Island Loan, etc., Co., 172 U. S. 493, 43 L. Ed. 528; Metcalf *v.* Watertown, 153 U. S. 671, 38 L. Ed. 861; Crescent City Live Stock Co. *v.* Butchers' Union Slaughter House Co., 120 U. S. 141, 30 L. Ed. 614; Embry *v.* Palmer, 107 U. S. 3, 27 L. Ed. 346; Dupasseur *v.* Rochereau, 21 Wall. 130, 22 L. Ed. 588. See, also, Riverdale Cotton Mills *v.* Alabama, etc., Mfg. Co., 198 U. S. 188, 49 L. Ed. 1008; Northern Assurance Co. *v.* Grand View Bldg. Ass'n, 203 U. S. 106, 51 L. Ed. 109.

"It cannot be doubted that, in respect of their effect under § 905, the judgments and decrees of the circuit courts of the United States are entitled to the same sanctity and effect in the courts of each state, when those courts are held within the state, as their own judgments, nothing more but nothing less." Metcalf *v.* Watertown, 153 U. S. 671, 38 L. Ed. 861.

A final decree was rendered in a federal court enjoining the collection of taxes and declaring that by the laws of the state an irrevocable contract had been created. This decree was based upon a judgment of the state court, declaring such judgment res judicata. The judgment of the state court was afterwards reversed by the highest court of the state and later the supreme court of the United States decided that the law of the state did not create an irrevocable contract. Held, that the decree of the federal court was conclusive on the state court. Deposit Bank *v.* Frankford, 191 U. S. 499, 520, 48 L. Ed. 276.

"When is the state court obliged to give to federal judgments only the force and effect it gives to state court judgments within its own jurisdiction? Such cases are distinctly pointed out in the opinion of Mr. Justice Bradley in Dupasseur *v.* Rochereau, 21 Wall. 130, 22 L. Ed. 588, where the learned justice says: 'The only effect that can be justly claimed for the judgment in the circuit court of the United States is such as would belong to judgments of the state courts rendered under similar circumstances. Dupasseur and Co. were citizens of France, and brought the suit in the circuit court of the United States as such citizens; and, consequently, that court, deriving its jurisdiction solely from the citizenship of the parties, was in the exercise of jurisdiction to administer the laws of the state, and its proceedings were had in accordance with the forms and course of proceedings in the state courts. It is apparent, therefore, that no higher sanctity or effect can be claimed for the judgment of the circuit court of the United States rendered in such a case under such circumstances than is due to the judgments of the state courts in a like case and under similar circumstances.' The cases which, by clear inference, cannot come within this class are to be noticed. When it was said that no higher sanctity or effect can be given to a judgment of the circuit court of the United States than to state judgments, the learned judge is careful to say 'in like case under similar circumstances.' What are these cases? Manifestly those just stated, wherein the court derives its jurisdiction from the citizenship of the parties and in the exercise of the jurisdiction to administer the laws of the state where the proceedings are had. Where language has been used in other cases to the effect that judgments of the federal courts are to be given the effect given to domestic judgments, they will be found to be cases where questions of general law are under consideration, and coming within the class suggested by Justice Bradley in the opinion quoted. Such is the case of Crescent City Live Stock Co. *v.* Butchers' Union Slaughter House Co., 120 U. S. 141, 30 L. Ed. 614." Deposit Bank *v.* Frankfort, 191 U. S. 499, 48 L. Ed. 276.

early day in the history of the United States supreme court, the act of congress of 1790, which was passed in the execution of the express power conferred by the constitution,[33] received an interpretation which has never been departed from.[34] It was argued that the act in question provided only for the admission of such records as evidence, but did not declare the effect of such evidence when admitted. It was held, however, that such argument could not be supported, but that from the very words of the act, the faith and credit spoken of are not limited to the form of the record, and are not satisfied by its admission as a record,[35] but that the same effect was to be given to the record in the courts of the state where produced, as in the courts of the state from which it is taken.[36] If in such court it has the faith and credit of evidence of the highest nature, viz, record evidence, it must have the same faith and credit in every other court.[37] Repeated decisions made since that time have affirmed the same rule, and by the settled construction of the provisions of the constitution and statutes of the United States, a judgment or decree of a state court, in a cause within its jurisdiction, and against a defendant lawfully summoned, or against lawfully attached property of an absent defendant, is entitled to as much force and effect against the person summoned or the property attached, when the question is presented for decision in a court of another state, as it has in the state in which it was rendered.[38] If a judgment is conclusive in the state where it was pronounced it

33. Constitutional and statutory provisions as to due faith and credit.—See ante, "Provisions Stated," II, B, 2, a.

34. Early interpretation of act of 1790.—Mills *v.* Duryee, 7 Cranch 481, 3 L. Ed. 411.

35. Faith and credit not limited to form of record nor satisfied by admission as a record.—Mills *v.* Duryee, 7 Cranch 481, 3 L. Ed. 411; Crapo *v.* Kelly, 16 Wall. 610, 21 L. Ed. 430; Hancock Nat. Bank *v.* Farnum, 176 U. S. 640, 44 L. Ed. 619; Christmas *v.* Russell, 5 Wall. 290, 18 L. Ed. 475.

"Were the construction contended for by the plaintiff in error to prevail, that judgments of the state courts ought to be considered prima facie evidence only, this clause in the constitution would be utterly unimportant and illusory. The common law would give such judgments precisely the same effect. It is manifest, however, that the constitution contemplated a power in congress to give a conclusive effect to such judgments. And we can perceive no rational interpretation of the act of congress, unless it declares a judgment conclusive, when a court of the particular state where it is rendered would pronounce the same decision." Mills *v.* Duryee, 7 Cranch 481, 3 L. Ed. 411.

"The effect of these provisions of the constitution and laws of the United States was at first a subject of diverse opinions, not only in the courts of the several states, but also in the circuit courts of the United States; Mr. Justice Cushing, Mr. Justice Wilson and Mr. Justice Washington, holding that judgments of the courts of a state had the same effect throughout the Union as within that state, but Chief Justice Marshall (if accurately reported) being of opinion that they were not entitled to conclusive effect, and that their consideration might be impeached. Armstrong *v.* Carson (1794), 2 Dall. 302, 1 L. Ed. 391; Green *v.* Sarmiento (1811), 3 Wash. C. C. 17, 21; S. C. Pet. C. C. 74, 78; Peck *v.* Williamson (reported as in November, 1813, apparently a mistake for 1812), 1 Carolina Law Repository 53. The decisions of this court have clearly recognized that judgments of a foreign state are prima facie evidence only, and that, but for these constitutional and legislative provisions, judgments of a state of the Union, when sued upon in another state, would have no greater effect." Hilton *v.* Guyot, 159 U. S. 113, 182, 40 L. Ed. 95.

36. To be given same effect as in courts of state, etc., from which taken.—Mills *v.* Duryee, 7 Cranch 481, 3 L. Ed. 411; Crapo *v.* Kelly, 16 Wall. 610, 21 L. Ed. 430.

37. Faith and credit of record evidence.—Mills *v.* Duryee, 7 Cranch 481, 3 L. Ed. 411.

38. Cases following interpretation given in Mills v. Duryee.—Hampton *v.* McConnell, 3 Wheat. 234, 4 L. Ed. 378; Mayhew *v.* Thatcher, 6 Wheat. 129, 5 L. Ed. 223; D'Arcy *v.* Ketchum, 11 How. 165, 13 L. Ed. 648; Lafayette Ins. Co. *v.* French, 18 How. 404, 15 L. Ed. 451; Christmas *v.* Russell, 5 Wall. 290, 18 L. Ed. 475; Green *v.* Van Buskirk, 7 Wall. 139, 19 L. Ed. 109; Cooper *v.* Reynolds, 10 Wall. 308, 19 L. Ed. 931; Chew *v.* Brumagen, 13 Wall. 497, 20 L. Ed. 663; Crapo *v.* Kelly, 16 Wall. 610, 21 L. Ed. 430; Board of Public Works *v.* Columbia College, 17 Wall. 521, 21 L. Ed. 687; Thompson *v.* Whitman, 18 Wall. 457, 21 L. Ed. 897; Habich *v.* Folger, 20 Wall. 1, 22 L. Ed. 307; Maxwell *v.* Stewart, 22 Wall. 77, 22 L. Ed. 564; South Ottawa *v.* Perkins, 94 U. S. 260, 24 L. Ed. 154; Pennoyer *v.* Neff, 95 U. S. 714, 24 L. Ed. 565; Insurance Co. *v.* Harris, 97 U. S. 331, 24 L. Ed. 959; Embry

is equally conclusive everywhere in the courts of the United States.[39] If re-

v. Palmer, 107 U. S. 3, 27 L. Ed. 346; Hanley *v.* Donoghue, 116 U. S. 1, 29 L. Ed. 535; Renaud *v.* Abbott, 116 U. S. 277, 29 L. Ed. 629; Chicago, etc., R. Co. *v.* Wiggins Ferry Co., 119 U. S. 615, 30 L. Ed. 519; Cole *v.* Cunningham, 133 U. S. 107, 33 L. Ed. 538; Reynolds *v.* Stockton, 140 U. S. 254, 35 L. Ed. 464; Chicago, etc., R. Co. *v.* Sturm, 174 U. S. 710, 43 L. Ed. 1141; Hancock Nat. Bank *v.* Farnum, 176 U. S. 640, 44 L. Ed. 619; Lynde *v.* Lynde, 181 U. S. 183, 45 L. Ed. 810; Harding *v.* Harding, 198 U. S. 317, 49 L. Ed. 1066; Harris *v.* Balk, 198 U. S. 215, 49 L. Ed. 1023; Louisville, etc., R. Co. *v.* Deer, 200 U. S. 176, 50 L. Ed. 426; Haddock *v.* Haddock, 201 U. S. 562, 50 L. Ed. 867.

"The requirement of the constitution is not that some, but that full, faith and credit shall be given by states to the judicial decrees of other states. That is to say, where a decree rendered in one state is embraced by the full faith and credit clause, that constitutional provision commands that the other states shall give to the decree the force and effect to which it was entitled in the state where rendered. Harding *v.* Harding, 198 U. S. 317, 49 L. Ed. 1066." Haddock *v.* Haddock, 201 U. S. 562, 50 L. Ed. 867.

No greater effect can be given to any judgment of a court of one state in another state than is given to it in the state where rendered. Any other rule would contravene the policy of the provisions of the constitution and laws of the United States on that subject. Board of Public Works *v.* Columbia College, 17 Wall. 521, 21 L. Ed. 687; Robertson *v.* Pickrell, 109 U. S. 608, 27 L. Ed. 1049; Overby *v.* Gordon, 177 U. S. 214, 44 L. Ed. 741. And see South Ottawa *v.* Perkins, 94 U. S. 260, 24 L. Ed. 154.

Must be binding on defendant in state where rendered.—In Laing *v.* Rigney, 160 U. S. 531, 40 L. Ed. 525, which was an action in the supreme court of New York on a final decree of the court of chancery of New Jersey, the supreme court of the United States, on writ of error to the supreme court of New York; said: "It is undoubtedly true, as claimed by the defendant in error, that if the judgment of the court of chancery of New Jersey was not binding upon the defendant therein personally in that state, no such force can be given in the state of New York."

Judgments against those of joint defendants served or appearing.—It is within the power of the legislature of a state to enact that judgments which shall be rendered in its courts in actions against joint defendants, one of whom has not been duly served with process, shall be valid as to those who have been so served, or who have appeared in the action. Hanley *v.* Donoghue, 116 U. S. 1, 29 L. Ed. 535.

Such judgments may be enforced against such persons in the courts of another state. Hanley *v.* Donoghue, 116 U. S. 1, 29 L. Ed. 535.

Generally, as to the validity of judgments against those of joint defendants served or appearing, see the title JUDGMENTS AND DECREES.

Presumption that decree is in accordance with laws of state where rendered.—In the absence of any statutory direction on the subject or any reported decision of the supreme court of the state wherein the question arises, where the chancellor of the chancery court of that state enters a final decree based upon an original bill, the process under which was served upon the defendant in that state, and upon a supplemental bill, a copy of which with a rule to plead was served upon defendant out of the state, such decree as long as it stands must be deemed to express the law of the state. Laing *v.* Rigney, 160 U. S. 531, 542, 40 L. Ed. 525.

Even though the opinion of an expert witness is that the chancellor erred in thinking that his court had jurisdiction of a defendant by service on him within the state of the subpœna under the original bill, and by service on him without the state of a copy of the supplemental bill and of a rule to plead, such opinion will not upset the opinion of the chancellor in whose judgment, under the laws and practice of his state, the defendant was in his court, subject to its jurisdiction and bound by its decree. Laing *v.* Rigney, 160 U. S. 531, 543, 40 L. Ed. 525.

Conclusiveness of highest state court as to interlocutory character of decree of inferior court of such state.—No greater effect can be given to any judgment of a court of one state in another state than is given to it in the state where rendered. So held in a case where a party, relying upon a decree of an inferior state court, objected to the character given to the decree as interlocutory by the highest appellate court of that state, and insisted that it should be treated as a final decree. Board of Public Works *v.* Columbia College, 17 Wall. 521, 21 L. Ed. 687.

39. Judgments equally conclusive everywhere in courts of United States.—Christmas *v.* Russell, 5 Wall. 290, 18 L. Ed. 475; Cheever *v.* Wilson, 9 Wall. 108, 19 L. Ed. 604; D'Arcy *v.* Ketchum, 11 How. 165, 175, 13 L. Ed. 648; Dow *v.* Johnson, 100 U. S. 158, 25 L. Ed. 632.

"Section 905, Rev. Stat., which embodies the original act of May 26, 1790, c. 11, and the supplement thereto of March 27, 1804, c. 56, provides that the records and judicial proceedings, not only of the courts of any state, but also of any territory, or of any country subject to the jurisdiction of the United States, authenticated as therein prescribed, 'shall have such faith and credit given to them, in every court within the United States,

examinable there, it is open to the same inquiries in every other state.[40] It is thus put upon the footing of a domestic judgment; by which is meant, not having the operation and force of a domestic judgment beyond the jurisdiction declaring it to be a judgment but a domestic judgment as to the merits of the claim, or subject matter of the suit.[41] Congress having declared the effect of the record, by declaring what faith and credit shall be given to it, it is only necessary to inquire in every case what is the effect of a judgment in the state where it is rendered.[42] Congress has not, however, undertaken to prescribe in what manner the effect that such judgments have in the courts of the state in which they are rendered shall be ascertained, but has left that to be regulated by the general rule of pleading and evidence applicable to the subject.[43] Upon principle, and according to the great preponderance of authority, whenever it becomes necessary for a court of one state, in order to give full faith and credit to a judgment rendered in another state, to ascertain the effect which it has in that state, the law of that state must be proved, like any other matter of fact.[44]

State Judgments in Federal Courts.—A federal court is required to give the judgments of a state court no greater force and effect than is awarded them by the courts of the state where rendered.[45]

Judgments of Federal Courts in State Court.—With regard to the effect which must be accorded by a state court to federal judgments it has been held that such judgments need be given only the force and effect which is due to the judgments of the state courts in a like case and other similar circumstances.[46]

(4) *Application of Provisions as Dependent upon Existence of Actual Valid Judgment or Decree*—(a) *In General.*—It is a well-established principle that in order that a judgment or decree may be binding upon the parties, and may be conclusive in another suit either in the courts of the same or another state, or in the federal courts, there must be a final judgment or decree, actually rendered on the merits by a court of competent jurisdiction.[47]

(b) *Inquiry as to Jurisdiction*—aa. *General Rule.*—In the earlier cases it was supposed that the provision of the federal statutes in pursuance of the constitutional provision as to the full faith and credit to be given to the acts, records and

as they have by law or usage in the courts of the state from which they are taken;' which, by supplying the ellipsis, must be taken to mean, such faith and credit as they are entitled to in the courts of the state, territory, or other country subject to the jurisdiction of the United States from which they are taken." Embry *v.* Palmer, 107 U. S. 3, 27 L. Ed. 346.

40. Open to same inquiries as in state where pronounced.—McElmoyle *v.* Cohen, 13 Pet. 312, 10 L. Ed. 177, citing Story's Com. 183.

Such judgments are conclusive in every state, except for such cause as would be sufficient to set aside the judgment in the courts of the state in which it was rendered. Embry *v.* Palmer, 107 U. S. 3, 27 L. Ed. 346.

For a full treatment of the grounds, manner and effect of setting aside judgments and decrees, see the title JUDGMENTS AND DECREES.

41. On footing of domestic judgment as to merits.—McElmoyle *v.* Cohen, 13 Pet. 312, 10 L. Ed. 177. See ante, "General Statement as to Purpose and Effect," II, B, 2, b, (1).

42. Only necessary to inquire effect of judgment in state where rendered.—Green *v.* Van Buskirk, 7 Wall. 139, 19 L. Ed. 109; Hancock Nat. Bank *v.* Farnum, 176 U. S. 640, 44 L. Ed. 619.

43. Effect of judgment ascertained in accordance with general rules of pleading and evidence.—Hanley *v.* Donoghue, 116 U. S. 1, 29 L. Ed. 535.

As to effect of demurrer as admitting allegations as to effect of judgment where rendered, see post, "Demurrer," II, D, 4, b.

44. Proof of law of sister state in ascertaining effect of judgment.—Hanley *v.* Donoghue, 116 U. S. 1, 29 L. Ed. 535.

45. State judgments in federal courts.—Covington *v.* First Nat. Bank, 198 U. S. 100, 49 L. Ed. 963; Deposit Bank *v.* Frankfort, 191 U. S. 499, 48 L. Ed. 276; Union, etc., Bank *v.* Memphis, 189 U. S. 71, 47 L. Ed. 713; Pennoyer *v.* Neff, 95 U. S. 714, 24 L. Ed. 565. See ante, "Judgments of State Courts in Federal Courts," II, B, 2, b, (2), (c).

46. Judgments of federal courts in state courts.—Deposit Bank *v.* Frankfort, 191 U. S. 499, 48 L. Ed. 276. See ante, "Judgments of Federal Courts in State Courts," II, B, 2, b, (2), (d).

47. Necessity for actual judgment or decree by court of competent jurisdiction.—See the titles JUDGMENTS AND DECREES; RES ADJUDICATA.

judicial proceedings of other states, gave to all judgments the same effect in other states which they had by law in the state where rendered.[48] This view was, however, afterwards qualified so as to make the act applicable only when the court rendering the judgment had jurisdiction of the parties and of the subject matter,[49] and it is now well settled that the provisions referred to do not preclude an inquiry, in the court to which a judgment is presented, as to the jurisdiction of the court by which such judgment or decree offered in evidence was rendered, over the person or in respect to the subject matter,[50] or, if rendered in

48. Early view as to equal conclusiveness of all judgments of other states.—Pennoyer *v.* Neff, 95 U. S. 714, 24 L. Ed. 565.

49. Subsequent qualification of view.—Pennoyer *v.* Neff, 95 U. S. 714, 24 L. Ed. 565.

50. Right of inquiry as to jurisdiction over person or subject matter now unquestioned.—Watkins *v.* Holman, 16 Pet. 25, 10 L. Ed. 873; D'Arcy *v.* Ketchum, 11 How. 165, 13 L. Ed. 648; Harris *v.* Hardeman, 14 How. 334, 14 L. Ed. 444; Lafayette Ins. Co. *v.* French, 18 How. 404, 15 L. Ed. 451; Christmas *v.* Russell, 5 Wall. 290, 18 L. Ed. 475; Bischoff *v.* Wethered, 9 Wall. 812, 19 L. Ed. 829; Board of Public Works *v.* Columbia College, 17 Wall. 521, 21 L. Ed. 687; Galpin *v.* Page, 18 Wall. 350, 21 L. Ed. 959; Thompson *v.* Whitman, 18 Wall. 457, 21 L. Ed. 897; Knowles *v.* Gaslight, etc., Co., 19 Wall. 58, 22 L. Ed. 70; Hill *v.* Mendenhall, 21 Wall. 453, 22 L. Ed. 616; Hall *v.* Lanning, 91 U. S. 160, 23 L. Ed. 271; Pennoyer *v.* Neff, 95 U. S. 714, 24 L. Ed. 565; St. Clair *v.* Cox, 106 U. S. 350, 27 L. Ed. 222; Cheely *v.* Clayton, 110 U. S. 701, 28 L. Ed. 298; Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265, 32 L. Ed. 239; Cole *v.* Cunningham, 133 U. S. 107, 33 L. Ed. 538; Grover, etc., Sewing Machine Co. *v.* Radcliffe, 137 U. S. 287, 34 L. Ed. 670; Simmons *v.* Saul, 138 U. S. 439, 34 L. Ed. 1054; Reynolds *v.* Stockton, 140 U. S. 254, 35 L. Ed. 464; Carpenter *v.* Strange, 141 U. S. 87, 35 L. Ed. 640; Goldey *v.* Morning News, 156 U. S. 518, 39 L. Ed. 517; Hilton *v.* Guyot, 159 U. S. 113, 40 L. Ed. 95; Laing *v.* Rigney, 160 U. S. 531, 40 L. Ed. 525; Owens *v.* Henry, 161 U. S. 642, 40 L. Ed. 837; Cooper *v.* Newell, 173 U. S. 555, 43 L. Ed. 808; Thormann *v.* Frame, 176 U. S. 350, 44 L. Ed. 500; Howard *v.* DeCordova, 177 U. S. 609, 44 L. Ed. 908; Clarke *v.* Clarke, 178 U. S. 186, 44 L. Ed. 1028; Atherton *v.* Atherton, 181 U. S. 155, 45 L. Ed. 794; Andrews *v.* Andrews, 188 U. S. 14, 47 L. Ed. 366; German Savings, etc., Society *v.* Dormitzer, 192 U. S. 125, 48 L. Ed. 373; National Exchange Bank *v.* Wiley, 195 U. S. 257, 49 L. Ed. 184; Haddock *v.* Haddock, 201 U. S. 562, 50 L. Ed. 867; Old Wayne Mut. Life Ass'n *v.* McDonough, 204 U. S. 8, 51 L. Ed. 345; Wetmore *v.* Karrick, 205 U. S. 141, 51 L. Ed. 745.

While the provisions of the constitution and of the federal statutes make the record of a judgment, rendered after due notice in one state, conclusive evidence in the courts of another state, or of the United States, of the matter adjudged, they do not affect the jurisdiction, either of the court in which the judgment is rendered, or of the court in which it is offered in evidence. Andrews *v.* Andrews, 188 U. S. 14, 47 L. Ed. 366.

"It is also an elementary doctrine of this court that a judgment rendered in personam against a defendant without jurisdiction of his person is not only erroneous but void. Pennoyer *v.* Neff, 95 U. S. 714, 24 L. Ed. 565. And the same case holds that such judgment is not required to be enforced in another state either by the due faith and credit clause of the constitution or the act of congress (Rev. Stat., § 905) passed in aid thereof." Wetmore *v.* Karrick, 205 U. S. 141, 51 L. Ed. 745.

"Since the cases of Thompson *v.* Whitman, 18 Wall. 457, 21 L. Ed. 897, and Knowles *v.* Gaslight, etc., Co., 19 Wall. 58, 22 L. Ed. 70, it may be considered as settled in this court, that when a judgment rendered in one state is sued upon in another, the defendant may contradict the record to the extent of showing that in point of fact the court rendering the judgment did not have jurisdiction of his person. If such showing is made the action must fail, because a judgment obtained under such circumstances has no effect outside of the state in which it was rendered." Hill *v.* Mendenhall, 21 Wall. 453, 454, 22 L. Ed. 616.

"The section of the federal constitution which is invoked by plaintiffs is § 1 of Article IV, which provides that 'full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state.' Under that section the full faith and credit demanded is only that faith and credit which the judicial proceedings had in the other state in and of themselves require. It does not demand that a judgment rendered in a court of one state, without the jurisdiction of the person, shall be recognized by the courts of another state as valid, or that a judgment rendered by a court which has jurisdiction of the person, but which is in no way responsible to the issues tendered by the pleadings and is rendered in the actual absence of the defendant, must be recognized as valid in the courts of any other state. The requirements of that section are fulfilled when a judgment rendered in a court of one state, which has jurisdiction of the subject matter and

a proceeding in rem, its jurisdiction of the res.[51] The record of a judgment rendered in another state may be contradicted as to the facts necessary to give the court jurisdiction;[52] and if it be shown that such facts do not exist, the record will be a nullity, notwithstanding it may recite that they did exist.[53] In this

of the person, and which is substantially responsive to the issues presented by the pleadings, or is rendered under such circumstances that it is apparent that the defeated party was in fact heard on the matter determined, is recognized and enforced in the courts of another state." Reynolds *v.* Stockton, 140 U. S. 254, 35 L. Ed. 464.

Judgment by confession entered on note for one not legal holder.—By the holder of negotiable paper is meant the legal holder, that is, one entitled by law to receive payment; and where one gave a note authorizing any attorney to confess judgment without service of process, if sued on by the holder, and judgment was confessed for one not a legal holder, such a judgment may be collaterally attacked in the courts of another state without violating the constitutional provision as to full faith and credit. National Exchange Bank *v.* Wiley, 195 U. S. 257, 49 L. Ed. 184. See, generally, the titles BILLS, NOTES AND CHECKS, vol. 3, p. 296; JUDGMENTS AND DECREES.

Where a judgment of dismissal has been rendered, a new judgment in personam, without notice at a subsequent term, is void, and in a suit upon the new judgment in another state the former judgment of dismissal may be set up, for not to allow it to be set up would be to deprive one of due process of law. Wetmore *v.* Karrick, 205 U. S. 141, 51 L. Ed. 745.

Generally, as to the power of courts over their judgments at a subsequent term, see the title JUDGMENTS AND DECREES.

51. Inquiry as to jurisdiction of res in proceedings in rem.—Reynolds *v.* Stockton, 140 U. S. 254, 35 L. Ed. 464; Thompson *v.* Whitman, 18 Wall. 457, 21 L. Ed. 897; Cooper *v.* Newell, 173 U. S. 555, 43 L. Ed. 808.

Inquiry to be under proper averments.—"If the conclusiveness of a judgment or decree in a court of one state is questioned in a court of another government, federal or state, it is open, under proper averments, to inquire whether the court rendering the decree or judgment had jurisdiction to render it." Old Wayne Mut. Life Ass'n *v.* McDonough, 204 U. S. 8, 51 L. Ed. 345. See post, "Pleadings by Way of Defense," II, D, 4, c.

52. Contradiction of record as to facts necessary to give jurisdiction.—Thompson *v.* Whitman, 18 Wall. 457, 21 L. Ed. 897; Cooper *v.* Newell, 173 U. S. 555, 43 L. Ed. 808; Hall *v.* Lanning, 91 U. S. 160, 23 L. Ed. 271.

By a law of New Jersey nonresidents were prohibited from raking clams and oysters in the waters of that state under penalty of forfeiture of the vessel employed; and any two justices of the county in which the seizures of the vessel should be made were authorized, on information given, to hear and determine the case. Held, that if the seizure was not made in the county where the prosecution took place, the justices of that county had no jurisdiction, and that this fact might be inquired into in an action for making such seizure brought in New York, notwithstanding the record of a conviction was produced which stated that the seizure was made within such county. Thompson *v.* Whitman, 18 Wall. 457, 21 L. Ed. 897.

"In the leading case of Thompson *v.* Whitman, 18 Wall. 457, 468, 21 L. Ed. 897, the whole question was fully examined in the light of the authorities. Mr. Justice Bradley, speaking for the court and delivering its unanimous judgment, stated the conclusion to be clear that the jurisdiction of a court rendering judgment in one state may be questioned in a collateral proceeding in another state, notwithstanding the averments in the record of the judgment itself. The court, among other things, said that if it be once conceded that 'the validity of a judgment may be attacked collaterally by evidence showing that the court had no jurisdiction, it is not perceived how any allegation contained in the record itself, however strongly made, can affect the right so to question it. The very object of the evidence is to invalidate the paper as a record. If that can be successfully done no statements contained therein have any force. If any such statements could be used to prevent inquiry, a slight form of words might always be adopted so as effectually to nullify the right of such inquiry. Recitals of this kind must be regarded like asseverations of good faith in a deed, which avail nothing if the instrument is shown to be fraudulent.'" Old Wayne Mut. Life Ass'n *v.* McDonough, 204 U. S. 8, 51 L. Ed. 345.'

53. Record a nullity notwithstanding recital as to existence of jurisdictional facts.—Cooper *v.* Newell, 173 U. S. 555, 43 L. Ed. 808; Thompson *v.* Whitman, 18 Wall. 457, 21 L. Ed. 897; National Exchange Bank *v.* Wiley, 195 U. S. 257, 49 L. Ed. 184; Grover, etc., Sewing Machine Co. *v.* Radcliffe, 137 U. S. 287, 34 L. Ed. 670; Andrews *v.* Andrews, 188 U. S. 14, 47 L. Ed. 366.

Where one party in a divorce proceedings had changed his domicile before beginning his divorce proceedings, the court held that a decree for divorce could be collaterally attacked, in another state, by

respect a court of another state is to be regarded as a foreign court.[54] As the courts of the United States are bound to give to the judgments of the state courts the same faith and credit that the courts of one state are bound to give the judgments of the courts of her sister states, the same rule applies to each, and the question of jurisdiction is open to inquiry even when the judgment of the court of a state comes under consideration in a court of the United States, sitting in the same state.[55]

bb. *Service of Process*—(aa) *In General.*—Under the provisions of the constitution of the United States and of the acts of congress, by which judgments of the courts of one state are to be given full faith and credit in the courts of another state, or of the United States, such a judgment is not entitled to any force or effect, unless the defendant was duly served with notice of the action in which the judgment was rendered, or waived the want of such notice.[56]

proof that the court had no jurisdiction, even when the record purports to show jurisdiction and appearance. Andrews *v.* Andrews, 188 U. S. 14, 47 L. Ed. 366; German Savings, etc., Society *v.* Dormitzer, 192 U. S. 125, 128, 48 L. Ed. 373.

A return to a summons by the sheriff that he has served the defendant personally therewith is sufficient, without stating that the service was made in his county. This will be presumed. But, in an action on a judgment rendered in another state, the defendant, notwithstanding the record shows a return of the sheriff that he was personally served with process, may show the contrary, namely, that he was not served, and that the court never acquired jurisdiction of his person. The case of Thompson *v.* Whitman, 18 Wall. 457, 21 L. Ed. 897, affirmed and applied. Knowles *v.* Gaslight, etc., Co., 19 Wall. 58, 22 L. Ed. 70.

As to the presumptions as to jurisdiction, and the conclusiveness of recitals of record, in the case of judgments generally, see the titles JUDGMENTS AND DECREES; JURISDICTION.

54. Courts of other states considered as foreign in this respect.—Grover, etc., Sewing Machine Co. *v.* Radcliffe, 137 U. S. 287, 34 L. Ed. 670. See post, "Impeachment for Want of Jurisdiction," III, A, 2, b.

55. Inquiry in court of United States sitting in same state.—Cooper *v.* Newell, 173 U. S. 555, 43 L. Ed. 808, followed in Howard *v.* DeCordova, 177 U. S. 609, 44 L. Ed. 908.

56. Want of notice or service of process as invalidating judgments.—Goldey *v.* Morning News, 156 U. S. 518, 39 L. Ed. 517; Harris *v.* Hardeman, 14 How. 334, 14 L. Ed. 444.

"No judgment of the court is due process of law, if rendered without jurisdiction in the court, or without notice to the party." Old Wayne Mut. Life Ass'n *v.* McDonough, 204 U. S. 8, 51 L. Ed. 345. See, also, National Exchange Bank *v.* Wiley, 195 U. S. 257, 49 L. Ed. 184; D'Arcy *v.* Ketchum, 11 How. 165, 13 L. Ed. 648. See, generally, the title DUE PROCESS OF LAW, vol. 5, p. 499.

"Whenever an action is brought in one state on a judgment recovered in another, it is not enough to show it to be valid in the state where it was rendered; it must also appear that the defendant was either personally within the jurisdiction of the state, or had legal notice of the suit, and was in some way subject to its laws, so as to be bound to appear and contest the suit, or suffer a judgment by default. In more general terms, the doctrine of this court, as well as of the courts of many of the states, is, that this act of congress was not designed to displace that principle of natural justice which requires a person to have notice of a suit before he can be conclusively bound by its result; nor those rules of public law which protect persons and property within one state from the exercise of jurisdiction over them by another." Lafayette Ins. Co. *v.* French, 18 How. 404, 15 L. Ed. 451.

"It seems to be agreed, on all hands, that the doctrine of the conclusiveness of the judgments of the several states, is to be taken with the qualification, that, where the court has no jurisdiction over the subject matter, or the person, or where the defendant has no notice of this suit, or was never served with process, and never appeared to the action, the judgment will be esteemed of no validity." Harris *v.* Hardeman, 14 How. 334, 14 L. Ed. 444.

"The act of congress has been restricted in its application by a series of decisions of this court to judgments of state courts, when they had jurisdiction of the cause and of the parties; and in actions brought on such judgments in other states, it has always been held that it was open to a defendant, whether sued alone or jointly with others, to show by plea and proof that he had not been served with process or had not voluntarily appeared. D'Arcy *v.* Ketchum, 11 How 165, 13 L. Ed. 648; Thompson *v.* Whitman, 18 Wall. 457, 21 L. Ed. 897; Knowles *v.* Gaslight, etc., Co., 19 Wall. 58, 22 L. Ed. 70; Hall *v.* Lanning, 91 U. S. 160, 23 L. Ed. 271." Renaud *v.* Abbott, 116 U. S. 277, 29 L. Ed. 629.

Generally, as to the necessity for proper process and service thereof in order that a judgment or decree may be valid and binding, see the titles JUDGMENTS

(bb) *Judgment against Nonresidents without Personal Service.*—**In General.**—The force and effect of judgments rendered against nonresidents without personal service of process upon them, or their voluntary appearance, have been the subject of frequent consideration in the courts of the United States and of the several states, as attempts have been made to enforce such judgments in states other than those in which they were rendered under the provision of the constitution and act of congress requiring full faith and credit to be given in each state to the records and judicial proceedings of other states. It is now well settled, however, that the act of congress in pursuance of the constitutional provision on this point was not designed to displace that principle of national justice, which requires a person to have notice of his suit before he can be conclusively bound by its result, nor those rules of public law which protects persons and property within one state from the exercise of jurisdiction over them by another.[57] In all the cases brought in the state and federal courts, where attempts have been made under the act of congress to give effect in one state to personal judgments rendered in another state against nonresidents, without service upon them, or upon substituted service by publication, or in some other form, it has been held, subject to exceptions to be hereafter noted, that such judgments were without any binding force, except as to property, or interests in property, within the state, to reach and affect which was the object of the action in which the judgment was rendered, and which property was brought under control of the court in connection with the process against the person.[58] The proceeding in such cases, though in the form of a personal ac-

AND DECREES; SUMMONS AND PROCESS.

Burden of proof where appearance or service denied.—The burden of proof is on the plaintiff in a suit in one state upon a personal judgment rendered in another state where it is not alleged in the complaint that the defendant appeared or that he has been served with process, and the defendant denies that there was appearance or service of process. Old Wayne Mut. Life Ass'n *v.* McDonough, 204 U. S. 8, 18, 51 L. Ed. 345.

Service of process held not obtained by fraud such as to invalidate judgment.—In order to get B. into Ohio, so that he could serve him with process, A. told him he was going to use his (B.'s) depositions in a suit in Ohio. B. came to Ohio and after the deposition had been taken, remained there for a few days, during which time A. had process served on him. He obtained a judgment in Ohio and sued B. in Nebraska on the judgment. The Nebraska court refused to enforce the judgment saying it was obtained by fraud. Held, this was not fraud and that by refusing to enforce the judgment the Nebraska court violated the "full faith and credit" clause of the federal constitution. Jaster *v.* Currie, 198 U. S. 144, 148, 49 L. Ed. 988.

57. Rule as to necessity for notice of suit not affected by provision as to faith and credit.—Lafayette Ins. Co. *v.* French, 18 How. 404, 15 L. Ed. 451; Pennoyer *v.* Neff, 95 U. S. 714, 24 L. Ed. 565.

58. General rule as to effect of judgments against nonresidents without service, or upon substituted service.—Pennoyer *v.* Neff, 95 U. S. 714, 24 L. Ed. 565; Empire *v.* Darlington, 101 U. S. 87, 25 L. Ed. 878; St. Clair *v.* Cox, 106 U. S. 350, 27 L. Ed. 222; Hart *v.* Sansom, 110 U. S. 151, 28 L. Ed. 101; York *v.* Texas, 137 U. S. 15, 34 L. Ed. 604; Grover, etc., Sewing Machine Co. *v.* Radcliffe, 137 U. S. 287, 34 L. Ed. 670; Wilson *v.* Seligmen, 144 U. S. 41, 36 L. Ed. 338; Goldey *v.* Morning News, 156 U. S. 518, 39 L. Ed. 517; Hollingsworth *v.* Barbour, 4 Pet. 466, 7 L. Ed. 922; Boswell *v.* Otis, 9 How. 336, 13 L. Ed. 164; D'Arcy *v.* Ketchum, 11 How. 165, 13 L. Ed. 648; Green *v.* Van Buskirk, 7 Wall. 139, 19 L. Ed. 109; Bischoff *v.* Wethered, 9 Wall. 812, 19 L. Ed. 829; Cooper *v.* Reynolds, 10 Wall. 308, 19 L. Ed. 931; Board of Public Works *v.* Columbia College, 17 Wall. 521, 21 L. Ed. 687; Galpin *v.* Page, 18 Wall. 350, 21 L. Ed. 959; Thompson *v.* Whitman, 18 Wall. 457, 21 L. Ed. 897; Knowles *v.* Gaslight, etc., Co., 19 Wall. 58, 22 L. Ed. 70.

Congress did not intend, by the act of 1790, to declare that a judgment rendered in one state against the person of a citizen of another, who had not been served with process or voluntarily made defense, should have such faith and credit in every other state as it had in the courts of the state in which it was rendered. D'Arcy *v.* Ketchum, 11 How. 165, 13 L. Ed. 648.

"Where the defendant resides in the state in which the proceedings are had, service at his residence, and perhaps other modes of constructive service, may be authorized by the laws of the state. But in the case of nonresidents, like that under consideration, personal service cannot be dispensed with unless the defendant voluntarily appears." Knowles *v.* Gaslight, etc., Co., 19 Wall. 58, 22 L. Ed. 70.

"Personal judgments thus rendered have no operation out of the limits of the

tion, has been uniformly treated, where service was not obtained and the party did not voluntarily appear, as effectual and binding merely as a proceeding in rem, and as having no operation beyond the disposition of the property, or some

state where rendered. Their effects are merely local. Out of the state they are nullities, not binding upon the nonresident defendant, nor establishing any claim against him. Such is the settled law of this country, asserted in repeated adjudications of this court and of the state courts." Board of Public Works *v.* Columbia College, 17 Wall. 521, 527, 21 L. Ed. 687.

The "full faith and credit" clause is not violated by the courts of one state not recognizing a decree for divorce rendered in another state, where one of the parties is domiciled there and the other is only served with process, by publication. Haddock *v.* Haddock, 201 U. S. 562, 606, 50 L. Ed. 867.

A personal judgment, rendered in one state against several parties jointly, upon service of process on them, or their voluntary appearance, and upon publication against the others, is not evidence outside of the state where rendered of any personal liability to the plaintiff of the parties proceeded against by publication. Board of Public Works *v.* Columbia College, 17 Wall. 521, 21 L. Ed. 687.

A member of a partnership, residing in one state, not served with process and not appearing, is not personally bound by a judgment recovered in another state against all the partners after a dissolution of the firm, although the other members were served, or did appear and cause an appearance to be entered for all, and although the law of the state where the suit was brought authorized such judgment. Hall *v.* Lanning, 91 U. S. 160, 23 L. Ed. 271. See, also, Goldey *v.* Morning News, 156 U. S. 518, 39 L. Ed. 517.

"The question to be decided in this case is, whether, after the dissolution of a copartnership, one of the partners in a suit brought against the firm has authority to enter an appearance for the other partners who do not reside in the state where the suit is brought, and have not been served with process; and, if not, whether a judgment against all the partners, founded on such an appearance, can be questioned by those not served with process in a suit brought thereon in another state. We recently had occasion, in the case of Thompson *v.* Whitman, 18 Wall. 457, 21 L. Ed. 897, to restate the rule, that the jurisdiction of a foreign court over the person or the subject matter embraced in the judgment or decree of such court is always open to inquiry; and that, in this respect, the court of another state is to be regarded as a foreign court. We further held in that case, that the record of such a judgment does not estop the parties from demanding such an inquiry. The cases bearing upon the subject having been examined and distinguished on that occasion, it is not necessary to examine them again, except as they may throw light on the special question involved in this cause. In the subsequent case of Knowles *v.* Gaslight, etc., Co., 19 Wall. 58, 22 L. Ed. 70, we further held, in direct line with the decision in Thompson *v.* Whitman, 18 Wall. 457, 21 L. Ed. 897, that the record of a judgment showing service of process on the defendant could be contradicted and disproved." Hall *v.* Lanning, 91 U. S. 160, 23 L. Ed. 271. See the titles APPEARANCES, vol. 2, p. 429; PARTNERSHIP.

Judgment against foreign corporation.—"If a judgment is rendered in one state against two partners jointly, after serving notice upon one of them only, under a statute of the state providing that such service shall be sufficient to authorize a judgment against both, yet the judgment is of no force or affect in a court of another state, or in a court of the United States, against the partner who was not served with process. D'Arcy *v.* Ketchum, 11 How. 165, 13 L. Ed. 648, and Hall *v.* Lanning, 91 U. S. 160, 23 L. Ed. 271, above cited. So a judgment rendered in a court of one state, against a corporation neither incorporated nor doing business within the state, must be regarded as of no validity in the courts of another state, or of the United States, unless service of process was made in the first state upon an agent appointed to act there for the corporation, and not merely upon an officer or agent residing in another state, and only casually within the state, and not charged with any business of the corporation there. Lafayette Ins. Co. *v.* French, 18 How. 404, 15 L. Ed. 451; St. Clair *v.* Cox, 106 U. S. 350, 359, 27 L. Ed. 222; Fitzgerald, etc., Construction Co. *v.* Fitzgerald, 137 U. S. 98, 106, 34 L. Ed. 608; Mexican Cent. R. Co. *v.* Pinkney, 149 U. S. 194, 37 L. Ed. 699; In re Hohorst, 150 U. S. 653, 663, 37 L. Ed. 1211." Goldey *v.* Morning News, 156 U. S. 518, 39 L. Ed. 517.

As to showing unauthorized appearance by attorney, for a party who had never been served with process, as a defense to an action on a judgment of another state, see the title APPEARANCES, vol. 2, p. 437.

Application of rule in federal courts.—A judgment or decree in personam merely, rendered on constructive service, will be allowed no force in the courts of another state, and is of no greater force, as against a citizen of another state, in a court of the United States though held within the state in which the judgment was rendered. Hart *v.* Sansom, 110 U. S. 151, 28 L. Ed. 101.

"The courts of the United States only

interest therein.[59] The reason assigned for this conclusion is that the tribunals of one state have no jurisdiction over persons beyond its limits, and can inquire only into their obligations to its citizens when exercising its conceded jurisdiction over their property within its limits.[60]

Exceptions to General Rule.—There are, however, exceptions to the rule just laid down; as in cases where proceedings are taken in a state to determine

regard judgments of the state courts establishing personal demands as having validity or as importing verity where they have been rendered upon personal citation of the party, or, what is the same thing, of those empowered to receive process for him, or upon his voluntary appearance. In Pennoyer *v.* Neff we had occasion to consider at length the manner in which state courts can acquire jurisdiction to render a personal judgment against nonresidents which would be received as evidence in the federal courts; and we held that personal service of citation on the party or his voluntary appearance was, with some exceptions, essential to the jurisdiction of the court. The exceptions related to those cases where proceedings are taken in a state to determine the status of one of its citizens towards a nonresident, or where a party has agreed to accept a notification to others or service on them as citation to himself. 95 U. S. 714, 24 L. Ed. 565." St. Clair *v.* Cox, 106 U. S. 350, 27 L. Ed. 222.

59. Proceeding binding merely as a proceeding in rem.—Pennoyer *v.* Neff, 95 U. S. 714, 24 L. Ed. 565.

"It is true that if the prosecution in the courts of one country for a violation of its municipal law is in rem, to obtain a forfeiture of specific property within its jurisdiction, a judgment of forfeiture, rendered after due notice, and vesting the title of the property in the state, will be recognized and upheld in the courts of any other country in which the title to the property is brought in issue. Rose *v.* Himely, 4 Cranch 241, 2 L. Ed. 608; Hudson *v.* Guestier, 4 Cranch 293, 2 L. Ed. 625; Bradstreet *v.* Neptune Ins. Co., 3 Sumner, 600, 605; Pigott on Foreign Judgments, 264. But the recognition of a vested title in property is quite different from the enforcement of a claim for a pecuniary penalty. In the one case, a complete title in the property has been acquired by the foreign judgment; in the other, further judicial action is sought to compel the payment by the defendant to the plaintiff of money in which the plaintiff has not as yet acquired any specific right. The application of the rule to the courts of the several states and of the United States is not affected by the provisions of the constitution and of the act of congress, by which the judgments of the courts of any state are to have such faith and credit given to them in every court within the United States as they have by law or usage in the state in which they were rendered. Constitution, art. 4, § 1; Act of May 26, 1790, c. 11, 1 Stat. 122; Rev. Stat., § 905. Those provisions establish a rule of evidence, rather than of jurisdiction. While they make the record of a judgment, rendered after due notice in one state, conclusive evidence in the courts of another state, or of the United States, of the matter adjudged, they do not affect the jurisdiction, either of the court in which the judgment is rendered, or of the court in which it is offered in evidence." Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265, 32 L. Ed. 239.

60. Reason for rule.—Pennoyer *v.* Neff, 95 U. S. 714, 24 L. Ed. 565.

"The courts of the state might perhaps feel bound to give effect to the service made as directed by its statutes. But no court deriving its authority from another government will recognize a merely constructive service as bringing the person within the jurisdiction of the court. The judgment would be allowed no force in the courts of any other state; and it is of no greater force, as against a citizen of another state, in a court of the United States, though held within the state in which the judgment was rendered. Hollingsworth *v.* Barbour, 4 Pet. 466, 475, 7 L. Ed. 922; Boswell *v.* Otis, 9 How. 336, 13 L. Ed. 164; Bischoff *v.* Wethered, 9 Wall. 812, 19 L. Ed. 829; Knowles *v.* Gaslight, etc., Co., 19 Wall. 58, 22 L. Ed. 70; Pennoyer *v.* Neff, 95 U. S. 714, 24 L. Ed. 565. See, also, Schibsby *v.* Westenholtz, L. R. 6 Q. B. 155; The City of Mecca, 6 P. D. 106." Hart *v.* Sansom, 110 U. S. 151, 28 L. Ed. 101.

Such judgment void even in state where rendered.—"Where a personal judgment has been rendered in the courts of a state against a nonresident merely upon constructive service and, therefore, without acquiring jurisdiction over the person of the defendant, such judgment may not be enforced in another state in virtue of the full faith and credit clause. Indeed, a personal judgment so rendered is by operation of the due process clause of the fourteenth amendment void as against the nonresident, even in the state where rendered, and, therefore, such nonresident in virtue of rights granted by the constitution of the United States may successfully resist even in the state where rendered, the enforcement of such a judgment. Pennoyer *v.* Neff, 95 U. S. 714, 24 L. Ed. 565." Haddock *v.* Haddock, 201 U. S. 562, 50 L. Ed. 867. See the title DUE PROCESS OF LAW, vol. 5, p. 499.

the status of one of its citizens towards a nonresident,[61] or where a party may be considered to have agreed, in advance, to accept a notification to others or service on them as citation to himself.[62] It is not meant, in the statement of the general rule just laid down as to service on nonresidents, to assert that a state may not require a nonresident entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent or representative in the state to receive service of process and notice in legal proceeding instituted with respect to such partnership, association, or contracts, or to designate a place where such service may be made and notice given, and provide, upon their failure, to make such appointment, or to designate such place that service may be made upon a public officer designated for that purpose, or in some other prescribed way, and that judgments rendered upon such service may not be binding upon the nonresidents both within and without the state.[63]

61. Proceedings in state to determine status of a citizen towards a nonresident.—St. Clair *v.* Cox, 106 U. S. 350, 27 L. Ed. 222; Pennoyer *v.* Neff, 95 U. S. 714, 24 L. Ed. 565.

"In Cheely *v.* Clayton (1884), 110 U. S. 701, 28 L. Ed. 298, which involved the validity of a decree of divorce, obtained in Colorado by a husband domiciled there, against his wife for unjustifiably refusing to live with him, this court said: 'The courts of the state of the domicile of the parties doubtless have jurisdiction to decree a divorce in accordance with its laws, for any cause allowed by those laws, without regard to the place of the marriage, or to that of the commission of the offense for which the divorce is granted; and a divorce so obtained is valid everywhere. Story, Conflict of Laws, § 230a; Cheever *v.* Wilson, 9 Wall. 108, 19 L. Ed. 604; Harvey *v.* Farnie, 8 App. Cas. 43. If a wife is living apart from her husband without sufficient cause, his domicile is in law her domicile; and in the absence of any proof of fraud or misconduct on his part, a divorce obtained by him in the state of his domicile, after reasonable notice to her, either by personal service or by publication in accordance with its laws, is valid, although she never in fact resided in that state. Burlen *v.* Shannon, 115 Mass. 438; Hunt *v.* Hunt, 72 N. Y. 218. But in order to make the divorce valid, either in the state in which it is granted or in another state, there must, unless the defendant appeared in the suit, have been such notice to her as the law of the first state requires.' Cheely *v.* Clayton, 110 U. S. 701, 705, 28 L. Ed. 298. In that case the decree of divorce was held void, because the notice required by the laws of the state had not been given; and the finding of the court below that the wife, at the time of the proceedings for divorce, was a citizen and resident of the state of Illinois, was given no weight, because, as this court said, it was hard to see how, if she unjustifiably refused to live with her husband in Colorado, she could lawfully acquire in his lifetime a separate domicile in another state; or how, if the Colorado court had jurisdiction to render the decree of divorce, and did render it upon the ground of her unlawful absence from him, the finding of the court below could consist with the fact so adjudged in the decree of divorce." Atherton *v.* Atherton, 181 U. S. 155, 45 L. Ed. 794. See the title DIVORCE AND ALIMONY, vol. 5, p. 412.

62. Where party has agreed to accept notification to or service on others.—St. Clair *v.* Cox, 106 U. S. 350, 27 L. Ed. 222.

63. Rule does not affect power of state to prescribe manner of service on nonresidents doing business within state.—Pennoyer *v.* Neff, 95 U. S. 714, 24 L. Ed. 565.

Where a corporation, chartered by the State of Indiana, was allowed by a law of Ohio to transact business in the latter state upon the condition that service of process upon the agent of the corporation should be considered as service upon the corporation itself, a judgment against the corporation, obtained by means of such process, ought to have been received in Indiana with the same faith and credit that it was entitled to in Ohio. The state of Ohio had a right to impose such a condition; and when the company sent its agent into the state, it must be presumed to have assented to the rule. Lafayette Ins. Co. *v.* French, 18 How. 404, 15 L. Ed. 451.

"In the present case, the libellee had, in compliance with the law of Louisiana, appointed an agent at New Orleans, on whom legal process might be served, and the monition was there served upon him. This would have been a good service in an action at law in any court of the state or of the United States in Louisiana. Lafayette Ins. Co. *v.* French, 18 How. 404, 15 L. Ed. 451; Ex parte Schollenberger, 96 U. S. 369, 24 L. Ed. 853; New England Mut. Life Ins. Co. *v.* Woodworth, 111 U. S. 138, 146, 28 L. Ed. 379." In re Louisville Underwriters, 134 U. S. 488, 33 L. Ed. 991.

For a full treatment of the power of a state to control foreign corporations or partnerships doing business within their borders, and to prescribe the manner and

(cc) *Process Sent to Nonresident without the State.*—It would seem that process sent to a party domiciled in another state is equally unavailing with process published within it, in proceedings to establish his personal liability, and will be so held in an action in another state on a judgment rendered on such service.[64]

(dd) *Effect of Appearance without Objection to Jurisdiction.*—Where a party voluntarily appears, in a suit, he thereby waives objection to the want of or defective process or service thereof, and a judgment rendered in such suit will be entitled to the usual faith and credit in the courts of another state or in the federal courts.[65]

(c) *Inquiry as to Responsiveness of Judgment to Pleadings.*—It has been held that if the fact of a judgment rendered in a court of one state does not preclude inquiry in the courts of another, as to the jurisdiction of the court rendering the judgment over the person or the subject matter, it certainly also does not preclude inquiry as to whether the judgment so rendered was so far responsive to the issues tendered by the pleadings as to be a proper exercise of jurisdiction on the part of the court rendering it.[66]

(d) *Fraud as Ground for Impeachment.*—According to the weight of authority it would seem that judgments recovered in one state of the Union, when proved in the courts of another, are not impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties;[67] this being one respect in which such judgments are held to differ from judgments recovered in a foreign country.[68] There is, however, at least one decision

sufficiency of service of process upon them, see the titles FOREIGN CORPORATIONS, ante, p. 305; PARTNERSHIP; SUMMONS AND PROCESS.

64. Process sent to nonresident without the state.—Pennoyer *v.* Neff; 95 U. S. 714, 24 L. Ed. 565. See the title SUMMONS AND PROCESS.

65. Judgment rendered on voluntary appearance.—Laing *v.* Rigney, 160 U. S. 531, 40 L. Ed. 525.

The record of a judgment in one state is conclusive evidence in another, although it appears that the suit in which it was rendered, was commenced by an attachment of property, the defendant having afterwards appeared and taken defense. Mayhew *v.* Thatcher, 6 Wheat. 129, 5 L. Ed. 223.

Generally, as to the effect of voluntary appearance as waiving objections to want of or defective service of process, see the title APPEARANCES, vol. 2, p. 448.

66. Inquiry as to responsiveness of judgment to pleadings.—Reynolds *v.* Stockton, 140 U. S. 254, 35 L. Ed. 464.

"Take an extreme case: Given a court of general jurisdiction, over actions in ejectment as well as those in replevin; a complaint in replevin for the possession of certain specific property, personal service upon the defendant, appearance and answer denying title; could (there being no subsequent appearance of the defendant and no amendment of the complaint) a judgment thereafter rendered in such action for the recovery of the possession of certain real estate be upheld? Surely not; even in the courts of the same state. If not there, the constitutional provision quoted gives no greater force to the same record in another state." Reynolds *v.* Stockton, 140 U. S. 254, 35 L. Ed. 464.

"Whatever may be the rule where substantial amendments to the complaint are permitted and made, and the defendant responds thereto, or where it appears that he takes actual part in the litigation of the matters determined, the rule is universal that, where he appears and responds only to the complaint as filed, and no amendment is made thereto, the judgment is conclusive only so far as it determines matters which by the pleadings are put in issue. And this rule, which determines the conclusiveness of a judgment rendered in one court of a state, as to all subsequent inquiries in the courts of the same state, enters into and limits the constitutional provision quoted, as to the full faith and credit which must be given in one state to judgments rendered in the courts of another state." Reynolds *v.* Stockton, 140 U. S. 254, 35 L. Ed. 464.

Generally, as to the rule that a judgment must be responsive to the issues tendered by the pleadings, see the title JUDGMENTS AND DECREES.

67. Judgments not impeachable for fraud in obtaining same.—Hanley *v.* Donoghue, 116 U. S. 1, 29 L. Ed. 535; Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265, 32 L. Ed. 239; Simmons *v.* Saul, 138 U. S. 439, 34 L. Ed. 1054; Hilton *v.* Guyot, 159 U. S. 113, 40 L. Ed. 95.

"In Christmas *v.* Russell, 5 Wall. 290, 304, 18 L. Ed. 475, this court held that fraud could not be pleaded to an action in one state upon a judgment in another. With this we are satisfied." Maxwell *v.* Stewart, 22 Wall. 77, 22 L. Ed. 564.

68. One point by which distinguished

in which it is apparently held that the act of congress as to full faith and credit does not prevent an inquiry into whether the judgment is founded in and impeachable for a manifest fraud.[69]

(e) *Effect of Irregularities or Errors in Decision.*—A judgment of a sister state cannot be impeached by showing irregularities in the form of proceedings or a noncompliance with some law of the state where the judgment was rendered relating thereto, or that the decision was erroneous. Jurisdiction confers power to render the judgment, and it will be regarded as valid and binding until set aside in the court in which it was rendered.[70]

(5) *Application as Dependent upon Nature of Adjudication*—(a) *General Rule.*—Subject to the provisions that the adjudication shall be final and on the merits, rendered by a court of competent jurisdiction, and shall be still in force and not annulled, reversed, satisfied or discharged, in the state where rendered, the constitution and federal statute relative to the faith and credit to be given to the records and judicial proceedings of other states are applicable irrespective of whether the adjudication in question was in the form of a judgment at law, or decree in equity;[71] whether it was rendered after the trial, or is a judgment by confession, a default judgment, a judgment by consent, or a decree pro

from foreign judgments.—See ante "Status as Distinguished from Domestic Judgments or Judgments of Foreign Countries," II, A. And see post, "Judgments of Foreign Countries," III.

As to fraud as ground for impeaching judgments generally, see the title JUDGMENTS AND DECREES.

69. View that judgment is impeachable for manifest fraud.—Cole *v.* Cunningham, 133 U. S. 107, 33 L. Ed. 538.

70. Not impeachable for irregularities or erroneous decision.—Laing *v.* Rigney, 160 U. S. 531, 40 L. Ed. 525.

Judgment having been rendered for the plaintiffs in the attachment, by a court having jurisdiction over the subject, it was too late to object to those proceedings in a suit upon the bond, in which they were collaterally introduced. Huff *v.* Hutchinson, 14 How. 586, 14 L. Ed. 553.

"The court had jurisdiction of the writ by attachment, and the judgment obtained in that case was collateral to a suit on the bond. Objections, therefore, could not be made to the proceedings in attachment, however erroneous they might be. In the case of Voorhees *v.* Jackson, 10 Pet. 449, 9 L. Ed. 490, this court say: 'So long as this judgment remains in force, it is in itself evidence of the right of the plaintiff to the thing adjudged, and gives him a right to process to execute the judgment. The errors of the court, however apparent, can be examined only by an appellate power.' That was a procedure by attachment, and there were many errors on the face of the record, which would have required an appellate court to reserve the judgment; but they could not be considered when the record of the judgment was introduced collaterally." Huff *v.* Hutchinson, 14 How. 586, 14 L. Ed. 553.

If a judgment was recovered in Ohio against the company by an erroneous name, but the suit upon the judgment was brought in Indiana against the company using its chartered name correctly, accompanied with an averment that it was the same company, this mistake is no ground of error; it could only be taken advantage of by a plea in abatement, in the suit in which the first judgment was recovered. Lafayette Ins. Co. *v.* French, 18 How. 404, 15 L. Ed. 451.

Generally, as to the effect of errors and irregularities in the exercise of jurisdiction, as affecting the validity of judgments and decrees, see the title JUDGMENTS AND DECREES.

71. Judgments and decrees equally entitled to faith and credit.—Pennington *v.* Gibson, 16 How. 65, 14 L. Ed. 847; Harding *v.* Harding, 198 U. S. 317, 49 L. Ed. 1066; Nations *v.* Johnson, 24 How. 195, 16 L. Ed. 628. See the titles JUDGMENTS AND DECREES; RES ADJUDICATA.

Admissibility of record of suit in equity pending in other state.—Assumpsit against an insurance company upon a life policy. Plea, non assumpsit, with an agreement that either party might introduce any matter in evidence which would be legally admissible if it had been specially pleaded. Leave was subsequently granted the defendant to file a plea of puis darrein continuance. There was also an agreement which provided for the admission of the record of a suit in equity then pending in the supreme court of New York, whereto the parties hereto, and others claiming the benefit of the policy, were parties, and stipulated that any further proceedings therein might be filed as a part of the agreement at any time before the trial of this action. A decree was rendered by said court November 26, that the company pay the full amount of the policy to the credit of the suit, for the benefit of such of the other parties as should be found to be thereunto entitled, and that upon such payment the company be released and discharged from

confesso.[72] Nor does the conclusiveness of such adjudications, either in regard to their enforcement, or to their conclusiveness in evidence, depend, as a rule, upon the proceedings in which the same were rendered. Thus, for instance, it has been held that the provisions as to faith and credit apply to decrees in suits for divorce,[73] or alimony,[74] or a suit by a wife for separate maintenance, but to enforce, out of the land fraudulently conveyed by the husband to his daughter, payment of the alimony awarded to this appellant by the California decree of divorce, which was held, in accordance with the decisions of other courts, to be so far in the nature of a debt, that the wife might sue the husband for it in another state, and might contest the validity of a conveyance of property made by him with the fraudulent intent of preventing her from recovering the alimony. Barber *v.* Barber, 21 How. 582, 16 L. Ed. 226; Livermore *v.* Boutelle, 11 Gray, 217; Bouslough *v.* Bouslough, 68 Penn. St. 495." Barrett *v.* Failing, 111 U. S. 523, 28 L. Ed. 505.

further liability on said policy, and that the several claimants be enjoined from suing thereon. The amount was thereupon forthwith paid into court. On the 25th of November the plaintiff stated his case, whereupon the hearing was postponed until the 29th of that month, when the defendant, no evidence having as yet been submitted, filed with the clerk of the court a duly certified transcript of said decree. On the trial, leave was refused the defendant to set up the matter of that suit and decree by way of plea, or put it in evidence, under the agreement. Held, that the decree was a final determination of the claim of the plaintiff below, and should have been admitted as matter of evidence, having the same force and effect in a court of the United States as in the courts of New York. Insurance Co. *v.* Harris, 97 U. S. 331, 24 L. Ed. 959.

72. Equally applicable to judgments by confession, by default, by consent, or decrees pro confesso.—For a full treatment of these different kinds of judgments, the effect and conclusiveness thereof, see the titles JUDGMENTS AND DECREES; RES ADJUDICATA.

73. Divorce decrees.—Barrett *v.* Failing, 111 U. S. 523, 28 L. Ed. 505; Haddock *v.* Haddock, 201 U. S. 562, 50 L. Ed. 867; Cheever *v.* Wilson, 9 Wall. 108, 19 L. Ed. 604. See, generally, the title DIVORCE AND ALIMONY, vol. 5, p. 412.

A decree in divorce, valid and effectual by the laws of the state in which it was obtained, is valid and effectual in all other states. Whether the finding by the court of domicile on which the decree is founded is conclusive or only prima facie sufficient is not decided. Cheever *v.* Wilson, 9 Wall. 108, 19 L. Ed. 604.

"It is no longer open to question that where husband and wife are domiciled in a state there exists jurisdiction in such state, for good cause, to enter a decree of divorce which will be entitled to enforcement in another state by virtue of the full faith and credit clause. It has, moreover, been decided that where a bona fide domicile has been acquired in a state by either of the parties to a marriage, and a suit is brought by the domiciled party in such state for a divorce, the courts of that state, if they acquire personal jurisdiction also of the other party, have authority to enter a decree of divorce, entitled to be enforced in every state by the full faith and credit clause. Cheever *v.* Wilson, 9 Wall. 108, 19 L. Ed. 604." Haddock *v.* Haddock, 201 U. S. 562, 50 L. Ed. 867.

"In Barrett *v.* Barrett, 5 Oregon 411, the suit was not to assert a title in real estate,

Decree obtained in fraud of laws of forum.—Where, in accordance with a statute in Massachusetts forbidding the enforcement in that state of a decree of divorce obtained in fraud of the laws of that state, the supreme court of Massachusetts refuses to give effect to a divorce decree of the state of Dakota, so obtained, such refusal is not a violation of the due faith and credit clause of the constitution of the United States. Andrews *v.* Andrews, 188 U. S. 14, 47 L. Ed. 366.

74. Decree for alimony.—Lynde *v.* Lynde, 181 U. S. 183, 45 L. Ed. 810; Audubon *v.* Shufeldt, 181 U. S. 575, 45 L. Ed. 1009; Barber *v.* Barber, 21 How. 582, 16 L. Ed. 226; Wetmore *v.* Markoe, 196 U. S. 68, 49 L. Ed. 390.

"The decree of a court of one state, indeed, for the present payment of a definite sum of money as alimony, is a record which is entitled to full faith and credit in another state, and may therefore be there enforced by suit. Barber *v.* Barber (1858), 21 How. 582, 16 L. Ed. 226; Lynde *v.* Lynde (1901), 181 U. S. 183, 45 L. Ed. 810." Audubon *v.* Shufeldt, 181 U. S. 575, 45 L. Ed. 1009.

"In the case of Audubon *v.* Shufeldt, 181 U. S. 575, 45 L. Ed. 1009, Mr. Justice Gray, delivering the opinion of the court, said: 'Alimony does not arise from any business transaction, but from the relation of marriage. It is not founded on contract, express or implied, but on the natural and legal duty of the husband to support the wife. The general obligation to support is made specific by the decree of the court of appropriate jurisdiction. Generally speaking, alimony may be altered by the court at any time, as the circumstances of the parties may require. The decree of a court of one state, indeed, for the present payment of a definite sum of money as alimony, is a record which is entitled to full faith and credit in another state, and

nance;[75] adjudications of a probate court as to the probate of a will;[76] adjudications in bankruptcy proceedings in the federal courts,[77] and, in short, to all judgments or decrees enforceable in the states wherein the same were rendered.[78]

(b) *Judgments for Penalties.*—It is well established that, as a general rule, the courts of no country execute the penal laws of another, and the application of this rule to the courts of the several states and of the United States is not affected by the provisions of the constitution and of the act of congress, by which the judgments of the courts of any state are to have such faith and credit given to them in every court within the United States as they have by law or usage in the state in which they were rendered; and a state court will properly decline to give full faith and credit to a judgment of another state for a penalty.[79]

may, therefore, be there enforced by suit. Barber *v.* Barber (1858), 21 How. 582, 16 L. Ed. 226; Lynde *v.* Lynde (1901), 181 U. S. 183, 45 L. Ed. 810." Wetmore *v.* Markoe, 196 U. S. 68, 49 L. Ed. 390.

75. Decree for separate maintenance.—Harding *v.* Harding, 198 U. S. 317, 49 L. Ed. 1066.

A wife sued for a divorce and separate maintenance in the state of Illinois; the husband filed a document saying that the wife was living apart from him without her fault and that he consented to the decree, but that it was not collusive. The Illinois court entered a decree upon the ground that the effect of document filed by the husband was to admit as true the allegations of the wife. The husband afterwards went to California and sued for a divorce; the California courts granted a divorce upon the ground that the Illinois decree was a consent decree. Held, that the California courts had to respect the Illinois decree, which was rendered upon the admission of the husband, which made it unnecessary for the court to go into the evidence, and so was conclusive. Harding *v.* Harding, 198 U. S. 317, 340, 49 L. Ed. 1066.

76. Adjudications as to probate of will.—Long *v.* Patton, 154 U. S. 573, 19 L. Ed. 881.

The probate of a will duly received to probate by a state court of competent jurisdiction, is conclusive of the validity and contents of the will in the supreme court. Gaines *v.* New Orleans, 6 Wall. 642, 18 L. Ed. 950. See the title WILLS.

A probate in Louisiana of the will of a person who died domiciled in New York is valid until set aside in the Louisiana court, though the order of the surrogate in New York has been reversed in the supreme court of that state, on which the Louisiana probate was founded. Foulke *v.* Zimmerman, 14 Wall. 113, 20 L. Ed. 785.

By the laws of Illinois, a copy of a will proved in one state, and with its probate and letters duly authenticated under the act of congress for the authentication of records to be used in others, may, after certain formalities gone through, be recorded in the county courts of a county of Illinois, where the testator had property. And when so recorded, certified copies of such county court records are evidence, being so under the general laws of the state. Secrist *v.* Green, 3 Wall. 744, 18 L. Ed. 153.

H., a citizen of South Carolina, died leaving a will. Her only child, B., lived in North Carolina. By her will H. gave all her property situated in South Carolina to W. in trust for B. with the provision that if B. should die without issue the property should go to such persons as B. should direct by will and testament duly executed. B. made a will in North Carolina appointing who should get the property. The probate of this will in North Carolina established that the will was executed according to the law of the state where the testatrix was domiciled, North Carolina, but it did not establish that it was executed accordingly to the law of South Carolina. The court had no jurisdiction and did not undertake to adjudge whether it was a good execution of the power under the will of H. Blount *v.* Walker, 134 U. S. 607, 613, 33 L. Ed. 1036.

Validity as affecting title to land in another state.—The title of lands can only pass by devise, according to the laws of the state or country where the lands lie; the probate in one state or country, is of no validity as effecting the title to lands in another. McCormick *v.* Sullivant, 10 Wheat. 192, 6 L. Ed. 300.

For a full treatment of this question, see the titles CONFLICT OF LAWS, vol. 3, p. 1067; WILLS.

77. Adjudications in bankruptcy proceedings.—See the title BANKRUPTCY, vol. 2, p. 960.

78. Application to all adjudications valid in state where rendered.—See ante "Extent of Faith and Credit Required to be Given," II, B. 2, b. (3); "Application of Provisions as Dependent Upon Existence of Actual Valid Judgment or Decree," II, B. 2, b. (4).

For a full treatment of the conclusiveness as res adjudicata, of particular judgments or decrees of sister states, as well as domestic judgments, see the title RES ADJUDICATA, and also the appropriate specific titles.

79. Judgments for penalties not within due faith and credit clause.—Wisconsin *v.*

(c) *Certificates of Discharge in Insolvency.*—As to the effect and conclusiveness in courts of one state, of certificates of discharge in insolvency granted by the court of another state, see the title CONFLICT OF LAWS, vol. 3, p. 1085.

c. *Enforcement of Provisions by United States Supreme Court.*—Either of the parties to a judgment or decree has, under the constitution of the United States, a right to insist that a judgment or decree shall have the same effect given to it in all the courts of the United States as it has, in the state where it was rendered, by the laws of such state,[80] and the supreme court of the United States will, in the case of improper refusal, enforce the constitutional requirement,[81] such refusal constituting a proper case for review in the supreme court, under the judiciary act.[82]

3. OPERATION AS RES ADJUDICATA.—As to the conclusiveness and effect of the judgments of other states when introduced in evidence, by way of estoppel, or pleaded in bar of another action between the same parties or their privies, see the title RES ADJUDICATA.

4. RIGHT OF PRIORITY OR LIEN.—Judgments of other states not being, as has

Pelican Ins. Co., 127 U. S. 265, 32 L. Ed. 239; Huntington *v.* Attrill, 146 U. S. 657, 36 L. Ed. 1123. See the title CONFLICT OF LAWS, vol. 3, p. 1073, etc.

"The only cases cited in the learned argument for the plaintiff, which tend to support the view that the courts of one state will maintain an action upon a judgment rendered in another state for a penalty incurred by a violation of her municipal laws, are Spencer *v.* Brockway, 1 Ohio 259, in which an action was sustained in Ohio upon a judgment rendered in Connecticut upon a forfeited recognizance to answer for a violation of the penal laws of that state; Healy *v.* Root, 11 Pick. 389, in which an action was sustained in Massachusetts upon a judgment rendered in Pennsylvania in a qui tam action on a penal statute for usury; and Indiana *v.* Helmer, 21 Iowa 370, in which an action by the state of Indiana was sustained in the courts of Iowa upon a judgment rendered in Indiana in a prosecution for the maintenance of a bastard child. The decision in each of those cases appears to have been mainly based upon the supposed effect of the provisions of the constitution and the act of congress as to the faith and credit due to a judgment rendered in another state, which had not then received a full exposition from this court; and the other reasons assigned are not such as to induce as to accept those decisions as satisfactory precedents to guide our judgment in the present case." Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265, 32 L. Ed. 239.

80. Right of parties to judgment to insist upon due faith and credit being given.—Chew *v.* Brumagen, 13 Wall. 497, 20 L. Ed. 663.

81. Enforcement of constitutional requirement by United States supreme court.—Rogers *v.* Alabama, 192 U. S. 226, 48 L. Ed. 417.

"There can be no doubt that if full faith and credit were denied to a judgment rendered in another state upon a suggestion of want of jurisdiction, without evidence to warrant the finding, this court would enforce the constitutional requirement. See German Savings, etc., Society *v.* Dormitzer, 192 U. S. 125, 48 L. Ed. 373." Rogers *v.* Alabama, 192 U. S. 226, 48 L. Ed. 417.

82. Matter proper for review by supreme court.—Green *v.* Van Buskirk, 5 Wall. 307, 18 L. Ed. 599; Caperton *v.* Ballard, 14 Wall. 238, 20 L. Ed. 885; Great Western Tel. Co. *v.* Purdy, 162 U. S. 329, 40 L. Ed. 986; Deposit Bank *v.* Frankfort, 191 U. S. 499, 48 L. Ed. 276; Abraham *v.* Casey, 179 U. S. 210, 45 L. Ed. 156.

"It is true that for some purposes and within certain limits it is only required that the judgments of the courts of the United States shall be given the same force and effect as are given the judgments of the courts of the states wherein they are rendered; but it is equally true that whether a federal judgment has been given due force and effect in the state court is a federal question reviewable by this court, which will determine for itself whether such judgment has been given due weight or otherwise. Crescent City Live Stock Co. *v.* Butchers' Union Slaughter House Co., 120 U. S. 141, 30 L. Ed. 614; Pittsburg, etc., R. Co. *v.* Long Island Loan, etc., Co., 172 U. S. 493, 43 L. Ed. 528." Deposit Bank *v.* Frankfort, 191 U. S. 499, 48 L. Ed. 276.

For a full treatment of the reviewability of such question in the United States supreme court, see the title APPEAL AND ERROR, vol. 1, p. 650.

Burden of proof to show denial of faith and credit.—The burden of proof rests upon the plaintiff in error to show that a reasonable construction by a state supreme court of decrees of sale made by a federal court of another state court violates the constitutional provision as to full faith and credit, and where the case has been tried on a statement of facts which does not afford the court the means of saying with the required certainty that the judgment below denied due faith and credit to the decrees in question, the supreme

been seen, made domestic judgments to all intents and purposes, by the provisions of the constitution and federal statutes as to due faith and credit, do not enjoy the right of priority or lien which they have in the state where they are pronounced, but that only which the lex fori gives to them by its own laws in their character of foreign judgments.[83]

C. Authentication and Proof—1. Records and Judicial Proceedings of State Courts—a. *Constitutional and Statutory Provisions.*—**Constitutional Provision.**—By article 4, § 1, of the constitution of the United States, requiring full faith and credit to be given to the public acts, records and judicial proceedings of other states, it is further provided that congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved.[84]

Provision of Federal Statute.—Congress has exercised the power thus conferred by the constitution, and has provided that the records and judicial proceedings of the courts of any state shall be proved and admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form of law.[85]

court of the United States will not, in view of the burden of proof, reverse the judgment below. Commercial Pub. Co. *v.* Beckwith, 188 U. S. 567, 47 L. Ed. 598.

83. Right of priority or lien dependent upon lex fori.—Andrews *v.* Andrews, 188 U. S. 14, 47 L. Ed. 366, quoting from Story's Conflict of Laws, § 609. To the same effect see Thompson *v.* Whitman, 18 Wall. 457, 21 L. Ed. 897; Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265, 32 L. Ed. 239; Cole *v.* Cunningham, 133 U. S. 107, 33 L. Ed. 538.

Generally, as to judgment liens, see the title JUDGMENTS AND DECREES.

84. Constitutional provision authorizing congress to prescribe manner of proof.—Great Western Tel. Co. *v.* Purdy, 162 U. S. 329, 40 L. Ed. 986; Turnbull *v.* Payson, 95 U. S. 418, 24 L. Ed. 437. And see cases cited ante, "Provisions Stated," II, B, 2, a.

85. Provision of act of May 26, 1790 (Rev. Stat., § 905), as to mode of authentication.—Ferguson *v.* Harwood, 7 Cranch 408, 3 L. Ed. 386; Mills *v.* Duryee, 7 Cranch 481, 3 L. Ed. 411; Christmas *v.* Russell, 5 Wall. 290, 18 L. Ed. 475; D'Arcy *v.* Ketchum, 11 How. 165, 13 L. Ed. 648; Caperton *v.* Ballard, 14 Wall. 238, 20 L. Ed. 885; Drummond *v.* Magruder, 9 Cranch 122, 3 L. Ed. 677; Turnbull *v.* Payson, 95 U. S. 418, 24 L. Ed. 437; South Ottawa *v.* Perkins, 94 U. S. 260, 24 L. Ed. 154; Carpenter *v.* Strange, 141 U. S. 87, 35 L. Ed. 640.

Authentication held sufficient.—If the clerk of a court certify at the foot of a paper, purporting to be a record, "that the aforegoing is truly taken from the record of proceedings" of his court; and if the judge, chief justice, or presiding magistrate, certifies that such attestation of the clerk is in due form of law, it is to be presumed that the paper so certified is a full copy of all the proceedings in the case, and is admissible in evidence. Ferguson *v.* Harwood, 7 Cranch 408, 3 L. Ed. 386.

"The statute of the United States of the 26th of May, 1790, declares that the records and judicial proceedings of the courts of any state shall be proved and admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice or presiding magistrate, as the case may be, that the said attestation is in due form of law. It is conceded that such a certificate accompanied the record objected to. It is, therefore, a case within the words of the law, and the court below were precluded from receiving any other evidence to show that the attestation was not in due form of law. The record so authenticated was properly admitted in evidence. Even if the points had been open, the court are not satisfied that any material variance existed between the attestations of the different clerks. The court are also of opinion that the second exception cannot be sustained. The writing produced did not purport to be a record; but a mere transcript of minutes extracted from the docket of the court. There is no foundation laid to show its admissibility in the cause." Ferguson *v.* Harwood, 7 Cranch 408, 3 L. Ed. 386.

In a suit upon a judgment of a sister state, objections to the form and sufficiency of the evidence offered to prove the record on which the action is brought cannot be sustained, the document offered being properly certified to be "a true and faithful copy of the record of the proceedings had in the cause." Nor is it a valid objection against the jurisdiction of the court rendering the judgment that the record shows that the cause was tried without the intervention of a jury, and did not show that a jury had been waived as

b. *Purpose and Effect of Provisions.*—The authentication provided for by the act of congress was intended as evidence only of the existence of such acts and records as are there specified, and not to give them any greater validity or effect than that which they had in the state from which they were thus accredited. It merely provides a mode of proving public records, leaving them, when proved,

provided by statute. Maxwell *v.* Stewart, 21 Wall. 71, 22 L. Ed. 564, followed in Carpenter *v.* Strange, 141 U. S. 87, 35 L. Ed. 640.

A copy of a deed from a clerk of the court, without the certificate of the presiding judge, that the attestation of the clerk is in due form, cannot be received as evidence, in a suit in equity. Drummond *v.* Magruder, 9 Cranch 122, 3 L. Ed. 677.

"The right of the appellees to bring this suit is, by their own showing, merely derivative; and consequently, it was incumbent on them to prove by legal evidence, that the deed of assignment from William B. Magruder & Co., under which they claimed this right to sue a debtor of that house, was duly executed. The answer put this matter directly in issue, by denying any knowledge of the deed exhibited with the bill, and requiring full proof to be made of it. This court is not at liberty to presume, that any other proof of this deed was given in the court below, than what appears on the record. That proof consists in the certificate of a person who styles himself clerk of Baltimore county court, that the paper to which his certificate is annexed is a copy of a deed taken from the records of the court of that county; but there is no such certificate as the act of congress requires, to satisfy the court that the attestation affixed to this copy, is in due form. It follows, that the instrument so certified cannot be noticed as a copy of a deed from William B. Magruder & Co.; and as it is the foundation of the complainants' right, the court erred in decreeing in favor of the complainants, upon such defective evidence. But as this court cannot fail to perceive, that the objection to the proof of this instrument is merely technical, and was probably not made at all in the circuit court, it would seem improper, to dismiss the bill absolutely." Drummond *v.* Magruder, 9 Cranch 122, 3 L. Ed. 677.

Necessity for signature of judge.—When a transcript of a record of another court was attached to the answer as an exhibit, and portions of it particularly referred to, and the record of the entire case pleaded, a decree, certified by the clerk, which had been executed by the parties, must be considered as part of the record, although it had not the signature of the judge. The signature of the judge is not the only evidence by which a decree can be authenticated. Secombe *v.* Steele, 20 How. 94, 15 L. Ed. 833.

Compliance with provisions essential to review by supreme court under 25th section of judiciary act.—To bring a case to the supreme court of the United States under the 25th section of the judiciary act, on the ground that the provision of the constitution which ordains that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state," has been violated by a refusal of the highest state court to give proper effect to a judicial record of another state, it is necessary that it appear that the record has been authenticated in the mode prescribed by the act of May 26, 1790, "to prescribe the mode in which the public acts, records, and judicial proceedings in each state shall be authenticated, so as to take effect in every other state." Caperton *v.* Ballard, 14 Wall. 238, 20 L. Ed. 885.

"The same constitutional provision which ordains 'that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state,' also ordains that 'the congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.' Congress acted on this subject, and on the 26th of May, 1790, prescribed the manner in which judicial records, and the proceedings of the courts of any state shall be authenticated, so as to be considered proved and admitted in any other court in the United States. This act declares further that the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every other court within the United States as they have by law, or usage, in the courts of the state from whence the said records are or shall be taken. The mode of authentication prescribed by the law requires the attestation of the clerk with his seal attached, and the certificate of the judge that the attestation was in due form. If a judicial proceeding has the effect of record evidence in the courts of the state from which it is taken, it has the same effect in the courts of every other state. To receive this conclusive effect, however, it must not only be pleaded but proved in conformity with the act of congress on the subject. Unless this is done there is nothing for this court to act upon. It is only through the instrumentality of the statute that the clause of the constitution, which the plaintiff in error relies on, can be invoked for his protection. Legislation was required to make the constitutional provision effective, and this having been done by a general law, it requires no argument to show that a party cannot claim that a right under the constitution and law has been denied him by a state court, unless he has used the means for

invested with the same force and effect, and no other, which they have at home.[86]

c. *To What Courts and Records Applicable.*—The provision as to authentication is not applicable to the courts of the United States,[87] nor to the public acts, records, or judicial proceedings of a state court to be used in evidence in another court of the same state.[88]

2. Records and Judicial Proceedings of United States Courts.—It has been held that the act of congress prescribing the mode of authentication of records and judicial proceedings of state courts does not apply to the courts of the United States,[89] and that the record of a circuit or district court of the United States is, when duly certified by the clerk under its seal, admissible as evidence in every other court of the United States.[90]

D. Enforcement—1. Necessity for New Suit.—As has already been seen, the provisions of the constitution and of the federal statutes requiring full faith and credit to be given to the records and judicial proceedings of other states make a judgment obtained in the court of a state a debt of record, not examinable upon its merits, but it does not carry with it into another state the efficacy of the judgment upon property, or upon persons, to be enforced by execution. To give it the force of a judgment in another state, it must be made a judgment there, and can only be executed in the latter as its laws may permit.[91] No ex-

his protection which the statute directs." Caperton *v.* Ballard, 14 Wall. 238, 20 L. Ed. 885. See the title APPEAL AND ERROR, vol. 1, p. 654.

86. Purpose and effect of provision.—South Ottawa *v.* Perkins, 94 U. S. 260, 24 L. Ed. 154. See ante, "Extent of Faith and Credit Required to Be Given," II, B, 2, b, (3).

"Congress, in the execution of the power conferred upon it by the constitution, having prescribed the mode of attestation of records of the courts of one state to entitle them to be proved in the courts of another state, and having enacted that records so authenticated shall have such faith and credit in every court within the United States as they have by law or usage in the state from which they are taken, a record of a judgment so authenticated doubtless proves itself without further evidence; and if it appears upon its face to be a record of a court of general jurisdiction, the jurisdiction of the court over the cause and the parties is to be presumed unless disproved by extrinsic evidence or by the record itself. Knowles *v.* Gaslight, etc., Co., 19 Wall. 58, 22 L. Ed. 70; Settlemier *v.* Sullivan, 97 U. S. 444, 24 L. Ed. 1110." Hanley *v.* Donoghue, 116 U. S. 1, 29 L. Ed. 535.

87. Provisions inapplicable to courts of the United States.—See post, "Records and Judicial Proceedings of United States Courts," II, C, 2.

88. Provisions inapplicable to state records to be used in another court of same state.—Turnbull *v.* Payson, 95 U. S. 418, 24 L. Ed. 437.

Authentication in state court good in circuit court sitting in state.—"Both the constitution and the act of congress are limited in terms to the records and judicial proceedings of the state court. Much discussion of that proposition is unnecessary, as it has long since been established by judicial decisions of high authority. * * * Beyond all doubt, the certificate of the clerk and the seal of the court is a sufficient authentication of the record of a judgment rendered in a state court, when offered in evidence in the circuit court sitting within the same state where the judgment was rendered. Mewester *v.* Spalding, 6 McLean 24. Held, also, that such an authentication would be sufficient in the state court; and, if so, that it would also be good in the circuit court." Turnbull *v.* Payson, 95 U. S. 418, 24 L. Ed. 437.

Generally, as to manner of proving judgments or decrees in courts of state where rendered, see the title JUDGMENTS AND DECREES.

89. Act of congress inapplicable to courts of United States.—Turnbull *v.* Payson, 95 U. S. 418, 24 L. Ed. 437.

90. Certification by clerk under seal of court sufficient.—Turnbull *v.* Payson, 95 U. S. 418, 24 L. Ed. 437.

"Circuit and district courts of the United States certainly cannot be considered as foreign in any sense of the term, either in respect to the state courts in which they sit, or as respects the circuit or district court of another circuit or district. On the contrary, they are domestic tribunals, whose proceedings all other courts of the country are bound to respect, when authenticated by the certificate of the clerk under the seal of the court, the rule being that the circuit court of one circuit or the district court of one district is presumed to know the seal of the circuit or district court of another circuit or district, in the same manner as each court within a state is presumed to know and recognize the seal of any other court within the same state. Womack *v.* Dearman, 7 Port. (Ala.) 513." Turnbull *v.* Payson, 95 U. S. 418, 24 L. Ed. 437.

91. Not a judgment enforceable by execu-

ecution can issue upon such judgment without a new suit in the tribunals of other states.[92]

2. Form of Action.—The proper method of enforcing in the courts of one state the judgments or decrees of the courts of other states would seem to be by an action of debt.[93]

3. Within What Time to Be Brought.—See, generally, the title Limitation of Actions and Adverse Possession.

Validity of State Statutes of Limitations as to Such Actions.—There is no constitutional inhibition on the states, nor any clause in the constitution, from which it can be even plausibly inferred that the states may not legislate upon the remedy, in suits on the judgments of other states, exclusive of all interference with their merits.[94] The plea of the statute of limitations, in an action instituted in one state on a judgment obtained in another state, is a plea to the remedy; and consequently the lex fori must prevail in such a suit.[95] Such suit must be brought within the period prescribed by the local law or the suit will be barred.[96] It is well settled, however, that while a state may legislate upon

tion in courts of other states.—McElmoyle *v.* Cohen, 13 Pet. 312, 10 L. Ed. 177. See ante, "General Statement as to Purpose and Effect," II, B, 2, b, (1).

92. Necessity for new suit in tribunals of other states.—Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265, 32 L. Ed. 239; Cole *v.* Cunningham, 133 U. S. 107, 33 L. Ed. 538; Thompson *v.* Whitman, 18 Wall. 457, 21 L. Ed. 897.

Right of state to exclude foreign corporations from suing on judgment obtained in other states.—By the New York Code it is provided that an action against a foreign corporation may be maintained by another foreign corporation, or by a nonresident, in certain cases only, one of which is "where the cause of action arose within the state, etc. * * * " One foreign corporation sued another foreign corporation on a judgment rendered in Illinois. The New York court dismissed the suit on demurrer. It was held that this was not a violation of article 4, § 1, of the constitution of the United States and that a state can exclude foreign corporations from suing upon judgments obtained in another state. Anglo-American Provision Co. *v.* Davis Provision Co. No. 1, 191 U. S. 373, 48 L. Ed. 225.

93. Action of debt proper form of procedure.—Pennington *v.* Gibson, 16 How. 65, 14 L. Ed. 847; Mills *v.* Duryee, 7 Cranch 481, 3 L. Ed. 411; Christmas *v.* Russell, 5 Wall. 290, 18 L. Ed. 475; Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265, 32 L. Ed. 239; Simmons *v.* Saul, 138 U. S. 439, 34 L. Ed. 1054.

Generally, as to the action of debt, when proper, manner of procedure, hearing and determination therein, etc., see the title DEBT, THE ACTION OF, vol. 5, p. 205.

Generally, as to the enforcement of judgments or decrees by bill in equity, see the title JUDGMENTS AND DECREES.

94. Validity of state statutes of limitation as to actions on such judgments.—McElmoyle *v.* Cohen, 13 Pet. 312, 10 L. Ed. 177; Bacon *v.* Howard, 20 How. 22, 15 L. Ed. 811; Metcalf *v.* Watertown, 153 U. S. 671, 38 L. Ed. 861.

Such statutes not retrospective in their operation.—A statute of Mississippi, passed in 1846, declares that no record of any judgment recovered in a foreign court against a citizen of that state, shall be received as evidence after the expiration of three years from the time of the rendition of such judgment, without the limits of the state. This statute has no application to judgments rendered before its passage. Hence, where it was pleaded as a defense in a suit brought upon a judgment recovered in Louisiana, in 1844, the plea was bad and a demurrer to it sustained. Murray *v.* Gibson, 15 How. 421, 14 L. Ed. 755.

95. Lex fori as controlling.—McElmoyle *v.* Cohen, 13 Pet. 312, 10 L. Ed. 177.

96. Suit barred if not brought within prescribed time.—McElmoyle *v.* Cohen, 13 Pet. 312, 10 L. Ed. 177. And see Owens *v.* Henry, 161 U. S. 642, 40 L. Ed. 837.

"It being settled that the statute of limitations may bar recovery upon foreign judgments; that the effect intended to be given under our constitution to judgments is, that they are conclusive only as regards the merits; the common-law principle then applies to suits upon them, that they must be brought within the period prescribed by the local law, the lex fori, or the suit will be barred." Metcalf *v.* Watertown, 153 U. S. 671, 38 L. Ed. 861.

"McElmoyle *v.* Cohen, 13 Pet. 312, 327, 10 L. Ed. 177, is an early and leading case on the subject cited, and largely quoted from by counsel for defendant. The statute of limitations of Georgia involved in that case required 'actions of debt upon judgments obtained in courts other than the courts of this state' to be brought 'within five years next after the judgments shall have been obtained,' and an action having been brought in the circuit court of the United States for the District of Georgia upon a judgment rendered in a

the remedy in such suits and prescribe statutes of limitations governing the same, no state can impair the effect required to be given to judicial proceedings in a sister state, by a statute of limitations intended to operate on demands which may have passed into judgment by such proceedings, as though no such judgment had been rendered.[97]

Running of Statute Not Affected by Revival of Judgment.—It has been held that a statute of limitations as to actions on the judgments of other states begins to run from the rendition of such judgment, and the bar of such statute

court of the state of South Carolina, it was held that the statute could be pleaded in bar thereof." Metcalf *v.* Watertown, 153 U. S. 671, 38 L. Ed. 861.

Judgments for money, whether rendered within or without the state, are barred by prescription in the state of Louisiana in ten years from the date of the rendition thereof. La. Civ. Code, Art. 3547. Owens *v.* Henry, 161 U. S. 642, 40 L. Ed. 837.

By the laws of the republic of Texas, no action would lie on a foreign judgment, and all actions of debt were prescribed in four years. When about to form a constitution, for the purpose of becoming a state of the Union, the legislature passed a law permitting suits to be brought on foreign judgments, but limiting them to sixty days when the judgment was of four years standing and upward. The plaintiffs' bill attempted to avoid the effect of the last limitation as to their judgment, which was more than four years old, on the ground that they lived more than two thousand miles distant, and could not know of the passage of the last act within time to prosecute their action. Held, that the last-mentioned statute conferred a favor, and was not retrospective; and that plaintiffs' action was barred, whether he knew of the act or not. The constitution of the United States does not restrain the right of each state to legislate as to the remedy on suits on judgments in other states. Bacon *v.* Howard, 20 How. 22, 15 L. Ed. 811.

97. **State may not so legislate as to destroy the right to enforce judgments of other states.**—Green *v.* Van Buskirk, 5 Wall. 307, 18 L. Ed. 599; Christmas *v.* Russell, 5 Wall. 290, 18 L. Ed. 475.

A state statute which enacts that "no action shall be maintained on any judgment or decree rendered by any court without this state against any person who, at the time of the commencement of the action in which such judgment or decree was or shall be rendered, was or shall be a resident of this state, in any case where the cause of action would have been barred by any act of limitation of this state, if such suit had been brought therein"—is unconstitutional and void, as destroying the right of a party to enforce a judgment regularly obtained in another state, and as conflicting therefore with the provision of the constitution (Art. IV, § 1), which ordains that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." Christmas *v.* Russell, 5 Wall. 290, 18 L. Ed. 475.

"The provision under consideration is not a statute of limitations as known to the law or the decisions of the courts upon that subject. Limitation, as used in such statutes, means a bar to the alleged right of the plaintiff to recover in the action created by or arising out of the lapse of a certain time after the cause of action accrued, as appointed by law. Looking at the terms of this provision, it is quite obvious that it contains no element which can give it any such character. Plain effect of the provision is to deny the right of the judgment creditor to sue at all, under any circumstances, and wholly irrespective of any lapse of time whatever, whether longer or shorter. No day is given to such a creditor, but the prohibition is absolute that no action shall be maintained on any judgment or decree falling within the conditions set forth in the provision. Those conditions are addressed, not to the judgment, but to the cause of action which was the foundation of the judgment. Substantial import of the provision is that judgments recovered in other states against the citizens of Mississippi shall not be enforced in the tribunals of that state, if the cause of action which was the foundation of the judgment would have been barred in her tribunals by her statute of limitations. Nothing can be plainer than the proposition is, that the judgment mentioned in the declaration was a valid judgment in the state where it was rendered. Jurisdiction of the case was undeniable, and the defendant being found in that jurisdiction, was duly served with process, and appeared and made full defense. Instead of being a statute of limitations in any sense known to the law, the provision, in legal effect, is but an attempt to give operation to the statute of limitations of that state in all the other states of the Union by denying the efficacy of any judgment recovered in another state against a citizen of Mississippi for any cause of action which was barred in her tribunals under that law. Where the cause of action which led to the judgment was not barred by her statute of limitations the judgment may be enforced; but if it would have been barred in her tribunals, under her statute, then the prohibition is absolute that no action shall be maintained on the judgment." Christmas *v.* Russell, 5 Wall. 290, 18 L. Ed. 475, dis-

is not removed by the revival of the judgment in the state where rendered.[98]

4. PLEADING—a. *Declaration.*—Where the declaration in an action of debt on the judgment of another state, avers that the court in which the same was rendered was a court of general jurisdiction, no averment is necessary that the subject matter in question was within its jurisdiction.[99]

b. *Demurrer.*—In actions on judgments of other states the usual rule applies as to the effect of a demurrer as an admission of facts well pleaded.[1]

tinguished in Great Western Tel. Co. *v.* Purdy, 162 U. S. 329, 40 L. Ed. 986.

"The plaintiff lays great stress upon Christmas *v.* Russell, 5 Wall. 290, 18 L. Ed. 475. In that case suit was brought in Mississippi on a Kentucky judgment against a citizen of Mississippi upon a promissory note made in Mississippi and payable in New Orleans. A suit upon the note would have been barred by the Mississippi statute of limitations when the suit in Kentucky was begun, and the defendant set up a statute of Mississippi providing that no action should be maintained upon a judgment rendered in such circumstances without the state against a resident of the state. It was held that the statute was void, and that as the judgment was valid in Kentucky it could not be treated as invalid in Mississippi." Anglo-American Provision Co. *v.* Davis Provision Co. No. 1, 191 U. S. 373, 48 L. Ed. 225.

98. Running of statute not affected by revival of judgment.—In Owens *v.* Henry, 161 U. S. 642, 40 L. Ed. 837, which was an action commenced in 1880 in the circuit court for the eastern district of Louisiana on a judgment rendered in the state of Pennsylvania in 1861, and revived in the latter state by scire facias in 1866 and 1871, it was held that judgments for money, whether rendered within or without the state, being barred by the laws of Louisiana in ten years from the rendition thereof, the action was barred, the running of the statute not being affected by the revival of the judgment in Pennsylvania.

"Viewed as a new judgment rendered as in an action of debt, it had no binding force in Louisiana, as Henry had not been served with process or voluntarily appeared. And considered as in continuation of the prior action and a revival of the original judgment for purposes of execution, on two returns of nihil, it operated merely to keep in force the local lien, and could not be availed of as removing the statutory bar of the lex fori, for the same reason. Thompson *v.* Whitman, 18 Wall. 457, 21 L. Ed. 897; Pennoyer *v.* Neff, 95 U. S. 714, 24 L. Ed. 565; Grover, etc., Sewing Machine Co. *v.* Radcliffe, 137 U. S. 287, 34 L. Ed. 670; Steel *v.* Smith, 7 Watts & Searg. 447; Evans *v.* Reed, 2 Mich. N. P. 212; Hepler *v.* Davis, 32 Nebraska 556." Owens *v.* Henry, 161 U. S. 642, 40 L. Ed. 837.

99. Declaration sufficient which avers rendition by court of general jurisdiction.—Pennington *v.* Gibson, 16 How. 65, 14 L. Ed. 847.

"The declaration avers, 'That at a general term of the supreme court in equity for the state of New York, one of the United States of America, held at the village of Cooperstown in the state of New York, on the 1st Monday in November, in the year 1848, it was ordered, adjudged, and decreed, etc., and farther, that on the 25th of November, 1848, the complaintant's costs were taxed, etc., as by the said decree duly signed and enrolled at a special term of the said supreme court, etc., and now remaining in the office, etc., reference being thereto had, will appear.' It is undeniably true in pleading, that where a suit is instituted in a court of limited and special jurisdiction, it is indispensable to aver that the cause of action arose within such restricted jurisdiction; but it is equally true, with regard to superior courts, or courts of general jurisdiction, that every presumption is in favor of their right to hold pleas, and that if an exception to their power or jurisdiction is designed, it must be averred, and shown as matter of defense. Such is the general rule as laid down by Chitty, vol. 1, p. 442. So too in the case of Shumway *v.* Stilman, in 4 Cow. (N. Y.) 296. The supreme court of New York, speaking with reference to a judgment rendered in another state, says: 'every presumption is in favor of the judgment. The record is prima facie evidence of it, and will be held conclusive until clearly and explicitly disproved.' And in farther affirmation of the doctrine here laid down, we hold that the courts of the United States can and should take notice of the laws and judicial decisions of the several states of this Union, and that with respect to these, nothing is required to be specially averred in pleading which would not be so required by the tribunals of those states repectively." Pennington *v.* Gibson, 16 How. 65, 14 L. Ed. 847.

As to presumptions as to jurisdiction of courts of general jurisdiction, see the title JURISDICTION.

1. Demurrer as admitting facts well pleaded.—See, generally, the title DEMURRERS, vol. 5, p. 293.

Thus, in Hanley *v.* Donoghue, 116 U. S. 1, 29 L. Ed. 535, it was held that "averment in the third count of the declaration, that by the law of Pennsylvania the judgment rendered in that state against Charles Donoghue and John Donoghue was valid and enforceable against Charles, who had

c. *Pleadings by Way of Defense*—(1) *Matters Pleadable.*—**In General.**—A judgment of a state court, as has been seen, has the same credit, validity and effect in every other court within the United States, which it had in the state where it was rendered; and whatever pleas would be good to a suit thereon, in such state, and none others, can be pleaded, in any other court within the United States.[2]

As to the right to set up particular matters by way of defense to a suit on a judgment or decree of another state, as, for instance, want of jurisdiction, fraud, irregularities, etc., see ante, "Application of Provisions as Dependent upon Existence of Actual Valid Judgment or Decree," II, B, 2, b, (4).

(2) *Form and Sufficiency of Pleading*—(a) *General Rule as to Form of General Issue.*—It would seem to be well established that under the provisions of the act of congress giving full faith and credit to state judgments in every other state, nil debet is not a proper plea in an action in the court of one state on a valid judgment rendered in the court of a sister state;[3] but that, being a record

been served with process in that state, and void against John who had not been so served, must be considered, both in the courts of Maryland and in this court on writ of error to one of those courts, an allegation of fact, admitted by the demurrer."

2. General rule as to matters pleadable in defense.—Hampton *v.* McConnell, 3 Wheat. 234, 4 L. Ed. 378; Mills *v.* Duryee, 7 Cranch 481, 3 L. Ed. 411; Hancock Nat. Bank *v.* Farnum, 176 U. S. 640, 44 L. Ed. 619; Armstrong *v.* Carson, 2 Dall. 302, 1 L. Ed. 391.

"This is precisely the same case as that of Mills *v.* Duryee, 7 Cranch 481, 3 L. Ed. 411; the court cannot distinguish the two cases. The doctrine there held was, that the judgment of a state court should have the same credit, validity and effect, in every other court in the United States, which it had in the state where it was pronounced, and that whatever pleas would be good to a suit thereon in such state, and none others, could be pleaded in any other court in the United States." Hampton *v.* McConnell, 3 Wheat. 234, 4 L. Ed. 378.

3. Nil debet not a proper plea.—Mills *v.* Duryee, 7 Cranch 481, 3 L. Ed. 411; Hilton *v.* Guyot, 159 U. S. 113, 40 L. Ed. 95; D'Arcy *v.* Ketchum, 11 How. 165, 13 L. Ed. 648; Hampton *v.* McConnell, 3 Wheat. 234, 4 L. Ed. 378; Armstrong *v.* Carson, 2 Dall. 302, 1 L. Ed. 391; Christmas *v.* Russell, 5 Wall. 290, 18 L. Ed. 475; Maxwell *v.* Stewart, 22 Wall. 77, 22 L. Ed. 564.

"Since the case of Mills *v.* Duryee (7 Cranch 481, 3 L. Ed. 411), it has been settled in this court that nil debet is not a good plea to an action upon a judgment in another state." Maxwell *v.* Stewart, 22 Wall. 77, 22 L. Ed. 564.

"The question in this case is, whether nil debet is a good plea to an action of debts brought in the courts of this district on a judgment rendered in a court of record of the state of New York, one of the United States? The decision of this question depends altogether upon the construction of the constitution and laws of the United States. By the constitution, it is declared, that 'full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state; and the congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof.' By the act of 26th May 1790, ch. 11, congress provided for the mode of authenticating the records and judicial proceedings of the state courts, and then further declared, that 'the record and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have, by law or usage, in the courts of the state from whence the said records are or shall be taken.' It is argued, that this act provides only for the admission of such records as evidence, but does not declare the effect of such evidence, when admitted. This argument cannot be supported. The act declares, that the record, duly authenticated, shall have such faith and credit as it has in the state court from whence it is taken. If in such court it has the faith and credit of evidence of the highest nature, viz, record evidence, it must have the same faith and credit in every other court. Congress have therefore declared the effect of the record, by declaring what faith and credit shall be given to it. It remains only then to inquire, in every case, what is the effect of a judgment in the state where it is rendered? In the present case, the defendant had full notice of the suit, for he was arrested and gave bail, and it is beyond all doubt, that the judgment of the supreme court of New York was conclusive upon the parties in that state. It must, therefore, be conclusive here also." Mills *v.* Duryee, 7 Cranch 481, 3 L. Ed. 411.

"It is said, that admitting that the judgment is conclusive, still nil debet was a good plea; and nul tiel record could not be pleaded, because the record was of another state, and could not be inspected or transmitted by certiorari. Whatever may be the validity of the plea of nil debet,

conclusive between the parties, it should be denied by the plea of nul tiel record.[4]

(b) *Where It Is Sought to Contradict the Record.*—It has been held that if it appears on the face of the record that the court did have jurisdiction, extrinsic evidence to contradict it is not admissible under a plea of nul tiel record.[5] Nul tiel record puts in issue only the fact of the existence of the record, and is met by the production of the record itself valid upon its face, or an exemplification duly authenticated under the act of congress.[6] A defense requiring evidence to contradict the record must necessarily admit that the record exists as a matter of fact, and seek relief by avoiding its effect. It should, therefore, be formally pleaded, in order that the facts upon which it is predicated may be admitted or put in issue. Under the common-law system of pleading, this would be done by a special plea. The equivalent of such a plea is required under any system. The precise form in which the statement should be made will depend upon the practice of the court in which it is to be used, but it must be made in some form.[7]

III. Judgments of Foreign Countries.

A. Conclusiveness and Effect—1. General Rule.—Judgments in Rem or in Nature Thereof.—A valid foreign judgment in rem would seem to be

after verdict, it cannot be sustained in this case. The pleadings in an action are governed by the dignity of the instrument on which it is founded. If it be a record, conclusive between the parties, it cannot be denied but by the plea of nul tiel record; and when congress gave the effect of a record to the judgment, it gave all the collateral consequences. There is no difficulty in the proof. It may be proved in the manner prescribed by the act, and such proof is of as high a nature as an inspection, by the court, of its own record, or as an exemplification would be in any other court of the same state. Had this judgment been sued in any other court of New York, there is no doubt that nil debet would have been an inadmissible plea. Yet the same objection might be urged, that the record could not be inspected. The law, however, is undoubted, that an exemplification would, in such case, be decisive. The original need not be produced." Mills *v.* Duryee, 7 Cranch 481, 3 L. Ed. 411.

A judgment having been obtained in the supreme court of New Jersey an action of debt was brought upon it in the United States circuit court in Pennsylvania and the defendant pleaded nil debet. It was held that if the plea would be bad in New Jersey it was inadmissible in any court sitting in Pennsylvania. Armstrong *v.* Carson, 2 Dall. 302, 303, 1 L. Ed. 391.

Generally, as to the propriety, form and sufficiency of plea of nil debet, see the title PLEADING.

4. Propriety of plea of nul tiel record.—Mills *v.* Duryee, 7 Cranch 481, 3 L. Ed. 411; McElmoyle *v.* Cohen, 13 Pet. 312, 10 L. Ed. 177; Hilton *v.* Guyot, 159 U. S. 113, 40 L. Ed. 95.

"The pleadings in an action are governed by the dignity of the instrument on which it is founded. If it be a record, conclusive between the parties, it cannot be denied but by the plea of nul tiel record; and when congress gave the effect of a record to the judgment, it gave all the collateral consequences." Mills *v.* Duryee, 7 Cranch 481, 3 L. Ed. 411.

Generally, as to the propriety, form and sufficiency of plea of nul tiel record, see the title PLEADING.

5. Extrinsic evidence to contradict record not admissible under plea of nul tiel record.—Hill *v.* Mendenhall, 21 Wall. 453, 22 L. Ed. 616.

6. Effect of plea of nul tiel record—How met.—Hill *v.* Mendenhall, 21 Wall. 453, 22 L. Ed. 616. See, generally, the title PLEADING.

7. Necessity for special plea or equivalent thereof.—Hill *v.* Mendenhall, 21 Wall. 453, 22 L. Ed. 616.

"Defects appearing on the face of the record may be taken advantage of upon its production under a plea of nul tiel record, but those which require extrinsic evidence to make them apparent must be formally alleged before they can be proved. This we believe to be in accordance with the practice of all courts in which such defenses have been allowed, and it is certainly the logical deduction from the elementary principles of pleading." Hill *v.* Mendenhall, 21 Wall. 453, 22 L. Ed. 616.

Where suit is brought on a record which shows that service was not made on the defendant, but which shows also that an appearance was entered for him by an attorney of the court, it is not allowable, under a plea of nul tiel record only, to prove that the attorney had no authority to appear. Presumptively, an attorney of a court of record, who appears for a party, has authority to appear for him; and though the party for whom he has appeared, when sued on a record in which judgment has been entered against him on such attorney's appearance, may prove that the attorney had no authority to

evidence of the facts adjudicated against all the world.[8] Thus, a judgment in rem, adjudicating the title to a ship or other moveable property within the custody of the court, is treated as valid everywhere.[9] So, also, a judgment affecting the status of persons, such as a decree confirming or dissolving a marriage, is regarded as valid in every country, unless contrary to the policy of its own law.[10] Other judgments, not strictly in rem, under which a person has been compelled to pay money, are so far conclusive that the justice of the payment cannot be impeached in another country, so as to compel him to pay it again.[11] For instance, a judgment in foreign attachment is conclusive, as between the parties, of the right to the property or money attached.[12]

Judgments in Personam.—While the decisions of the United States supreme court have, as already seen, recognized that judgments of a foreign state are prima facie evidence only,[13] yet, it has been held in a recent decision, reviewing the English and American authorities, that, in view of all the authorities upon the subject, and of the trend of judicial opinion in this country and in England, where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law and in fact.[14]

appear, yet he can do this only on a special plea, or on such plea as under systems which do not follow the common-law system of pleading, is the equivalent of such plea. Hill *v.* Mendenhall, 21 Wall. 453, 22 L. Ed. 616.

Averment of jurisdiction in complaint and denial in answer.—In Knowles *v.* Gaslight, etc., Co., 19 Wall. 58, 22 L. Ed. 70, the issue was directly made by an averment of jurisdiction in the complaint and a denial in the answer. See, also, Hill *v.* Mendenhall, 21 Wall. 453, 22 L. Ed. 616.

Issue made by plea and replication.—In Thompson *v.* Whitman, 18 Wall. 457, 21 L. Ed. 897, issue was made by plea and replication. See, also, Hill *v.* Mendenhall, 21 Wall. 453, 22 L. Ed. 616.

8. **Foreign judgments in rem conclusive against the world.**—Ennis *v.* Smith, 14 How. 400, 14 L. Ed. 472; Hilton *v.* Guyot, 159 U. S. 113, 40 L. Ed. 95; Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265, 32 L. Ed. 239. See, generally, the titles JUDGMENTS AND DECREES; RES ADJUDICATA; and the specific titles relating to proceedings in rem.

As to the rule that there must be a valid judgment by a court of competent jurisdiction, see post, "Conclusiveness as Dependent upon Existence of Valid Adjudication by Court of Competent Jurisdiction," III, A, 2.

9. **Judgments adjudicating title to ship or other moveable property.**—Hilton *v.* Guyot, 159 U. S. 113, 40 L. Ed. 95.

As to conclusiveness and effect of decrees in admiralty, see the titles ADMIRALTY, vol. 1, p. 178; PRIZE.

10. **Judgments affecting status of persons.**—Hilton *v.* Guyot, 159 U. S. 113, 40 L. Ed. 95, citing Cheely *v.* Clayton, 110 U. S. 701, 28 L. Ed. 298. See the title DIVORCE AND ALIMONY, vol. 5, p. 412.

11. **Application of rule to judgments compelling payment of money.**—Hilton *v.* Guyot, 159 U. S. 113, 40 L. Ed. 95.

12. **Judgments in foreign attachment.**—Hilton *v.* Guyot, 159 U. S. 113, 40 L. Ed. 95, citing Story on Conflict of Laws (2d Ed.), § 592a.

E. a creditor of F., attached the effects of F. in a foreign country, in the hands of S., the agent of F.; S. appeared and made defense. The court adjudged that the money in the hands of S. was the property of F., and compelled him, by their judgment, to pay E. his debt out of it. R. brought an action against E. for the money, claiming that it was his property and not that of F. It was held by the Pennsylvania supreme court that the judgment itself was conclusive, as the decision of a competent tribunal, upon a subject in litigation. Rapelje *v.* Emery, 2 Dall. 231, 233, 1 L. Ed. 361.

13. **Judgments of foreign state held prima facie evidence only.**—See ante, "In Absence of Constitutional and Statutory Provisions," II, B, 1.

14. **General rule as to effect and conclusiveness of foreign judgments in courts of United States.**—Hilton *v.* Guyot, 159 U.

2. Conclusiveness as Dependent upon Existence of Valid Adjudication by Court of Competent Jurisdiction—a. *In General.*—It may be stated as a general principle affecting the conclusiveness of such judgments, that every foreign judgment, of whatever nature, in order to be entitled to any effect, must have been rendered by a court having jurisdiction of the cause, and upon regular proceedings and due notice.[15]

b. *Impeachment for Want of Jurisdiction.*—As to judgments of foreign countries, it is well settled that the inquiry is always open, whether the court by which it was rendered had jurisdiction of the person or the thing.[16]

c. *Effect of Fraud.*—**In General.**—Both in this country and in England, a foreign judgment may be impeached for fraud,[17] and this has been held to be

S. 113, 40 L. Ed. 95, followed in Ritchie *v.* McMullen, 159 U. S. 235, 40 L. Ed. 133.

"When an action is brought in a court of this country, by a citizen of a foreign country against one of our own citizens, to recover a sum of money adjudged by a court of that country to be due from the defendant to the plaintiff, and the foreign judgment appears to have been rendered by a competent court, having jurisdiction of the cause and of the parties, and upon due allegations and proofs, and opportunity to defend against them, and its proceedings are according to the course of a civilized jurisprudence, and are stated in a clear and formal record, the judgment is prima facie evidence, at least, of the truth of the matter adjudged; and it should be held conclusive upon the merits tried in the foreign court, unless some special ground is shown for impeaching the judgment, as by showing that it was affected by fraud or prejudice, or that, by the principles of international law, and by the comity of our own country, it should not be given full credit and effect." Hilton *v.* Guyot, 159 U. S. 113, 40 L. Ed. 95.

For a full discussion of the effect given to foreign judgments in the courts of the different nations, see the case of Hilton *v.* Guyot, 159 U. S. 113, 40 L. Ed. 95.

15. Necessity for actual valid judgment by court of competent jurisdiction.—Hilton *v.* Guyot, 159 U. S. 113, 40 L. Ed. 95; Rose *v.* Himely, 4 Cranch 241, 2 L. Ed. 608.

Generally, as to the essentials of a valid judgment, see the titles JUDGMENTS AND DECREES; RES ADJUDICATA.

"In the courts of England, whose decisions are particularly mentioned, because we are best acquainted with them, and because, as is believed, they give to foreign sentences as full effect as are given to them in any part of the civilized world, the position that the sentence of a foreign court is conclusive with respect to what it professes to decide, is uniformly qualified, with the limitation, that it has, in the given case, jurisdiction of the subject matter." Rose *v.* Himely, 4 Cranch 241, 2 L. Ed. 608.

16. Impeachment by showing want of jurisdiction.—Thompson *v.* Whitman, 18 Wall. 457, 21 L. Ed. 897; Michaels *v.* Post, 21 Wall. 398, 22 L. Ed. 520; Christmas *v.* Russell, 5 Wall. 290, 18 L. Ed. 475; Ritchie *v.* McMullen, 159 U. S. 235, 40 L. Ed. 133; Hilton *v.* Yuyot, 159 U. S. 113, 40 L. Ed. 95.

If a claim be set up under the sentence of condemnation of a foreign court, the federal supreme court will examine into the jurisdiction of such court; and if that court cannot, consistently with the law of nations, exercise the jurisdiction which it has assumed, its sentence will be disregarded. Rose *v.* Himely, 4 Cranch 241, 2 L. Ed. 608. See the title PRIZE.

A judgment recovered in the common pleas, at Westminster, England, against a person in the United States, without any service of process on him, or any notice of the suit other than a personal one served on him in this country, has no validity here, even of a prima facie character. Bischoff *v.* Wethered, 9 Wall. 812, 19 L. Ed. 829.

"The doctrine thus stated but expressed a general principle expounded in previous decisions. Bischoff *v.* Wethered, 9 Wall. 812, 19 L. Ed. 829. In that case, speaking of a money judgment recovered in the common pleas of Westminster Hall, England, upon personal notice served in the city of Baltimore, Mr. Justice Bradley, speaking for the court, said (p. 814): 'It is enough to say (of this proceeding) that it was wholly without jurisdiction of the person, and whatever validity it may have in England, by virtue of statute law against property of the defendant there situate, it can have no validity here, even of a prima facie character. It is simply null.'" Haddock *v.* Haddock, 201 U. S. 562, 50 L. Ed. 867.

It is competent for a defendant in an action on a judgment of a sister state, as in an action on a foreign judgment, to set up, as a defense, want of jurisdiction, in that he was not an inhabitant of the state rendering the judgment and had not been served with process, and did not enter his appearance. Grover, etc., Sewing Machine Co. *v.* Radcliffe, 137 U. S. 287, 298, 34 L. Ed. 670.

Generally, as to collateral impeachment of judgments and decrees for want of jurisdiction, see the title JUDGMENTS AND DECREES.

17. Foreign judgment impeachable for fraud.—Hilton *v.* Guyot, 159 U. S. 113, 40

one respect in which judgments of the states of this country differ from the judgments of foreign countries.[18]

Judgments on Contracts in Evasion or Fraud of Laws of Forum.—It may be assumed that, as the courts of a country will not enforce a contract made abroad in evasion or fraud of its own laws, so they will not enforce a foreign judgment upon such a contract.[19]

L. Ed. 95; Ritchie *v.* McMullen, 159 U. S. 235, 40 L. Ed. 133; Michaels *v.* Post, 21 Wall. 398, 22 L. Ed. 520.

"Foreign judgments, by the rules of the common law, were only prima facie evidence of the debt adjudged to be due to the plaintiff, and every such judgment was open to examination, not only to show that the court in which it was rendered had no jurisdiction of the subject matter, but also to show that the judgment was fraudulently obtained." Michaels *v.* Post, 21 Wall. 398, 22 L. Ed. 520.

"There is no doubt that both in this country, as appears by the authorities already cited, and in England, a foreign judgment may be impeached for fraud. Shortly before the Declaration of Independence, the House of Lords, upon the trial of the Duchess of Kingston for bigamy, put to the judges the question whether—assuming a sentence of the ecclesiastical court against a marriage, in a suit for jactitation of marriage, to be conclusive evidence so as to prevent the counsel for the crown from proving the marriage upon an indictment for polygamy—'the counsel for the crown may be admitted to avoid the effect of such sentence, by proving the same to have been obtained by fraud or collusion.' Chief Justice De Grey, delivering the opinion of the judges, which was adopted by the House of Lords, answering this question in the affirmative, said: 'But if it was a direct and decisive sentence upon the point, and, as it stands, to be admitted as conclusive evidence upon the court, and not to be impeached from within; yet, like all other acts of the highest judicial authority, it is impeachable from without; although it is not permitted to show that the court was mistaken, it may be shown that they were misled. Fraud is an intrinsic collateral act; which vitiates the most solemn proceedings of courts of justice. Lord Coke says, it avoids all judicial acts, ecclesiastical or temporal.' 20 Howell's State Trials, 537, 543, note; S. C. in 2 Smith's Lead. Cas. All the subsequent English authorities concur in holding that any foreign judgment, whether in rem or in personam, may be impeached upon the ground that it was fraudulently obtained. White *v.* Hall (1806), 12 Ves. 321, 324; Bowles *v.* Orr (1835), 1 Yo. & Col. Exch. 464, 473; Price *v.* Dewhurst (1837), 8 Sim. 279, 302-305; Don *v.* Lippmann (1837), 5 Cl. & Fin. 1, 20; Bank of Australasia *v.* Nias (1851), 16 Q. B. 717, 735; Reimers *v.* Druce (1856), 23 Beavan 145, 150; Castrique *v.* Imrie (1870), L. R. 4 H. L. 414, 445, 446; Godard *v.* Gray (1870), L. R. 6 Q. B. 139, 149; Messina *v.* Petrococchino (1872), L. R. 4 P. C. 144, 157; Ochsenbein *v.* Papelier (1873), L. R. 8 Ch. 695." Hilton *v.* Guyot, 159 U. S. 113, 207, 40 L. Ed. 95.

Nature of fraud invalidating judgment.—"It has often, indeed, been declared by this court that the fraud which entitles a party to impeach the judgment of one of our own tribunals must be fraud extrinsic to the matter tried in the cause, and not merely consist in false and fraudulent documents or testimony submitted to that tribunal, and the truth of which was contested before it and passed upon by it. United States *v.* Throckmorton, 98 U. S. 61, 66, 25 L. Ed. 93; Vance *v.* Burbank, 101 U. S. 514, 519, 25 L. Ed. 929; Steel *v.* Smelting Co., 106 U. S. 447, 453, 27 L. Ed. 226; Moffat *v.* United States, 112 U. S. 24, 32, 28 L. Ed. 623; United States *v.* Minor, 114 U. S. 233, 242, 29 L. Ed. 110. And in one English case, where a ship had been sold under a foreign judgment, the like restriction upon impeaching that judgment for fraud was suggested; but the decision was finally put upon the ground that the judicial sale passed the title to the shop. Commell *v.* Sewell (1858-60), 3 H. & N. 617, 646; 5 H. & N. 728, 729, 742. But it is now established in England, by well considered and strongly reasoned decision of the court of appeal, that foreign judgments may be impeached, if procured by false and fraudulent representations and testimony of the plaintiff, even if the same question of fraud was presented to and decided by the foreign court." Hilton *v.* Guyot, 159 U. S. 113, 207, 40 L. Ed. 95, in which the court held that it was unnecessary to determine whether the decisions referred to could be followed in regard to foreign judgments, consistently with our own decisions as to impeaching domestic judgments for fraud, as there was a distinct ground upon which the court was satisfied that it was not required to give conclusive effect to the judgments in question.

Generally, as to collateral impeachment of judgments and decrees for fraud, see the title JUDGMENTS AND DECREES.

18. Element of distinction between foreign judgments and judgments of sister states.—See ante, "Status as Distinguished from Domestic Judgments or Judgments of Foreign Countries," II, A.

19. Judgments on contracts in evasion or fraud of laws of forum.—Hilton *v.* Guyot, 159 U. S. 113, 40 L. Ed. 95. See the title CONFLICT OF LAWS, vol. 3, p. 1045.

d. *Effect of Mistake or Irregularity.*—It has been held that the judgment of a foreign country may be impeached by showing that it was founded on clear mistake or irregularity.[20]

e. *Showing That Judgment Was Bad by the Law of Place Where Rendered.*—According to some authorities it has been held that the judgment of another country may be impeached by showing that it was bad by the law of the place where it was rendered.[21]

f. *Difference in Procedure Not Ground for Impeachment.*—Where all the essentials of a valid judgment have been complied with in the foreign tribunal rendering the judgment, the fact that the procedure in that tribunal in certain respects differs from that of our own courts, would not seem, of itself, a sufficient ground for impeaching such judgment.[22]

3. Credit and Conclusiveness as Dependent upon Reciprocity.—It would seem that judgments rendered in any foreign country, by the laws of which our own judgments are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are prima facie evidence only of the justice of the plaintiff's claim.[23]

4. Operation as Res Adjudicata.—For a full consideration of the effect and conclusiveness of the judgments and decrees of foreign countries when pleaded in bar of another action, or introduced in evidence in another action between the same parties, see the title Res Adjudicata.

B. Authentication.—Foreign judgments may be authenticated by an ex-

20. Showing that judgment was founded on clear mistake or irregularity.—Hilton *v.* Guyot, 159 U. S. 113, 40 L. Ed. 95, citing Story's Conflict of Laws, § 607; and 2 Kent Com. (6th Ed.) 120.

"The word 'mistake' was evidently used by Story and Kent, in this connection, not in its wider meaning of error in judgment, whether upon the law or upon the facts; but in the stricter sense of misapprehension or oversight, and as equivalent to what, in Burnham *v.* Webster, before cited, Mr. Justice Woodbury spoke of as 'some objection to the judgment's reaching the merits, and tending to prove that they had not been acted on;' 'some accident or mistake,' or 'that the court did not decide at all on the merits.' 1 Woodb. & Min. 180." Hilton *v.* Guyot, 159 U. S. 113, 194, 40 L. Ed. 95. See, generally, the title MISTAKE AND ACCIDENT.

21. Showing judgment to be bad by law of place where rendered.—Hilton *v.* Guyot, 159 U. S. 113, 40 L. Ed. 95, citing Story's Conflict of Laws. § 607; and 2 Kent Com. (6th Ed.) 120.

22. Difference in procedure not ground for impeachment.—"It is next objected that in those courts one of the plaintiffs was permitted to testify not under oath, and was not subjected to cross-examination by the opposite party, and that the defendants were, therefore, deprived of safeguards which are by our law considered essential to secure honesty and to detect fraud in a witness; and also that documents and papers were admitted in evidence, with which the defendants had no connection, and which would not be admissible under our own system of jurisprudence. But it having been shown by the plaintiffs, and hardly denied by the defendants, that the practice followed and the method of examining witnesses were according to the laws of France, we are not prepared to hold that the fact that the procedure in these respects differed from that of our own courts is, of itself, a sufficient ground for impeaching the foreign judgment." Hilton *v.* Guyot, 159 U. S. 113, 205, 40 L. Ed. 95.

23. Effect as dependent on that given judgments of this country by foreign country.—Hilton *v.* Guyot, 159 U. S. 113, 40 L. Ed. 95, applying this rule to a judgment rendered in France.

Reason for this view.—"In holding such a judgment, for want of reciprocity, not to be conclusive evidence of the merits of the claim, we do not proceed upon any theory of retaliation upon one person by reason of injustice done to another; but upon the broad ground that international law is founded upon mutuality and reciprocity, and that by the principles of international law recognized in most civilized nations, and by the comity of out own country, which it is our judicial duty to know and to declare, the judgment is not entitled to be considered conclusive." Hilton *v.* Guyot, 159 U. S. 113, 227, 40 L. Ed. 95.

"By the law of England, prevailing in Canada, a judgment rendered by an American court under like circumstances would be allowed full and conclusive effect. Scott *v.* Pilkington, 2 B. & S. 11; Abouloff *v.* Oppenheimer, 10 Q B. D. 295, 307; Vadala *v.* Lowes, 25 Q. B. D. 310, 316; Nouvion *v.* Freeman, 15 App. Cas. 1, 10; Fowler *v.* Vail, 27 Upper Canada C. P. 417, and 4 Ontario App. 267." Ritchie *v.* McMullen, 159 U. S. 235, 40 L. Ed. 133.

emplification under the great seal;[24] by a copy proved to be a true copy,[25] or by the certificate of an officer authorized by law, which certificate must itself be properly authenticated.[26] These are the usual, and appear to be the most proper, if not the only, modes of verifying foreign judgments. If they be all beyond the reach of the party, other testimony, inferior in its nature, might be received.[27]

C. Enforcement—1. In General.—In the case of judgments of foreign countries as in the case of the judgments of state courts when presented in the courts of a sister state,[28] execution will not be given upon them, but they must be enforced by an action for that purpose.[29]

2. Form of Action.—At common law the form of action upon a foreign judgment was either in debt as for a definite sum of money due by simple contract, or in assumpsit upon such a contract.[30]

3. Pleading—a. *Matters Pleadable by Way of Defense.*—As to what matters may be pleaded by the defendant by way of defense to an action on a foreign judgment, as for instance, want of jurisdiction, fraud, etc., see ante, "Conclusiveness as Dependent upon Existence of Valid Adjudication by Court of Competent Jurisdiction," III, A, 2.

24. Exemplification under great seal.—Church *v.* Hubbard, 2 Cranch 187, 2 L. Ed. 249.

25. By proved copy.—Church *v.* Hubbard, 2 Cranch 187, 2 L. Ed. 249.

26. By properly authenticated certificate of authorized officer.—Church *v.* Hubbard, 2 Cranch 187, 2 L. Ed. 249.

Instances of authentication held sufficient.—If the decrees of the Portuguese colonies are transmitted to the seat of government, and registered in the department of state, a certificate of that fact, under the great seal, with a copy of the decree, authenticated in the same manner would be sufficient prima facie evidence. Church *v.* Hubbard, 2 Cranch 187, 2 L. Ed. 249.

Copies of the proceedings in the vice-admiralty court of Jamaica are admissible in evidence, when certified under the seal of the court, by the deputy registrar, who is certified by the judge of the court, who is certified by a notary public. Yeaton *v.* Fry, 5 Cranch 335, 3 L. Ed. 117.

"The sentence in this case is sufficiently authenticted to be received as evidence. Being a court acting under the law of nations, its proceedings may be proved according to the mode observed in the present case; and were this doubtful, that doubt would be removed by the circumstance, that it is the form stipulated by treaty." Yeaton *v.* Fry, 5 Cranch 335, 3 L. Ed. 117.

A copy of a decree by the governor of East Florida, granting land to a petitioner, while Spain had possession of the territory, certified by the secretary of the government to have been faithfully made from the original in the secretary's office, is evidence in the courts of the United States. By the laws of Spain, prevailing in the province at that time, the secretary was the proper officer to give copies; and the law trusted him for this particular purpose, so far as he acted under its authority; the original was confined to the public office. United States *v.* Wiggins, 14 Pet. 334, 10 L. Ed. 481.

Instances of insufficient authentication.—In the case of Church *v.* Hubbard, 2 Cranch 187, 2 L. Ed. 249, it was held that the certificate of a consul, under his consular seal, is not a sufficient authentication of a foreign law, to make it evidence; it not being one of his consular functions to grant such certificates; and also, that the proceedings of a foreign court, under the seal of a person who styled himself the secretary of foreign affairs in Portugal was not evidence. Approved and followed in Stein *v.* Bowman, 13 Pet. 209, 10 L. Ed. 129.

The certificate and seal of the minister resident for Great Britain, from Hanover, is not a proper authentication of the proceedings of a foreign court, or of the proceedings of an officer authorized to take depositions; it is not connected in any way with the functions of the minister; his certificate and seal could only authenticate those acts which are appropriate to his office. Stein *v.* Bowman, 13 Pet. 209, 10 L. Ed. 129.

27. Propriety of resort to other inferior testimony.—Church *v.* Hubbard, 2 Cranch 187, 2 L. Ed. 249.

Generally, as to when secondary evidence may properly be resorted to, see the title BEST AND SECONDARY EVIDENCE, vol. 3, p. 214.

28. Application of same rule as in case of judgments of sister states.—See ante, "Necessity for New Suit," II, D, 1.

29. Enforcement through new action.—"Judgments are executory while unpaid, but in this country execution is not given upon a foreign judgment as such, it being enforced through a new judgment obtained in an action brought for that purpose." Per Fuller, C. J., dissenting in Hilton *v.* Guyot, 159 U. S. 113, 40 L. Ed. 95.

30. Enforcement by action of debt or assumpsit.—Hilton *v.* Guyot, 159 U. S.

b. *Requisites and Sufficiency.*—**In General.**—As has already been seen, in an action in the courts of this country upon a judgment rendered by the tribunal of a foreign country, the merits of the case should not be tried afresh, upon the mere assertion that the judgment was erroneous in law or in fact, and a defendant cannot be permitted upon that general ground to contest the validity or the effect of the judgment sued on.[31] His answer must plainly allege some special ground for not allowing the judgment full effect,[32] and must be sufficient to give the other party notice of the defenses which he must be prepared to meet.[33]

If it is intended to set up want of jurisdiction in the foreign court to render the judgment in question sufficient facts should be alleged to make such want of jurisdiction apparent.[34]

Allegations as to Fraud.—To warrant the impeaching of a foreign judgment because procured by fraud, fraud must be distinctly alleged and charged.[35]

Must Aver Facts and Not Legal Conclusions.—In accordance with the

113, 40 L. Ed. 95. See, generally, the titles ASSUMPSIT, vol. 2, p. 638; DEBT, THE ACTION OF, vol. 5, p. 205.

31. Mere assertion of error in law or fact insufficient.—See ante, "General Rule," III, A, 1.

32. Necessity for alleging special grounds for denying judgment full effect.—Ritchie *v.* McMullen, 159 U. S. 235, 40 L. Ed. 133.

General allegations setting up matters pleaded and triable in foreign court insufficient.—In Ritchie *v.* McMullen, 159 U. S. 235, 40 L. Ed. 133, the court in holding that the judgment sued on should be held conclusive of the matter adjudged said: "The defense set up in the answer to this action upon the Canadian judgment reduced themselves to an attempt, without any sufficient allegation of want of jurisdiction of the cause or of the defendant, or of any fraud in procuring that judgment, or of any other special ground for not allowing the judgment full effect, but upon general allegations setting up the same matters of defense which were pleaded and might have been tried in the foreign court, to reopen and try anew the whole merits of the original claim in an action upon the judgment. This, for the reason stated in Hilton *v.* Guyot, 159 U. S. 113, 40 L. Ed. 95, cannot be allowed."

33. Answer must apprise plaintiff of defenses which he must meet.—Ritchie *v.* McMullen, 159 U. S. 235, 40 L. Ed. 133.

34. Allegations as to want of jurisdiction in court rendering judgment.—In Ritchie *v.* McMullen, 159 U. S. 235, 40 L. Ed. 133, which was an action on a judgment of a Canadian court, the first part of the answer expressly admits that "certain attorneys entered, or undertook to enter, the appearance of this defendant in said action." As it did not allege that the attorneys were not authorized to enter the defendant's appearance in that action, it was held that they must be taken to have been authorized by him to do so. The second part of the answer described the defense, now undertaken to be made upon the merits of the case, as the one "stated in his answer in said original action in the province of Ontario," this clearly showing that he had not only appeared, but answered in that action. It was nowhere alleged that he appeared or answered in that court under compulsion or for any purpose except to contest his personal liability. It was held that he must therefore be taken to have voluntarily submitted himself to the jurisdiction of the court.

"The defendant, indeed, in the first part of his answer, alleges that the 'judgment was entered without his knowledge and in his absence, and without any hearing whatever;' and likewise, in the second part of his answer 'says that he was not present at the time that said pretended judgment was rendered,' and 'denies that any hearing occurred before said court,' and 'says that said judgment was irregular and without evidence,' and 'entered up against him in his absence, without his knowledge.' But, as he had once submitted himself to the jurisdiction of the court, all these allegations and denials are quite consistent with the position, taken by the plaintiffs at the argument here, that the defendant, at the time appointed for the hearing, failed to appear and made default, and therefore no hearing or evidence was necessary to entitle the court to proceed to judgment." Ritchie *v.* McMullen, 159 U. S. 235, 40 L. Ed. 133.

Generally, as to the effect of an appearance as waiving objections to the jurisdiction, see the title APPEARANCES, vol. 2, p. 443.

35. Necessity for distinct allegations as to fraud relied on to impeach judgment.—Ritchie *v.* McMullen, 159 U. S. 235, 40 L. Ed. 133, in which the court said: "This answer does not even contain a general charge that the judgment was procured by fraud, or any equivalent allegations. And the only matter specified, from which fraud is sought to be inferred, are those already considered, which have no tendency to prove it and the knowledge which the plaintiffs had of the real purpose of the contract, which is referred to, not as a ground for charging fraud in procuring the judgment, but only as inci-

general rules of pleading, the answer in an action on a foreign judgment must set out facts and not mere averments of legal conclusions.[36]

FOREIGN JURISPRUDENCE.—See note 1.

FOREIGN LAWS.

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I. What Are Foreign Laws.

A. Laws of the States—1. IN FEDERAL COURTS.—It can never be main-

dental to and in explanation of the allegation that the plaintiffs never tendered, or delivered, or attempted to deliver, any bonds to the defendant, in accordance with the written contract. To treat the loose and imperfect allegations of this answer as duly setting up a defense of fraud would be inconsistent with all precedent, and would ignore the duty of giving the other party notice of the defenses which he must be prepared to meet."

Generally, as to the necessity, manner and sufficiency of charging fraud, see the title FRAUD AND DECEIT, and the cross references there found.

36. **Averment of legal conclusions insufficient.**—In Ritchie *v.* McMullen, 159 U. S. 235, 40 L. Ed. 133, the court held that the general averments, in the first part of the answer, that the judgment was "an irregular and void judgment," and, in the second part, that "said judgment was irregular," and, "without any jurisdiction or authority on the part of the court to enter such a judgment upon the facts and upon the pleadings in said action," are but averments of legal conclusions, and wholly insufficient to impeach the judgment, without specifying the grounds upon which it is supposed to be irregular and void, or without jurisdiction or authority to enter it.

Generally, as to the impropriety of averring legal conclusions, see the title LEGAL CONCLUSIONS.

1. **Foreign jurisprudence.**—The judicial power conferred on the general government, by the constitution, extends to many cases arising under the laws of the different states. And the supreme court is called upon, in the exercise of its appellate jurisdiction, constantly to take notice of and administer the jurisprudence of all the states. That jurisdiction is in no just sense a **foreign jurisprudence,** to be proved in the courts of the United States, by the ordinary modes of proof by which the laws of a foreign country are to be established; but it is to be judicially taken notice of, in the same manner as the laws of the United States. Owings *v.* Hull, 9 Pet. 607, 625, 9 L. Ed. 246.

tained in the courts of the United States that the laws of any state of this Union are to be treated as the laws of a foreign nation.[1]

2. In State Courts.—The several states of the Union are to be considered in some respects[2] as foreign to each other, and the courts of one state are not presumed to know the laws of another state.[3]

B. Laws of Great Britain Since the Declaration of Independence.—The law of Great Britain since the Declaration of Independence is the law of a foreign country.[4]

C. Laws of Territories Ceded to the United States.—But the laws of territories ceded to the United States, under which titles are claimed, are not treated by the supreme court as foreign laws.[5]

II. Foreign Laws in Evidence.

A. Judicial Notice—1. In General.—The rule that the courts of one country cannot take cognizance of the law of another without plea and proof has been constantly maintained, at law and in equity, in England and America. The existence of a foreign law, written or unwritten, cannot be judicially noticed.[6]

2. Laws of Territories Ceded to the United States.—The laws of territories ceded to the United States, under which titles were claimed, were never treated by the federal supreme court as foreign laws, to be decided as a question

1. In federal courts.—United States *v.* Turner, 11 How. 663, 667, 13 L. Ed. 857. See, generally, the title JUDICIAL NOTICE.

2. In state courts.—Buckner *v.* Finley, 2 Pet. 586, 590, 7 L. Ed. 528.

"Whenever a court of one state is required to ascertain what effect a public act of another state has in that state, the law of such other state must be proved as a fact." Chicago, etc., Railroad *v.* Wiggins Ferry Co., 119 U. S. 615, 30 L. Ed. 519; Hanley *v.* Donoghue, 116 U. S. 1, 29 L. Ed. 535; Lloyd *v.* Matthews, 155 U. S. 222, 227, 39 L. Ed. 128.

3. Hanley *v.* Donoghue, 116 U. S. 1, 4, 29 L. Ed. 535.

4. Laws of Great Britain since the Declaration of Independence.—Liverpool Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 445, 32 L. Ed. 788. See, generally, the title COMMON LAW, vol. 3, p. 958.

5. Laws of territories ceded to the United States.—Fremont *v.* United States, 17 How. 542, 15 L. Ed. 241. See post, "Laws of Territories Ceded to the United States," II, A, 2.

6. Plea and proof.—Church *v.* Hubbart, 2 Cranch 187, 236, 2 L. Ed. 249; Ennis *v.* Smith, 14 How. 399, 400, 426, 427, 14 L. Ed. 472; Dainese *v.* Hale, 91 U. S. 13, 20, 21, 23 L. Ed. 190; Pierce *v.* Indseth, 106 U. S. 546, 27 L. Ed. 254; Liverpool Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 445, 32 L. Ed. 788; Armstrong *v.* Lear, 8 Pet. 52, 73, 8 L. Ed. 863; Strother *v.* Lucas, 6 Pet. 763, 8 L. Ed. 573; Talbot *v.* Seeman, 1 Cranch 1, 38, 2 L. Ed. 15.

The court cannot ordinarily take judicial notice of foreign laws and usages; a party claiming the benefit of them by way of justification must plead them. Dainese *v.* Hale, 91 U. S. 13, 14, 23 L. Ed. 190.

The defendant, as consul-general of Egypt, in 1864 issued an attachment against the goods of the plaintiff, there situate. The plaintiff, and the persons at whose suit the attachment was issued, were citizens of the United States, and not residents or sojourners in the Turkish dominions. For this act the plaintiff brought suit to recover the value of the goods attached. The defendant pleaded his official character, and, as incident thereto, claimed jurisdiction to entertain the suit in which the attachment was issued. Held, that the plea was defective for not setting forth the laws or usages of Turkey upon which, by the treaty and act of congress conferring the jurisdiction, the latter was made to depend, and which alone would show its precise extent, and that it embraced the case in question. Dainese *v.* Hale, 91 U. S. 13, 14, 23 L. Ed. 190.

"Foreign laws and usages are, as to us, matters of fact, and not matters of law; and although the court may take judicial cognizance of many matters of fact of public importance, yet of foreign laws and customs, which are multiform and special in their character, it would be very dangerous for it to do so, at least without having had them brought to its attention and knowledge by previous adjudications or proofs." Dainese *v.* Hale, 91 U. S. 13, 20, 23 L. Ed. 190.

Law of Great Britain.—The law of Great Britain since the Declaration of Independence is the law of a foreign country, and, like any other foreign law, is matter of fact, which the courts of this country cannot be presumed to be acquainted with, or to have judicial knowledge of, unless it is pleaded and proved. Liverpool Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 445, 32 L. Ed. 788.

of fact; but the court held itself bound to notice them judicially, as much so as the laws of a state of the Union.[7]

3. Laws of the States—a. *In Federal Courts.*—As the laws of the different states are not treated as foreign laws in the federal courts—see ante, "In Federal Courts," I, A, 1—this part of the subject is treated under the title Judicial Notice.

b. *In State Courts.*—"Courts of one state do not take judicial notice of the laws of another state, whether written or unwritten. They must be proved as facts.[8]

B. Proof of Foreign Laws—1. In General.—"Foreign laws are well understood to be facts which must, like other facts, be proved to exist, before they can be received in a court of justice.[9]

Foreign Municipal Laws.—Municipal laws of foreign countries are generally to be proved as facts.[10]

2. Marine Ordinances of Foreign Countries.—But marine ordinances of foreign countries, promulgated by the executive, by order of the legislature of the United States, may be read in the courts of the United States, without further authentication of proof.[11]

7. **Laws of territories ceded to the United States.**—Fremont *v.* United States, 17 How. 542, 15 L. Ed. 241.

"**The Spanish laws** which formerly prevailed in Louisiana, and upon which the titles to land in that state depend, must be judicially noticed and expounded by the court, like the laws affecting titles to real property in any other state." United States *v.* Turner, 11 How. 663, 667, 13 L. Ed. 857.

"**The laws of Mexico,** of force in Texas previous to the Texan revolution, were the laws not of a foreign, but of an antecedent government, to which the government of the United States, through the medium of the republic of Texas, is the direct successor. Its laws are not deemed foreign laws; for as to that portion of our territory they are domestic laws; and we take judicial notice of them." Fremont *v.* United States, 17 How. 542, 557, 15 L. Ed. 241; United States *v.* Perot, 98 U. S. 428, 430, 25 L. Ed. 251.

The courts of the United States take judicial notice of the laws and regulations of Mexico pertaining to grants made prior to the cession. United States *v.* Chaves, 159 U. S. 452, 459, 40 L. Ed. 215.

8. **In state courts.**—Talbot *v.* Seeman, 1 Cranch 1, 38, 2 L. Ed. 15; Livingston *v.* Maryland Ins. Co., 6 Cranch 274, 3 L. Ed. 222; Ennis *v.* Smith, 14 How. 399, 400, 426, 14 L. Ed. 472; Pierce *v.* Indseth, 106 U. S. 546, 551, 27 L. Ed. 254; Chicago, etc., Railroad *v.* Wiggins Ferry Co., 119 U. S. 615, 622, 30 L. Ed. 519; Lloyd *v.* Matthews, 155 U. S. 222, 39 L. Ed. 128; Eastern Building, etc., Ass'n *v.* Ebaugh, 185 U. S. 114, 121, 46 L. Ed. 830; Nashua Savings Bank *v.* Anglo-American Land Co., 189 U. S. 221, 47 L. Ed. 782; Eastern Building, etc., Ass'n *v.* Williamson, 189 U. S. 122, 125, 47 L. Ed. 735.

"Whenever it becomes necessary for a court of one state, in order to give full faith and credit to a judgment rendered in another state, to ascertain the effect which it has in that state, the law of that state must be proved, like any other matter of fact." Hanley *v.* Donoghue, 116 U. S. 1, 5, 29 L. Ed. 535. See, generally, the title FOREIGN JUDGMENTS, RECORDS AND JUDICIAL PROCEEDINGS, ante, p. 335.

But where one state recognizes acts done in pursuance of the laws of another state, its courts will take judicial cognizance of those laws, so far as it may be necessary to determine the validity of the acts alleged to be in conformity with them. Carpenter *v.* Dexter, 8 Wall. 513, 531, 19 L. Ed. 426.

9. **Proof of foreign laws in general.**—Church *v.* Hubbart, 2 Cranch 187, 236, 2 L. Ed. 249.

10. **Foreign municipal laws.**—The Amelia, 1 Cranch 1, 2 L. Ed. 15; The Scotia, 14 Wall. 170, 188, 20 L. Ed. 822.

11. **Marine ordinances of foreign countries.**—The Amelia, 1 Cranch 1, 2 L. Ed. 15.

"That the laws of a foreign nation, designed only for the direction of its own affairs, are not to be noticed by the courts of other countries, unless proved as facts, and that this court, with respect to facts, is limited to the statement made in the court below, cannot be questioned. The real and only question is, whether the public laws of a foreign nation, on a subject of common concern to all nations, promulgated by the governing powers of a country, can be noticed as law, by a court of admiralty of that country, or must be still further proved as a fact. The negative of this proposition has not been maintained in any of the authorities which have been adduced. On the contrary, several have been quoted (and such seems to have been the general practice), in which the marine ordinances of a foreign nation are read as law, without being proved as facts. It has been said,

3. Manner of Proof.—**Written and Unwritten Laws.**—The general rule as to the proof of foreign laws is that the law which is written, that is, statute law, must be proved by a copy properly authenticated;[12] and that the unwritten law must be proved by the testimony of experts, that is, by those acquainted with the law.[13] As to the manner of authenticating the law, there is no general rule, except this, that no proof shall be received, which presupposes better testimony behind, and attainable by the party.[14] They may be verified by an oath,[15] or by an exemplification of a copy, under the great seal of a state;[16] or, by a copy, proved to be a true copy by a witness who has examined and compared it with

that this is done by consent; that it is a matter of general convenience, not to put parties to the trouble and expense of proving permanent and well-known laws which it is in their power to prove; and this opinion is countenanced by the case cited from Douglas. If it be correct, yet, this decree having been promulgated in the United States as the law of France, by the joint act of that department which is entrusted with foreign intercourse, and of that which is invested with the powers of war, seems to assume a character of notoriety which renders it admissible in our courts. It is, therefore, the opinion of the court, that the decree should be read as an authenticated copy of a public law of France, interesting to all nations." The Amelia, 1 Cranch 1, 38, 2 L. Ed. 15.

12. Written laws.—Ennis *v.* Smith, 14 How. 399, 400, 14 L. Ed. 472; Pierce *v.* Indseth, 106 U. S. 546, 551, 27 L. Ed. 254.

A party domiciled in France died intestate as to property owned in the United States. In a proceeding to distribute this property the code civil of France, with the indorsement "Les Grande des Sceaux de France a la Coeur Supreme Des Etats Unis," is offered as evidence to show the law of France for the distribution of such property. Held, that the code civil, with its indorsement, being a certified official publication received by the supreme court of the United States through the course of our national exchange of laws with France, is sufficiently authenticated to make it evidence in this proceeding, and that it would be so in any other case in which it may be offered. Ennis *v.* Smith, 14 How. 399, 400, 423, 14 L. Ed. 472.

"A foreign written law may be received, when it is found in a statute book, with proof that the book has been officially published by the government which made the law." Ennis *v.* Smith, 14 How. 399, 428, 14 L. Ed. 472.

"This rule may be varied by statute, and that of Minnesota leaves it to the discretion of the judge to require the production of a copy of the written law when the fact appears that the law in question is in writing." Pierce *v.* Indseth, 106 U. S. 546, 551, 27 L. Ed. 254.

"The testimony of the lawyer of Norway as to the law of that country was admissible under the statute of Minnesota, which provides that 'the existence and the tenor or effect of all foreign laws may be proved as facts by parol evidence, but if it appears that the law in question is contained in a written statute or code, the court may, in its discretion, reject any evidence of such law that is not accompanied by a copy thereof.'" Pierce *v.* Indseth, 106 U. S. 546, 550, 27 L. Ed. 254.

"The written foreign law may be proved, by a copy of the law properly authenticated." Ennis *v.* Smith, 14 How. 399, 425, 14 L. Ed. 472.

13. Unwritten laws.—Ennis *v.* Smith, 14 How. 399, 425, 14 L. Ed. 472.

If foreign laws and regulations respecting trade be not proved to have been in writing, as public edicts, they may be proved by parol. Livingston *v.* Maryland Ins. Co., 6 Cranch 274, 3 L. Ed. 222.

The existence of a foreign law, especially when unwritten, is a fact to be proved like any other by appropriate evidence. United States *v.* Wiggins, 14 Pet. 334, 10 L. Ed. 481.

14. Manner of proof in general.—Ennis *v.* Smith, 14 How. 399, 425, 14 L. Ed. 472; Church *v.* Hubbart, 2 Cranch 187, 236, 2 L. Ed. 249. See, generally, the title BEST AND SECONDARY EVIDENCE, vol. 3, p. 214.

If the best methods be all beyond the reach of the party, other testimony, inferior in its nature, might be received. But where it does not appear that there was any insuperable impediment to the use of either of these modes, the court cannot presume such impediment to have existed. Church *v.* Hubbart, 2 Cranch 187, 238, 2 L. Ed. 249.

15. Sanction of an oath.—Ennis *v.* Smith, 14 How. 399, 425, 14 L. Ed. 472; Church *v.* Hubbart, 2 Cranch 187, 236, 2 L. Ed. 249.

"The sanction of an oath is required for their establishment, unless they can be verified by some other such high authority, that the law respected not less than the oath of an individual." Ennis *v.* Smith, 14 How. 399, 426, 14 L. Ed. 472; Church *v.* Hubbart, 2 Cranch 187, 2 L. Ed. 249.

16. Exemplified copy.—Ennis *v.* Smith, 14 How. 399, 425, 14 L. Ed. 472; Church *v.* Hubbart, 2 Cranch 187, 238, 2 L. Ed. 249.

Under the act of the 26th of May, 1790, c. 38, copies of the legislative acts of the several states, authenticated by having

the original; or by a certificate of an officer, properly authorized, by law, to give the copy,[17] which certificate must be duly proved. But such modes of proof as have been mentioned are not to be considered exclusive of others,[18] especially of codes of laws and accepted histories of the law of a country.[19]

III. Extraterritorial Effect of Foreign Laws.

For a detailed discussion of this subject, see, generally, the title CONFLICT OF LAWS, vol. 3, p. 1020.

FOREIGN MINISTER.—See note 1.

the state seal affixed thereto, are conclusive evidence of such acts, in the courts of other states, and of the Union. No other formality is required than the annexation of the seal; and in the absence of all contrary proof, it must be presumed to have been done by an officer having the custody thereof, and competent authority to do the act. United States *v.* Amedy, 11 Wheat. 392, 6 L. Ed. 502.

The exemplification of the laws of Maryland have been admitted, when under the great seal of Maryland, without any further attestation. United States *v.* Johns, 4 Dall. 412, 416, 1 L. Ed. 888.

Upon argument in supreme court.—A paper certified by the secretary of state of Rhode Island, and by the governor, under the seal of the state, stating that certain laws were passed by the legislature of that state, and that certain matters were cognizable by the general assembly of Rhode Island, and of the practice of the assembly of Rhode Island, in cases of a particular description, is not evidence on the argument of a cause before the federal supreme court. Usage and custom should be proved in the circuit court, on the trial of the case in which it may be referred to; and evidence of the same is not admissible in the supreme court, if not found in the record. Leland *v.* Wilkinson, 6 Pet. 317, 8 L. Ed. 412.

17. Ennis *v.* Smith, 14 How. 399, 425, 14 L. Ed. 472; Church *v.* Hubbart, 2 Cranch 187, 238, 2 L. Ed. 249.

A certificate of the proceedings of a court, under the seal of a consul in Portugal is not evidence. Church *v.* Hubbart, 2 Cranch 187, 2 L. Ed. 249.

"In Church *v.* Hubbart, 2 Cranch 187, 2 L. Ed. 249, this court said, that the edicts of Portugal, offered in evidence, would have been admissible, if the copies of them had been sworn to be true copies, by the American consul at Lisbon, instead of his having given his consular certificate, that they were true copies, because it was not one of the functions of a consul to authenticate foreign laws in that way." Ennis *v.* Smith, 14 How. 399, 426, 14 L. Ed. 472; Stein *v.* Bowman, 13 Pet. 209, 10 L. Ed. 129.

18. Ennis *v.* Smith, 14 How. 399, 429, 14 L. Ed. 472.

Expert evidence.—"In order to prove the incorporation of the plaintiff company, as well as the liability and rights of the stockholders, the deposition of an attorney and solicitor of the supreme court of judicature in England, who was also managing director of the plaintiff company, was read in evidence. His testimony showed that the plaintiff was a corporation organized with limited liability under five different acts of Parliament, from 1862 to 1880, copies of which he produced and delivered to the commissioner, stating that these copies were 'issued by authority, being printed by Her Majesty's printer, and are as such by law receivable in evidence without further proof.' To the admission of the statutes the defendant excepted upon the ground that they were not proved according to the established rules of law." Held, such evidence was properly received. In its argument the court said: "In most, if not all, of the states of this Union statutes have been passed permitting laws of sister states to be proved simply by the production of a book containing what purports to be an authorized edition of such laws printed by state authority. * * * While the same liberality is not extended to foreign laws required to be proved as facts, it would seem like sticking in the bark to hold that a foreign expert might testify orally as to what such laws were, and not be able to produce what purports to be the official edition of such laws, and to testify as to the authenticity of such edition, and to the fact that it was received as evidence in the domestic courts of that country. To the average mind it would seem as though there was much less liability to mistake in a printed copy of a statute from the official printer, than in a copy written and compared by an ordinary scrivener." Nashua Savings Bank *v.* Anglo-American Land Co., 189 U. S. 221, 229, 47 L. Ed. 782.

19. Ennis *v.* Smith, 14 How. 399, 429, 14 L. Ed. 472.

1. **Foreign minister.**—In the diplomatic use of the term, we call every minister a foreign minister who comes from another jurisdiction or government. Cherokee Nation *v.* Georgia, 5 Pet. 1, 56, 8 L. Ed. 25. See, also, the title AMBASSADORS AND CONSULS, vol. 1, p. 273.

FOREIGN NATION.—See FOREIGN COUNTRY, ETC., ante, p. 334. And see note 1.

FOREIGN PORTS.—Ports of states, other than those of the state where a vessel belongs, are considered as foreign ports, in the sense of the rule that owners of a vessel are liable for contracts of the master for repairs made and supplies furnished for the vessel's use in a foreign port.[2]

FOREIGN PRINCE OR STATE.—See the title NEUTRALITY.

FOREIGN STATE.—See FOREIGN COUNTRY, ETC., ante, p. 334. And see note 3.

FOREIGN WILLS.—See the title WILLS.

FORESEEN.—See note 4.

FORFEIT.—The words "to forfeit and pay," are not so strongly indicative of a stipulation in the nature of a penalty, as the word "penalty" itself.[5]

FORFEITURE.—A clause of forfeiture in a law is a punishment inflicted for a violation of some duty enjoined upon the party by law; while in an engagement between individuals it is a matter of contract.[6]

FORGED.—See the title FORGERY AND COUNTERFEITING.

1. Foreign nation.—In general, nations not owing a common allegiance are foreign to each other, and the term **foreign nation** is with strict propriety applicable by either to the other. Cherokee Nation *v.* Georgia, 5 Pet. 1, 8 L. Ed. 25.

2. The Lulu, 10 Wall. 192, 200, 19 L. Ed. 906; The Kalorama, 10 Wall. 204, 212, 19 L. Ed. 941. See the titles MASTERS OF VESSELS; SHIPS AND SHIPPING.

3. Foreign state.—An Indian tribe or nation within the United States is not a **foreign state**, in the sense in which the term **foreign state** is used in the constitution of the United States, extending the judicial power of the United States to controversies between a state or citizen thereof and foreign states, citizens or subjects. Cherokee Nation *v.* Georgia, 1 Pet. 1, 8 L. Ed. 25.

4. Forseen.—The code of Louisiana provided that a tenant should have no right to an abatement of rent for an accidental destruction of the whole or a part of his crop, if it was stipulated in the contract that the tenant should run the chances of all "**foreseen** and unforeseen" accidents. It was held that the words "**foreseen** or unforeseen" respectively mean, in this connection, those which could have been **foreseen** as likely to happen, and those which could not have been so **foreseen**. Viterbo *v.* Friedlander, 120 U. S. 707, 728, 30 L. Ed. 776.

5. Tayloe *v.* Sandiford, 7 Wheat. 13, 18, 5 L. Ed. 384. See the title PENALTIES AND FORFEITURES.

A statute provided for increased pay of soldiers after a certain time of service, but provided that this increase should be considered as retained pay, and should not be paid to the soldier until his discharge from the service, and should be **forfeited** unless he served honestly and faithfully to the date of discharge. The court in construing this statute says: "It is true the word **forfeited**, is used in the statute, but we think it is not used in the technical sense of a punishment after judgment, but rather in the sense of a disability incurred by the nonperformance of a contract. A similar meaning is attached to the word when used in connection with the claim of a mariner for his wages. By his contract of shipment the seaman also bargains for honest and faithful service, and obedience to the lawful commands of the master and other officers of his vessel, and in case of desertion or gross misconduct, it is the constant practice of courts of admiralty to **forfeit** the whole or a part of his wages, irrespective of the actual damages suffered by the owner or master of the vessel. The Balize, Brown's Adm. 424." United States *v.* Kingsley, 138 U. S. 87, 90, 34 L. Ed. 896.

6. Forfeiture.—Maryland *v.* Baltimore, etc., R. Co., 3 How. 534, 11 L. Ed. 714. See the title PENALTIES AND FORFEITURES.

In Van Buren *v.* Digges, 11 How. 462, 476, 13 L. Ed. 771, it is said: "The term **forfeiture** imports a penalty; it has no necessary or natural connection with the measure or degree of injury which may result from a breach of contract, or from an imperfect performance. It implies an absolute infliction, regardless of the nature and extent of the causes by which it is superinduced. Unless, therefore, it shall have been expressly adopted and declared by the parties to be a measure of injury or compensation, it is never taken as such by courts of justice, who leave it to be enforced where this can be done in its real character, viz, that of a penalty." See, also, the title DAMAGES, vol. 5, pp. 176, 179.

FORGERY AND COUNTERFEITING.

BY R. E. MAXWELL.

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CROSS REFERENCES.

See the titles AUTREFOIS, ACQUIT AND CONVICT, vol. 2, pp. 756, 757, 758; CONSTITUTIONAL LAW, vol. 4, p. 1; FRAUD AND DECEIT; INDICTMENTS, INFORMATIONS, PRESENTMENTS AND COMPLAINTS; INSOLVENCY; INTERSTATE AND FOREIGN COMMERCE; PAYMENT; PUBLIC LANDS; UNITED STATES.

As to state acts incorporating a bank and providing for the punishment of counterfeiting notes of the bank, being a public act, see the title BANKS AND BANKING, vol. 3, p. 10. As to forged checks or indorsements, see the title BANKS AND BANKING, vol. 3, pp. 31, 32, 33, 34, 35. As to effect of payment of a debt due a bank by the bank's forged notes, see the title BANKS AND BANKING, vol. 3, pp. 70, 71. As to recovery back of money paid on a forged paper, see the title BILLS, NOTES AND CHECKS, vol. 3, pp. 350, 351. As to admissibility of a deed to prove forgery, see the title DOCUMENTARY EVIDENCE, vol. 5, p. 450. As to effect of affidavit alleging forgery upon the admissibility of instruments, see the titles DOCUMENTARY EVIDENCE, vol. 5, p. 451; LOST INSTRUMENTS AND RECORDS. As to time of filing affidavit alleging forgery, see the title AFFIDAVITS, vol. 1, p. 202. As to extradition of a person for the crime of forgery, see the title EXTRADITION, ante, p. 215. As to forgery in transfer of stock, see the title STOCK AND STOCKHOLDERS.

I. Forgery.

A. Definition and General Consideration—1. DEFINITION.—Forgery may be defined as falsely making or materially altering, with intent to defraud, any writing which, if genuine, might apparently be of legal efficacy or the foundation

of a legal liability. It consists in making an instrument appear to be that which it is not.[1]

2. Confers and Transfers No Power or Rights.—Forgery can confer no power, nor transfer any rights.[2]

B. Means of Accomplishing Forgery—1. Making False Instrument in Name of Nonexisting Person.—It is, clearly settled, that the making of a false instrument, which is the subject of forgery, with a fraudulent intent, although in the name of a nonexisting person, is as much a forgery as if it had been made in the name of a person known to exist, and to whom credit was due.[3]

2. Antedating Note by a Retired Partner.—Antedating a note by a retired partner, giving it a date within the period of the existence of the partnership, partakes of the character of a forgery and is always open to inquiry no matter who relies on it.[4]

3. Where Names Are Idem Sonans.—A person may commit forgery by signing his own name intending thereby to counterfeit the name of another, the names being idem sonans.[5]

C. Writings of Which Forgery May Be Committed—1. In General.—"The offense extends to every writing used for the purpose of authentication; as in the case of a will, by which a testator signifies his intentions as to the disposition of his property, or of a certificate by which an officer or other authorized person assures others of the truth of any fact, or of a warrant by which a magistrate signifies his authority to arrest an offender."[6]

2. Printing, Engraving, Seals and Stamps.—An instrument may be the subject of forgery, when the entire contract, including the signature of the party, has been printed or engraved. The crime is not confined to the falsification of mere writings; it plainly extends to seals, stamps, and all other visible marks of distinction by which the truth of any fact is authenticated, or the quality of genuineness of any article is warranted.[7]

1. **Definition.**—Bouvier's Law Dictionary.

In Benson *v.* McMahon, 127 U. S. 457, 458, 32 L. Ed. 234, it was held that the term "forgery," as used in an extradition treaty between Mexico and the United States, was not confined to its common-law meaning, when the question concerned an offense of that character committed in Mexico.

"By the Roman civil law, which perhaps pervades or did pervade the jurisprudence of the larger portion of the civilized nations of the earth at th time of the making of this treaty, forgery was looked upon as one of the subdivisions of the crimen falsi, which included forgery, perjury, the alteration of the current coin, dealing with false weights and measures, etc." Benson *v.* McMahon, 127 U. S. 457, 466, 32 L. Ed. 234.

Texas act.—See White *v.* Van Horn, 159 U. S. 3, 18, 40 L. Ed. 55.

2. **Forgery can confer no power nor transfer any rights.**—Telegraph Co. *v.* Davenport, 97 U. S. 369, 371, 24 L. Ed. 1047. This was a case of the forgery of a certificate of stock. See the title STOCK AND STOCKHOLDERS.

3. **Making false instrument in name of nonexisting person.**—United States *v.* Turner, 7 Pet. 132, 136, 8 L. Ed. 633.

4. **Antedating note by a retired partner.**—Anthony *v.* County of Jasper, 101 U. S. 693, 699, 25 L. Ed. 1005; Coler *v.* Cleburne, 131 U. S. 162, 174, 33 L. Ed. 146.

5. **Where names are idem sonans.**—White *v.* Van Horn, 159 U. S. 3, 12, 40 L. Ed. 55.

"Clearly, if one whose name was J. H. Chisholm took a certificate issued to J. H. Chism, and, falsely personating J. H. Chism, signed his name as J. H. Chisolm, intending thereby to counterfeit the signature of J. H. Chism, and, by reason of the fact that the names were idem sonans, to produce the impression that the name signed was that of J. H. Chism, this act would have been a forgery under this statute. The case of Commonwealth *v.* Baldwin, 11 Gray 197, cited to the contrary, sustains this view." White *v.* Van Horn, 159 U. S. 3, 18, 40 L. Ed. 55.

6. **Forgery may be committed on any writing used for the purpose of authentication.**—Benson *v.* McMahon, 127 U. S. 457, 468, 32 L. Ed. 234.

Section 5418 of the Revised Statutes makes it an offense against the United States for any person to falsely make, forge or counterfeit "any bid, proposal, guarantee, official bond, public record, affidavit or other writing, for the purpose of defrauding the United States." Cross *v.* North Carolina, 132 U. S. 131, 138, 33 L. Ed. 287.

7. **Printing, engraving, seals and stamps are subject of forgery.**—Benson *v.* Mc-

D. Uttering and Publishing Forged Writings.—Section 5418 of the Revised Statutes makes it an offense against the United States for any person to utter or publish as true any false, forged, altered or counterfeited bid, proposal, guarantee, official bond, public record, affidavit or other writing, knowing the same to be false, forged, altered or counterfeited for such purpose, or to transmit to or present at the office of any officer of the United States any false, forged, altered or counterfeited bid, proposal, guaranty, official bond, public record, affidavit or other writing, knowing the same to be false, forged, altered or counterfeited, for such purpose.[8]

E. Jurisdiction.—Though a party makes false entries with regard to bills or notes, forged in violation of a state law, on the books of a national bank in violation of the statute of the United States, the state is not deprived of the power to furnish the offender for the forgery.[9] Also, a forgery of a power of attorney, to receive warrants for lands granted by congress, may be punished under the jurisdiction of a state court.[10]

F. Indictment.—An indictment, under a statute embracing the distinct acts of committing forgery, and causing forgery to be committed, the doing of either of which is punishable, is not defective in that it charges separate felonies.[11] But an indictment, for uttering a forged and counterfeited paper, purporting to be a bank bill of the United States, signed by the president and cashier, cannot be supported by an act of congress to punish frauds committed on the bank of the United States.[12] Also, an indictment charging the uttering and forging of a counterfeit bill in imitation of a bill issued by the president of a bank of the United States, is insufficient where the genuine bill, of which the forged bill was an imitation, was not a bill issued by order of the president.[13]

Mahon, 127 U. S. 457, 468, 469, 32 L. Ed. 234. This case was the forgery of a ticket to the opera and was held to be forgery as the term was used in the extradition treaty between Mexico and the United States. The court intimated that it would have been forgery at common law.

It can hardly be said that the crime of forgery, even at common law, is limited to the production by means of a pen of the resemblance of some man's genuine signature which was produced with a pen. This view of the subject would exclude from the definition of this crime all such instruments as government bonds, bank notes, and other obligations of great value, as well as railroad tickets, where the signature of the officer which makes them binding and effectual is impressed upon them by means of a plate or other device representing his genuine signature. Benson *v.* McMahon, 127 U. S. 457, 467, 32 L. Ed. 234.

8. Uttering or publishing forged writings.—Cross *v.* North Carolina, 132 U. S. 131, 138, 33 L. Ed. 287. See, also, § 5479, Rev. Stat.

9. Jurisdiction of state court.—Cross *v.* North Carolina, 132 U. S. 131, 33 L. Ed. 287.

If it were competent for congress to give exclusive jurisdiction to the courts of the United States of the crime of falsely making or forging promissory notes, purporting to be executed by individuals, and made payable to or at a national bank, or of the crime of uttering or publishing as true any such falsely made or forged notes, it has not done so. Cross *v.* North Carolina, 132 U. S. 131, 139, 33 L. Ed. 287.

Its legislation does not assume to restrict the authority, which the states have always exercised, of punishing in their own tribunals the crime of forging promissory notes and other commercial securities executed by private persons, and used for purposes of private business. The forgery of such instruments is none the less injurious to the welfare of the people of a state because they happen to be made payable to or at banking associations which come into existence under the authority of the United States. Cross *v.* North Carolina, 132 U. S. 131, 139, 33 L. Ed. 287.

10. Com. *v.* Schaffer, 4 Dall. XXV, XXXI, 1 L. Ed. 926.

11. Sufficiency of indictment.—Crain *v.* United States, 162 U. S. 625, 635, 40 L. Ed. 1097; § 5421, Rev. Stat.

12. United States *v.* Cantril, 4 Cranch 167, 2 L. Ed. 584.

13. United States *v.* Brewster, 7 Pet. 164, 8 L. Ed. 645.

Indictment founded on the 18th section of the act of congress, passed on the 15th day of April, 1816, entitled "act to incorporate the subscribers to the Bank of the United States." The indictment charged the defendant with uttering and forging "a counterfeit bill in imitation of a bill issued by the president," etc., of the bank. The forged paper was in these words and figures: (5) F 745 F 745 5) Cashier of the Bank of the United States, pay to C. W. Earnest, or order, five

Allegation as to Intent.—An indictment under § 5431, Rev. Stat., for uttering and publishing a forged obligation of the United States, must allege that the defendant knew of the forgery. Thus, the allegation that the defendant did pass, utter and publish a forged obligation of the United States is insufficient. An uttering with intent to defraud, of an instrument in fact counterfeit, but supposed by the defendant to be genuine, is not within the meaning and object of the statute.[14] But it is sufficient to allege the intent to defraud, without also charging that it was done feloniously, or with a felonious intent.[15]

G. Evidence—1. BURDEN OF PROOF.—The burden of proof upon a charged forgery is upon the one charging the forgery.[16] And where it is admitted that the signatures to writings were genuine, but insisted that the writing above them was forged, the burden of proof was clearly upon those who asserted it to establish that the written part above the signatures was forged.[17]

2. COMPETENCY OF WITNESS.—In a prosecution for forging a promissory note, it is competent to prove the forgery by the supposed indorser,[18] or maker.[19]

H. Civil Rights and Liabilities Arising Out of Forgery.—A person making payment upon a forged paper must repudiate it as soon as he ought to have discovered the forgery; otherwise, he will be regarded as accepting the paper. Unnecessary delay under such circumstances is unreasonable. And it is, also true, as a general rule of commercial law, that where one accepts forged paper purporting to be his own, and pays it to a holder for value, he cannot recall the payment.[20]

Evidence.—As to burden of proof, see ante, "Burden of Proof," I, G, 1.

dollars. Office of Discount and Deposit, in Pittsburgh, the 10th day of Dec., 1829. J. Correy, Cash. A. Brackenridge, Pres. (Indorsed) Pay the bearer, C. W. Earnest. Held, that a genuine instrument, of which the forged and counterfeited instrument was an imitation was not a bill issued by order of the president, etc., of the Bank of the United States, according to the true intent and meaning of the 18th section of the act incorporating the bank. United States *v.* Brewster, 7 Pet. 164, 8 L. Ed. 645.

14. Must allege intent.—United States *v.* Carll, 105 U. S. 611, 26 L. Ed. 1135.

15. Need not allege felonious intent.—United States *v.* Staats, 8 How. 41, 12 L. Ed. 979.

Where an act of congress declared, that, if any person "shall transmit to, or present at, or cause or procure to be transmitted to, or presented at, any office or officer of the government of the United States, any deed, power of attorney, order, certificate, receipt, or other writing, in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged or counterfeited; every such person shall be deemed and adjudged guilty of felony," etc., it was sufficient that the indictment charged the act to have been done "with intent to defraud the United States," without also charging that it was done feloniously, or with a "felonious intent." United States *v.* Staats, 8 How. 41, 12 L. Ed. 979.

The indictment is not fatally defective for the reason the acts charged to have been committed by the defendant are not charged to have been committed feloniously, or with a felonious intent. United States *v.* Staats, 8 How. 41, 48, 12 L. Ed. 979.

16. Forgery must be proven by the one alleging the forgery.—White *v.* Van Horn, 159 U. S. 3, 16, 40 L. Ed. 55.

Complainant filed a bill to have a deed of trust and a note set aside because of forgery, contending that the mark on the deed of trust, given as security for the payment of the note, was not made by the grantor as his signature. The deed of trust contained a notarial certificate, with the notarial seal, of a notary public, certifying that the grantor personally appeared before him, being personally well known to him to be the person who executed the deed, and acknowledged it to be his act and deed. Held, they could not be set aside, it being a question of fact with the burden of proof on complainant and the forgery was not sufficiently proved. Cissel *v.* Dutch, 125 U. S. 171, 31 L. Ed. 642.

17. Sturm *v.* Boker, 150 U. S. 312, 37 L. Ed. 1093.

18. Competency of witness.—Republica *v.* Keating, 1 Dall. 110, 1 L. Ed. 59.

19. Republica *v.* Ross, 2 Dall. 239, 1 L. Ed. 364.

As to recovery of interest upon a bond given as bail by a person indicted for forgery, see the title BAIL AND RECOGNIZANCE, vol. 2, p. 781.

20. Right of person making payment upon forged paper.—Cooke *v.* United States, 91 U. S. 389, 396, 397, 23 L. Ed. 237.

The ruling of the district judge, that though treasury notes may be printed in the department from the genuine plates,

II. Counterfeiting.

A. Definition and General Consideration.—The term counterfeit, both by its etymology and common intendment, signifies the fabrication of a false image or representation.[21] And the criminality of counterfeiting consists in the obtaining for a false representative of the true coin that for which the true coin alone is the equivalent.[22]

Distinction between Counterfeiting and Passing Base Coins.—A material distinction has been recognized between the offenses of counterfeiting the coin and of passing base coin by a government which may be deemed sufficiently jealous of its authority; sufficiently rigorous, too, in its penal code. Thus, in England, the counterfeiting of the coin is made high treason, whether it be uttered or not; but those who barely utter false money are neither guilty of treason nor of misprision of treason.[23]

A scheme to defraud is unnecessary to complete the offense against § 5480 of the Revised Statutes, as amended by act of March 2, 1889, ch. 393, for devising a scheme to sell counterfeit obligations of the United States, by communication through the post office.[24]

Aiding and Abetting.—If a person counterfeit gold or silver coin, and by agreement before such counterfeiting another is to receive and vent the money, he is an aider and abettor to the act itself of counterfeiting, and consequently a principal traitor within the law. But if he merely vents the money for his own private benefit, knowing it to be false, in fraud of any person, he is only liable to be punished as for a cheat and misdemeanor.[25]

B. Power to Punish.—Congress has the constitutional power to pass laws for the punishment of any person who shall pass, utter or publish false or counterfeit coin.[26] And the sixth section of the act of February 25th, 1862, to punish the counterfeiting of treasury notes, is not void for repugnancy in its reference to uttering or passing such counterfeited notes.[27]

C. Counterfeiting Foreign Coins, Notes, etc.—It was made an offense, by statute, to counterfeit any foreign gold or silver coin which, by law, then

and may be all ready to issue, yet, if they are not in fact issued by an officer thereunto authorized, they do not come within the statute of August 12, 1866, and the United States are not bound to redeem them, held, to be error. Cooke *v.* United States, 91 U. S. 389, 23 L. Ed. 237.

21. **Counterfeiting defined.**—United States *v.* Marigold, 9 How. 560, 568, 13 L. Ed. 257.

22. Fox *v.* Ohio, 5 How. 410, 433, 12 L. Ed. 213.

23. **Distinction between counterfeiting and passing base coins.**—Fox *v.* Ohio, 5 How. 410, 433, 12 L. Ed. 213. See the title AUTREFOIS, ACQUIT AND CONVICT, vol. 2, p. 757.

On the 3d of March, 1825, congress passed an act (4 Stat. at L. 121), providing for the punishment of persons who shall bring into the United States with intent to pass, any false, forged, or counterfeited coin; and also for the punishment of persons who shall pass, utter, publish or sell any such false, forged or counterfeited coin. Held, that the clause of the constitution authorizing congress to provide for the punishment of counterfeiting the securities and current coin of the United States does not embrace within its language the offense of uttering or circulating spurious or counterfeited coin; but that congress has power to punish the offenses provided for in the statute both under its power to regulate commerce, and under its power to coin money and regulate the value thereof; that under the last-mentioned power it is the duty of congress to protect the creature and object of that power. United States *v.* Marigold, 9 How. 560, 568, 13 L. Ed. 257, distinguishing Fox *v.* Ohio, 5 How. 410, 433, 12 L. Ed. 213.

24. **Scheme to defraud unnecessary.**—Streep *v.* United States, 160 U. S. 128, 40 L. Ed. 365.

25. **Aiding and abetting.**—Fox *v.* Ohio, 5 How. 410, 433, 12 L. Ed. 213. See the title ACCOMPLICES AND ACCESSORIES, vol. 1, p. 63.

26. **Powers of congress to punish.**—United States *v.* Marigold, 9 How. 560, 13 L. Ed. 257; Fox *v.* Ohio, 5 How. 410, 12 L. Ed. 213. See the titles CRIMINAL LAW, vol. 5, pp. 53, 56; INTERNATIONAL LAW.

Laws, passed to punish the offenses of counterfeiting, or having in possession plates for the purpose of counterfeiting notes of a foreign bank, are valid. United States *v.* Arjona, 120 U. S. 479, 30 L. Ed. 728.

27. **Validity of acts.**—United States *v.* Howell, 11 Wall. 432, 20 L. Ed. 195.

was, or thereafter might be, made current or be in actual use and circulation as money in the United States.[28]

As an Offense against the Law of Nations.—Counterfeiting foreign bank notes and bills, put out under authority at home, is an offense against the law of nations.[29]

Alleging Notes to Be of Foreign Government.—See post, "Indictment," II, D.

D. Indictment.—In an indictment for counterfeiting, or having in possession plates to counterfeit, notes of a foreign bank, it is not necessary to allege that the notes are of money of a foreign government; nor that the offense is an offense against the law of nations.[30]

An indictment, pursuing the language of a statute, to punish the counterfeiting of treasury notes, is not bad because it describes the notes passed as false, forged and counterfeited notes of the United States, issued under the authority of that statute or of other statutes, authorizing the issue of such notes.[31]

E. Verdict.—A verdict is valid, which is founded on part of several counts charging possessing, passing and uttering and counterfeiting coins. Such an indictment is a divisible unit and does not have to be treated as an entirety, and a verdict may be returned upon any one or more of the accusations.[32]

28. Counterfeiting foreign coins.—United States *v.* Gardner, 10 Pet. 618, 9 L. Ed. 556.

The act clearly embraces money in circulation which was not made current by law; and in this class or description may be embraced the small silver foreign coin under twenty-five cents, in circulation here. United States *v.* Gardner, 10 Pet. 618, 623, 9 L. Ed. 556.

By the act of 1825 § 20 (4 U. S. Stat. 121), under which the prisoner is indicted, this class of currency is omitted, and the offense is confined to counterfeiting such foreign gold or silver coin which, by law, then was, or thereafter might be, made correct in the United States. The jury, by their special verdict, find, that the head pistarem has for many years past been in common circulation in the country. The counterfeiting of such coin, under the act of 1806, would be felony; but not under the act of 1825, unless it is a coin made current by law. United States *v.* Gardner, 10 Pet. 618, 623, 9 L. Ed. 556.

Indictment for forging a silver coin of Spain, called a head pistarem, which the indictment alleged was, by law, made current in the United States. Held, that the head pistarem is no part of the Spanish milled dollar; that such pistarem or piece of coin is not a silver coin of Spain, made current by law in the United States. United States *v.* Gardner, 10 Pet. 618, 9 L. Ed. 556.

29. As an offense against the law of nations.—United States *v.* Arjona, 120 U. S. 479, 30 L. Ed. 728.

30. Indictment—Need not allege money to be that of a foreign government.—United States *v.* Arjona, 120 U. S. 479, 30 L. Ed. 728.

31. Indictment pursuing language of statute.—United States *v.* Howell, 11 Wall. 432, 20 L. Ed. 195.

"Nor is an indictment pursuing the language of the statute bad because it describes the note passed by the prisoner as a false, forged, and counterfeit note of the United States, issued under the authority of that statute or of other statutes authorizing the issue of such notes." United States *v.* Howell, 11 Wall. 432, 20 L. Ed. 195.

"The words 'false, forged, and counterfeit,' necessarily imply that the instrument so characterized is not genuine, but only purports to be, or is in the similitude of such an instrument, and this implication is according to good usage and is supported by adjudged cases." United States *v.* Howell, 11 Wall. 432, 20 L. Ed. 195.

32. Verdict found on part of several counts.—Selvester *v.* United States, 170 U. S. 262, 42 L. Ed. 1029. See the title INDICTMENTS, INFORMATIONS, PRESENTMENTS AND COMPLAINTS.

An indictment charged a violation of § 5457, Rev. Stat., and contained four counts, charging first, the possession of two counterfeit coins; second, the unlawful passing of two such coins; third, the unlawful passing of three such coins; and fourth, the counterfeiting of five like coins. Upon request from the jury, the court instructed that a verdict might be returned upon three of the counts though there be a disagreement as to the fourth. Selvester *v.* United States, 170 U. S. 262, 42 L. Ed. 1029.

Where the jury finds the defendant guilty in the first count for having in possession counterfeit minor coin, and not guilty as to second and third counts, it is a good verdict under an indictment containing three counts, the first charging the defendant with "having counterfeit coin in his possession with intent to defraud certain per-

FORGINGS.—The word "forgings" used in its ordinary and commonly accepted sense means metal shaped by heating and hammering.[1]

FORM.—See note 2. And see the title AMENDMENTS, vol. 1, p. 308.

FORMA PAUPERIS.—See the title APPEAL AND ERROR, vol. 2, p. 425.

FORMER ACQUITTAL OR CONVICTION.—See the title AUTREFOIS, ACQUIT AND CONVICT, vol. 2, p. 751.

FORMER ADJUDICATION OR RES ADJUDICATA.—See the title RES ADJUDICATA.

FORMER JEOPARDY.—See the title AUTREFOIS, ACQUIT AND CONVICT, vol. 2, p. 751.

FORMER OWNER.—See note 3.

FORMER RECOVERY.—See the title RES ADJUDICATA.

FORNICATION.—See the title ADULTERY, FORNICATION AND LEWDNESS, vol. 1, p. 195.

sons to this grand inquest unknown;" the second, with having with like intent attempted to pass such coin; and the third, with actually passing such coin with criminal intent. Statler *v.* United States, 157 U. S. 277, 278, 39 L. Ed. 700. See the title VERDICT.

1. Saltonstall *v.* Wiebusch, 156 U. S. 601, 603, 39 L. Ed. 549. See, generally, the title REVENUE LAWS.

2. **For matter of form.**—A statute provided: "If, in any action duly commenced within the time allowed, the writ shall be abated, or the action otherwise avoided or defeated by the death or marriage of any party thereto, or for any matter of form, * * * the plaintiff may commence a new action for the same cause at any time within one year after the abatement or other determination of the original suit." The phrase "for matter of form" has been construed to relate to technical defects in the form of the action, or pleadings, or proof, or to variances between the one and the other. And where it was found that the plaintiff had no legal title, it was held that his action was not defeated for any matter of form. Meath *v.* Mississippi Levee Comm'rs, 109 U. S. 268, 273, 27 L. Ed. 930.

Forms and modes of proceedings.—See, also, the title COURTS, vol. 4, p. 1122. In § 1914, Rev. Stat., providing that the "forms and modes of proceedings" in civil causes, other than equity and admiralty causes, to the circuit and district courts, shall conform, as near as may be, to the practice, pleading, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit and district courts are held, the words "forms and modes of proceedings" do not apply to proceedings for the enforcement of judgment, as well as proceedings before judgments were rendered, unless they were prescribed by law of the state at the time the provisions of the section took effect; or, if subsequently prescribed by such law, until they have been adopted by general rules in court. Lamaster *v.* Keeler, 123 U. S. 376, 389, 31 L. Ed. 238.

"In Wayman *v.* Southard, 10 Wheat. 1, 6 L. Ed. 253, these statutes were considered and construed by this court. And in giving a meaning to the language 'forms and modes of proceeding in suits,' the court, speaking by Chief Justice Marshall, said, that it 'embraces the whole progress of the suit, and every transaction in it, from its commencement to its termination, which has been already shown not to take place until the judgment shall be satisfied. It may then and ought to be understood as prescribing the conduct of the officer in the execution of process, that being a part of "the proceedings" in the suit.' 10 Wheat. 32." Lamaster *v.* Keeler, 123 U. S. 376, 389, 31 L. Ed. 238.

3. A West Virginia statute provided for the redemption of land sold for taxes by the **former owner.** The words **former owner** were held to embrace those who, in law, would have owned the lands, upon the death of such owner, if they had not been sold for taxes, or, if sold, had been redeemed within the prescribed time after the sale at which the state purchased. Rich *v.* Braxton, 158 U. S. 400, 402, 39 L. Ed. 1022.

FORTHCOMING AND DELIVERY BONDS.

BY R. E. MAXWELL.

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CROSS REFERENCES.

See the titles ATTACHMENT AND GARNISHMENT, vol. 2, p. 660; EXECUTIONS, ante, p. 84; JUDGMENTS AND DECREES; PRINCIPAL AND SURETY; REPLEVIN; SHERIFFS AND CONSTABLES; UNITED STATES MARSHALS.

I. General Consideration.

A. Definition.—A forthcoming and delivery bond is a bond given for the security of an officer, conditioned to produce the property levied on when required.[1]

B. Distinction.—A difference has been made between a bond on a ca. sa. and a bond on a fi. fa.[2]

Distinguished from Replevy Bond.—There is a material difference between a forthcoming and delivery bond and a replevy bond.[3]

1. **Definition.**—Bouvier's Law Dictionary, vol. 1, p. 834.

2. **Under statute of Hen. VIII.**—"A difference was taken between a bond on a ca. sa. and a bond on a fi. fa. under the construction of the statute of Hen. VIII, respecting sheriffs taking bonds colore officii." Peyton *v.* Brooke, 3 Cranch 92, 94, 2 L. Ed. 376.

3. **Distinguished from replevy bond.**—Hagan *v.* Lucas, 10 Pet. 400, 405, 9 L. Ed. 470.

"In 3 Munf. 417, * * * Judge Roane draws the following distinctions between a forthcoming bond, and what is called a replevy bond, under the statute of Virginia. 1. A replevy bond, under the act, operated a release of the property. 2. Because the surety therein is to be approved by the creditor; a circumstance very material in a bond considered as a substitute for an execution, and wanting as to the sureties upon forthcoming bonds. 3. Because a replevy bond obtained the force of a judgment, by the mere giving thereof; though its execution was suspended, till the expiration of three months, and did not owe its obligation, as a judgment, to

C. Nature and Purpose.—Nature.—The forthcoming bond is regarded as part of the process of execution;[4] but it cannot be considered as a substitute for the property, as the condition requires its return to the sheriff.[5]

Purpose.—The object of a forthcoming and delivery bond is to insure the safe-keeping and faithful return of the property, should its return be required.[6]

D. When Proper.—In Virginia the owner of goods which have been taken by virtue of a writ of fieri facias may give bond to have the goods forthcoming when required.[7] Also in Alabama, where an execution is levied on property, claimed by a person not a party to the execution, such person, upon making oath to the property, may enter into bond, conditioned for the delivery of the property, whenever the claim of the property is determined by the court.[8]

E. Proceedings to Obtain.—The proceedings which produce a forthcoming bond are purely ministerial.[9]

II. Validity.

A forthcoming bond is usually required, by statute, to recite the service and the amount due on the execution under which the property was taken, and be in a penalty double the amount due thereon.[10]

Effect of Error in Recital of Amount.—And the bond is not vitiated by an error in setting out an item of cost, if the aggregate amount is truly stated.[11]

III. Operation and Effect.

A. Before Forfeiture.—On the giving of a forthcoming bond, the property is placed in the possession of the claimant; his custody is substituted for the custody of the sheriff; the property is not withdrawn from the custody of the law.[12] So the giving of the bond does not release the lien upon the property;

the breach of the condition thereof, as is the case of forthcoming bonds." Hagan *v.* Lucas, 10 Pet. 400, 405, 9 L. Ed. 470. See the title REPLEVIN.

4. **Nature.**—Amis *v.* Smith, 16 Pet. 303, 313, 10 L. Ed. 973.

"It aids materially in securing the payment of the money to satisfy the judgment; and it is part of the process by which the plaintiff is enabled to obtain the payment of the money secured to him by the judgment." Amis *v.* Smith, 16 Pet. 303, 313, 10 L. Ed. 973.

The provisions of the third section of the act of congress of May 19th, 1828, adopted the forthcoming bond in Mississippi, as a part of the final process of that state, at the time of the passage of the act. Amis *v.* Smith, 16 Pet. 303, 10 L. Ed. 973.

5. **Bond is not a substitute for the property.**—Hagan *v.* Lucas, 10 Pet. 400, 404, 9 L. Ed. 470.

6. **Purpose.**—Hagan *v.* Lucas, 10 Pet. 400, 404, 9 L. Ed. 470.

7. **When proper.**—Alexander *v.* Brown, 1 Pet. 683, 7 L. Ed. 314.

So in Mississippi, in Brown *v.* Clarke, 4 How. 4, 12, 11 L. Ed. 850.

8. Hagan *v.* Lucas, 10 Pet. 400, 402, 9 L. Ed. 470.

Under Minnesota statute.—See Thorn Wire Co. *v.* Fuller, 122 U. S. 535, 541, 30 L. Ed. 1235; See, generally, the title INTERVENTION.

9. **Proceedings to obtain.**—Amis *v.* Smith, 16 Pet. 303, 10 L. Ed. 973.

10. **Validity.**—Brown *v.* Clarke, 4 How. 4, 12, 11 L. Ed. 850; Huff *v.* Hutchinson, 14 How. 586, 588, 14 L. Ed. 553.

In Huff *v.* Hutchinson, 14 How. 586, 588, 14 L. Ed. 553, it was said: "It was objected that the bond did not pursue the statute. 1. That it should have been in double the amount of the goods attached. 2. That the bond described in the declaration is in the penalty of $5,600, to pay whatever judgment should be obtained. The 13th section of the statute, which regulates the giving of the bond, provides that 'it may be in a penalty of double the amount specified in the affidavit, annexed to the writ, as due to the plaintiff, conditioned for the payment of any judgment which may be recovered by the plaintiff in the suit commenced by such attachment, within sixty days after such judgment shall be rendered.' The bond is within the statute."

11. **Effect of error in recital of amount.**—Williams *v.* Lyles, 2 Cranch 9, 2 L. Ed. 191.

In Virginia, a forthcoming bond which, in reciting the execution, states the costs to be $20, instead of $12, is not thereby vitiated, if the aggregate of debts and costs be truly stated, but will support a judgment, on motion. Williams *v.* Lyles, 2 Cranch 9, 2 L. Ed. 191.

12. Hagan *v.* Lucas, 10 Pet. 400, 404, 9 L. Ed. 470.

Vests right of possession in owner.—Hagan *v.* Lucas, 10 Pet. 400, 9 L. Ed. 470.

the property, in contemplation of law, remains in possession of the officer;[13] and the property in the hands of the claimant, under the bond for its delivery, is as free from the reach of other process as it would be in the hands of the sheriff.[14] The debtor is at liberty to deal with the property as his own.[15] So a second judgment is a lien thereon,[16] and the lien thus acquired by the second judgment is not destroyed by subsequently quashing the forthcoming bond.[17]

B. After Forfeiture—1. EFFECT ON ORIGINAL JUDGMENT.—As the forfeiture of a forthcoming bond has the effect of a judgment, it necessarily operates as an extinguishment of the original judgment.[18]

2. EFFECT OF JUDGMENT.—On failure to deliver property held under a forthcoming bond, the bond, on being returned into the clerk's office, will have the effect of a judgment.[19]

C. Estoppel.—A person by executing a forthcoming bond thereby recognizes and is estopped to deny a claim and the validity of a judgment against him rendered upon such claim, the execution of the bond being tantamount to a confession of judgment for the demand.[20]

IV. Quashing Bond.

The plaintiff may quash the bond, and proceed on the original judgment; the defendant can only quash the execution.[21]

Distinction of Lien by Quashing Bond.—See ante, "Before Forfeiture," III, A.

Appeal from Judgment or Order Refusing to Quash Bond.—See the title APPEAL AND ERROR, vol. 1, pp. 941, 942.

13. Does not divest lien of attachment under which property was taken.—Krippendorf *v.* Hyde, 110 U. S. 276, 279, 25 L. Ed. 145; Hagan *v.* Lucas, 10 Pet. 400, 405, 9 L. Ed. 470.

The lien, by virtue of a writ of fieri facias, upon the property of the debtor, is not released by his giving a forthcoming bond, but continues, until such bond is forfeited. Hagan *v.* Lucas, 10 Pet. 400, 405, 9 L. Ed. 470.

"According to the law of Indiana, the giving of the delivery bond did not divest the lien of the attachment upon the goods, which remained, in contemplation of law, in the possession of the officer." Krippendorf *v.* Hyde, 110 U. S. 276, 279, 25 L. Ed. 145.

14. Property cannot be reached by other process.—Hagan *v.* Lucas, 10 Pet. 400, 9 L. Ed. 470.

15. Debtor deals with property as his own.—"After that lien was suspended or discharged, the original judgment being, in contemplation of law, satisfied by the new and substituted security, the debtor was at liberty to deal with the property as his own, and it remained in his possession, subject to any charge or lien impressed upon it either by the act of the party, or by operation of law, the same, after the forthcoming bond, as before the entry of the original judgment." Brown *v.* Clarke, 4 How. 4, 14, 11 L. Ed. 850.

16. Second judgment would become a lien thereon.—If another judgment be entered against the original defendant, this second judgment is a lien upon the property which has been released by the bond. Brown *v.* Clarke, 4 How. 4, 11 L. Ed. 850.

17. Lien so acquired not destroyed by subsequently quashing the forthcoming bond.—The effect of such quashing is not to revive the first judgment, and thus restore the lien which was superseded by the execution of the bond. If the forthcoming bond had been shown to have been void ab initio, the result would be different. Brown *v.* Clarke, 4 How. 4, 11 L. Ed. 850.

18. A forthcoming bond forfeited, is an extinguishment of the original judgment. Amis *v.* Smith, 16 Pet. 303, 311, 10 L. Ed. 973.

19. Has effect as judgment after forfeiture.—Hagan *v.* Lucas, 10 Pet. 400, 402, 9 L. Ed. 470; Alexander *v.* Brown, 1 Pet. 683, 684, 7 L. Ed. 314; Amis *v.* Smith, 16 Pet. 303, 313, 10 L. Ed. 973; Gwin *v.* Breedlove, 2 How. 29, 36, 11 L. Ed. 167; Brown *v.* Clarke, 4 How. 4, 12, 11 L. Ed. 850.

By the laws of Mississippi, if the bond is forfeited for not delivering the property, it operates as a new judgment against the defendant to the execution, and the sureties to the bond, and merges the prior judgment. Gwin *v.* Breedlove, 2 How. 29, 36, 11 L. Ed. 167.

The statute of Mississippi declared that it shall have the force and effect of a judgment. Amis *v.* Smith, 16 Pet. 303, 313, 10 L. Ed. 973; Brown *v.* Clarke, 4 How. 4, 12, 11 L. Ed. 850. See Laws of Miss. of 1827, p. 123, § 2.

So in Virginia.—See Alexander *v.* Brown, 1 Pet. 683, 684, 7 L. Ed. 314.

20. When execution of bond operates as estoppel.—Sample *v.* Barnes, 14 How. 70, 75, 14 L. Ed. 330.

21. Quashing bond.—Peyton *v.* Brooke, 3 Cranch 92, 94, 2 L. Ed. 376.

V. Enforcement.

A. Mode of Proceeding.—By the practice of some courts, the mode of proceeding against a surety on a forthcoming bond, given to obtain the release of property attached, is by rule to show cause why he should not be liable according to the conditions of the bond.[22]

B. Jurisdiction.—Jurisdiction existing in a proceeding by rule, against a surety on a forthcoming bond, to show cause why he should not be liable on the bond, will not cease, because the parties to the rule are citizens of the same state; especially is this true where the defendant in the rule has appeared and answered on merits and the case has gone to judgment.[23] And where a marshal of the district of Wisconsin attached property at the suit of creditors in New York, and then gave it up upon the execution of a bond to himself, for the use of those creditors, it was within the jurisdiction of the district court of the United States for Wisconsin, to entertain a suit by the marshal, suing upon the bond for the New York creditors, against the claimants in Wisconsin, although both parties resided in the same state.[24]

Jurisdiction of Court from Which Execution Issued.—It has been held, that a motion upon a forthcoming bond given to secure possession of property taken under an execution, will not be allowed other than in the same court from which the execution issued.[25]

C. Parties.—A forthcoming bond given in the name of an officer, and his successor in office, may be sued on in the name of the officer, though he has been succeeded in office by another.[26]

D. Notice.—A notice of a motion to award execution on a forthcoming bond executed for the release of property taken under execution will be sufficient if it is so explicit as to render mistake impossible, although the whole of the defendants in the original execution are not named in the notice.[27]

E. Variance.—It is not a natural variance that the declaration stated the bond to have been given to the officer as marshal of the district, while the evidence showed it to have been given him as marshal of the state.[28]

F. Judgment.—If the original judgment be reversed, the reversal of the dependent judgment on the forthcoming bond follows of course; but a special certiorari is necessary to bring up the execution upon which the bond was given, so as to show the connection between the two judgments.[29]

22. **Enforcement of bond.**—Reilly *v.* Golding, 10 Wall. 56, 19 L. Ed. 858.

By the practice of the courts of Louisiana, a practice which has been adopted in the circuit court in that district, the mode of proceeding in an attachment suit against a surety on a forthcoming bond given to obtain a release of property attached, is by rule to show cause; and this proceeding being merely incidental to the original suit. Reilly *v.* Golding, 10 Wall. 56, 19 L. Ed. 858.

23. **Jurisdiction.**—Reilly *v.* Golding, 10 Wall. 56, 19 L. Ed. 858.

24. Huff *v.* Hutchinson, 14 How. 586, 14 L. Ed. 553.

The name of the marshal was merely formal; the real plaintiffs were averred to be citizens of New York. Huff *v.* Hutchinson, 14 How. 586, 14 L. Ed. 553.

25. **So held under law of Virginia.**—Stuart *v.* Laird, 1 Cranch 299, 302, 2 L. Ed. 115.

26. **Parties.**—Huff *v.* Hutchinson, 14 How. 586, 588, 14 L. Ed. 553.

The bond being given in the name of Hutchinson, as marshal, and his successor in office, the suit is well brought in the name of Hutchinson, though he has been succeeded in office by another. The name of the obligee being used as matter of form, the action may be brought in the name of the late marshal or his successor. Huff *v.* Hutchinson, 14 How. 586, 588, 14 L. Ed. 553.

27. **Notice of motion to award execution on forthcoming bond.**—Alexander *v.* Brown, 1 Pet. 683, 684, 7 L. Ed. 314.

28. **Variance between declaration and evidence.**—Huff *v.* Hutchinson, 14 How. 586, 14 L. Ed. 553. See the title VARIANCE.

It was not a good exception upon the ground of variation between the evidence and declaration, that the latter stated the bond to have been given to Hutchinson as marshal of the district of Wisconsin, and the former said the state of Wisconsin. They mean the same thing. Huff *v.* Hutchinson, 14 How. 586, 14 L. Ed. 553.

29. **Reversal of judgment.**—Bartow *v.* Petit, 7 Cranch 288, 3 L. Ed. 348. See the title JUDGMENTS AND DECREES.

G. New Trial.—The objections, that the declaration on the bond did not show the jurisdiction of the court in the attachment suit; that the verdict was entered for the amount due instead of the penalty of the bond, and that the recovery was for a sum greater than was claimed by the ad damnum in the declaration, are not sufficient for a new trial.[30]

FORTHWITH.—"Forthwith is defined by Bouvier as indicating that 'as soon as by reasonable exertion, confined to the object, it may be accomplished. This is the import of the term. It varies, of course, with every particular case.' In matters of practice and pleading it is usually construed, and sometimes defined by rule of court, as within twenty-four hours. Anderson (Law Dict.) says of the word that it 'has a relative meaning, and will imply a longer or shorter period, according to the nature of the thing to be done.'"[1]

FORTS.—See the titles CRIMINAL LAW, vol. 5, p. 87; EMINENT DOMAIN, vol. 5, p. 768; UNITED STATES.

FORTUITOUS EVENT.—See note 2.

FORWARDERS.—See the title CARRIERS, vol. 3, p. 608.

FOR WHOM IT MAY CONCERN.—See note 3.

FOUND.—See note 4.

FOUNDER.—See note 5.

30. New trial.—Huff *v.* Hutchinson, 14 How. 586, 14 L. Ed. 553. See the title NEW TRIALS.

1. Forthwith.—Dickerman *v.* Northern Trust Co., 176 U. S. 181, 193, 44 L. Ed. 423.

It was provided that a trustee in a deed of trust might declare the principal and interest of the mortgage to be due, if the obligor should not **forthwith**, upon execution being sued out against it, discharge or pay the execution. It was insisted that the obligor was entitled to a reasonable time in analogy to certain cases which hold that in **insurance** companies the word **forthwith** carries this significance. The court said: "There are many cases which turn upon the question whether a person was not too late in complying with a requirement that a thing must be done **forthwith**, but we can recall none where he has been held in default for doing such act too speedily, and as the corporation in this case made no objection to an instant declaration by the trustees that they would treat the principal and interest of the mortgage as due, it was not within the power of the appellants to set up the fact that they acted with too great haste." Dickerman *v.* Northern Trust Co., 176 U. S. 181, 193, 44 L. Ed. 423.

"In Simpson *v.* Henderson (1 Moo. & M. 300), a written contract stipulated that a ship should be ready to take freight on board **forthwith**. Parol evidence was admitted to show the surrounding circumstances when the contract was made. Lord Tenterden said: 'The word **forthwith**, indeed, in strictness, means immediately; but it is plain this cannot be the construction to be affixed to it here. It was known that she required some repairs; at least, to be coppered, and some time must be allowed for that.' He left it to the jury to say whether, under the circumstances, the vessel had been made ready within a reasonable time." George *v.* Tate, 102 U. S. 564, 569, 26 L. Ed. 232.

2. A **fortuitous event** is that which happens by a cause which we cannot resist. Code of Louisiana. Viterbo *v.* Friedlander, 120 U. S. 707, 727, 30 L. Ed. 776.

3. For whom it may concern.—A marine insurance policy on property, "**for whom it may concern**," will, in ordinary cases, cover belligerent property. Buck *v.* Chesapeake Ins. Co., 1 Pet. 151, 160, 7 L. Ed. 90. See, generally, the title MARINE INSURANCE.

4. Found in his possession.—In Thornton *v.* Schreiber, 124 U. S. 612, 620, 31 L. Ed. 577, it is said: "Counsel for defendants in error, Schreiber & Sons, insist that the words '**found** in his possession' are to be construed as referring to the finding of the jury; that the expression means simply that where the sheets are ascertained by the finding of the jury to have been at any time in the possession of the person who committed the wrongful act, such person shall forfeit one dollar for each sheet so ascertained to have been in his possession. We, however, think that the word **found** means that there must be a time before the cause of action accrues at which they are **found** in the possession of the defendant." This case arose upon the construction of the words "**found** in his possession," in § 4965 of the Revised Statutes, imposing certain penalties for infringement of copyright. See, also, the title COPYRIGHT, vol. 4, p. 618.

5. Founder.—In Dartmouth College *v.* Woodward, 4 Wheat. 518, 672, 4 L. Ed. 629, the court says: "The **founder** of all corporations (says Sir William Blackstone), in the strictest and original sense,

FRACTIONAL SECTION.—A fractional section is a tract of land not bounded by sectional lines on all sides, in consequence of the intervention of rivers, etc., and containing a less quantity than six hundred and forty acres.[1]

FRACTION OF A DAY.—See DAY, vol. 5, p. 198.

FRANCHISES.—See the titles CONSTITUTIONAL LAW, vol. 4, p. 423; CORPORATIONS, vol. 4, pp. 630, 677. A franchise is a privilege conferred in the United States by the immediate or antecedent legislation of an act of incorporation, with conditions expressed or necessarily inferential from its language, as to the manner of its exercise and for its enjoyment.[2]

is the king alone, for he only can incorporate a society; and in civil corporations, such as mayor, commonalty, etc., where there are no possessions or endowments given to the body, there is no other founder but the king; but in eleemosynary foundations, such as colleges and hospitals, where there is an endowment of lands, the law distinguishes and makes two species of foundation, the one fundatio incipiens, or the incorporation, in which sense the king is the general founder of all colleges and hospitals; the other fundatio perficiens, or the dotation of it, in which sense, the first gift of the revenues is the foundation, and he who gives them is, in the law, the founder; and it is in this last sense we generally call a man the founder of a college or hospital."

1. Brown *v.* Clements, 3 How. 650, 669, 11 L. Ed. 767. See, generally, the title PUBLIC LANDS.

2. Franchise.—Woods' *v.* Lawrence County, 1 Black 386, 409, 17 L. Ed. 122.

"What is a franchise? Under the English law Blackstone defines it as 'a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject.' 2 Bl. Com. 37. Generalized, and divested of the special form which it assumes under a monarchical government based on feudal traditions, a franchise is a right, privilege or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest, and for the public security. Such rights and powers must exist under every form of society. They are always educed by the laws and customs of the community. Under our system, their existence and disposal are under the control of the legislative department of the government, and they cannot be assumed or exercised without legislative authority." California *v.* Central Pac. R. Co., 127 U. S. 1, 40, 32 L. Ed. 150, Central Pac. R. Co. *v.* California, 162 U. S. 91, 124, 40 L. Ed. 903. See, also, Ashley *v.* Ryan, 153 U. S. 436, 441, 38 L. Ed. 773.

"Much confusion of thought has arisen in this case and in similar cases from attaching a vague and undefined meaning to the franchises. It is often used as synonymous with rights, privileges, and immunities, though of a personal and temporary character; so that, if any one of these exists, it is loosely termed a franchise, and is supposed to pass upon a transfer of the franchises of the company. But the term must always be considered in connection with the corporation or property to which it is alleged to appertain. The franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation, and without which its road and works would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. They are positive rights or privileges, without the possession of which the road of the company could not be successfully worked. Immunity from taxation is not one of them. The former may be conveyed to a purchaser of the road as part of the property of the company; the latter is personal, and incapable of transfer without express statutory direction." Morgan *v.* Louisiana, 93 U. S. 217, 223, 23 L. Ed. 860; Chesapeake, etc., R. Co. *v.* Miller, 114 U. S. 176, 185, 29 L. Ed. 121. See, also, Picard *v.* Tennessee, etc., R. Co., 130 U. S. 637, 641, 32 L. Ed. 1051.

Not peculiar to corporation.—"Franchises are not peculiar to corporations; they are granted to individuals, and may be held by any persons capable of holding or enjoying property; a franchise is property, a right to the privilege or immunity conferred by the grant; it may be of a corporeal or incorporeal right, but it is a right of property, or proprietv, in the thing to which it attaches. Franchises are of various grades, from that of a mere right of succession to an estate in land, to the grant of a County Palatine, which is the highest franchise known to the law; the nature and character whereof is the same, whether the grant is to one or many." Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 583b, 9 L. Ed. 773.

"It is quite too narrow a definition of the word franchise, used in this statute, to hold it as meaning only the right to be a corporation. The word is generic,

covering all the rights granted by the legislature. As the greater power includes every less power which is a part of it, the right to withdraw a **franchise** must authorize a withdrawal of every or any right or privilege which is a part of the **franchise.**" Railroad Co. *v.* Georgia, 98 U. S. 359, 365, 25 L. Ed. 185.

"**Exemption from taxation** being a special privilege granted by the government to an individual, either in gross, or as appurtenant to his freehold, is a **franchise.**" Given *v.* Wright, 117 U. S. 648, 656, 29 L. Ed. 1021. See the title TAXATION.

An immunity from taxation is not such a **franchise** of a railroad corporation as will pass by a sale under a mortgage "on the property and **franchises** of the company" and the term **franchises** is not synonymous with "rights, privileges, and **franchises,**" "rights, powers and privileges," and the like. Railroad Co. *v.* County of Hamblem, 102 U. S. 273, 275, 26 L. Ed. 152; Morgan *v.* Louisiana, 93 U. S. 217, 23 L. Ed. 860.

Franchise taxes are levied directly by an act of the legislature, and the corporations are required to pay the amount into the state treasury. They differ from property taxes, as levied for state and municipal purposes, in the basis prescribed for computing the amount, in the manner of assessment, and in the mode of collection, and they are in lieu of all other taxation, state or municipal. Comparative valuation in assessing property taxes is the basis of computation in ascertaining the amount to be contributed by an individual, but the amount of a **franchise** tax depends upon the business transacted by the corporation and the extent to which they have exercised the privileges granted in their charter. Provident Inst. *v.* Massachusetts, 6 Wall. 611, 631, 18 L. Ed. 907; Home Ins. Co. *v.* New York, 134 U. S. 594, 605, 33 L. Ed. 1025. See the title TAXATION.

FRAUD AND DECEIT.

BY JAMES F. MINOR.

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CROSS REFERENCES.

See the titles ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 12; ACCOUNTS AND ACCOUNTING, vol. 1, p. 70; APPEAL AND ERROR, vol. 1, p. 333; ARBITRATION AND AWARD, vol. 2, p. 464; ASSIGNMENTS FOR BENEFIT OF CREDITORS, vol. 2, p. 599; ATTORNEY AND CLIENT, vol. 2, p. 703; AUCTIONS AND AUCTIONEERS, vol. 2, p. 743; BANKRUPTCY, vol. 2, p. 792; BANKS AND BANKING, vol. 3, p. 1; BARRATRY, vol. 3, p. 201; BILL OF LADING, vol. 3, p. 232; BILLS, NOTES AND CHECKS, vol. 3, p. 257; BONDS, vol. 3, p. 382; BOTTOMRY AND RESPONDENTIA, vol. 3, p. 448; BRIBERY, vol. 3, p. 514; CHATTEL MORTGAGES, vol. 3, p. 699; COMPROMISE AND SETTLEMENT, vol. 3, p. 980; CONFLICT OF LAWS, vol. 3, p. 1020; CONFUSION OF GOODS, vol. 3, p. 1093; CONSPIRACY, vol. 3, p. 1099; CONTRACTS, vol. 4, p. 552; CORPORATIONS, vol. 4, p. 621; COURTS, vol. 4, p. 861; COVENANTS, vol. 5, p. 5; CREDITORS' SUITS, vol. 5, p. 22; DAMAGES, vol. 5, p. 157; DECLARATIONS AND ADMISSIONS, vol. 5, p. 214; DOCUMENTARY EVIDENCE, vol. 5, p. 431; DRUNKENNESS, vol. 5, p. 496; DURESS, vol. 5, 682; ELECTION OF REMEDIES, vol. 5, p. 719; ELECTIONS, vol. 5, p. 721; EMBEZZLEMENT, vol. 5, p. 742; EQUITY, vol. 5, p. 803; ESTOPPEL, vol. 5, p. 913; EVIDENCE, vol. 5, p. 1004; EXCHANGE OF PROPERTY, ante, p. 75; EXECUTORS AND ADMINISTRATORS, ante, p. 119; FACTORS AND COMMISSION MERCHANTS, ante, p. 232; FORGERY AND COUNTERFEITING, ante, p. 380; FRAUDULENT AND VOLUNTARY CONVEYANCES; GIFTS; GUARANTY; GUARDIAN AND WARD; HUSBAND AND WIFE; ILLEGAL CONTRACTS; IMPLIED CONTRACTS; INFANTS; INSANITY; INSOLVENCY; INSURANCE; JUDGMENTS AND DECREES; JUDICIAL SALES; LACHES; LETTERS OF CREDIT; LIENS; LIMITATION OF ACTIONS AND ADVERSE POSSESSION; LOANS; LOTTERIES; MARRIAGE; MARRIAGE CONTRACTS AND SETTLEMENTS; MARSHALING ASSETS AND SECURITIES; MECHANICS' LIENS; MISTAKE AND ACCIDENT; MORTGAGES AND DEEDS OF TRUST; PARENT AND CHILD; PAROL EVIDENCE; PARTIES; PARTNERSHIP; PATENTS; PAYMENT; PLEADING; PLEDGE AND COLLATERAL SECURITY; POSTAL LAWS; PRESUMPTIONS AND BURDEN OF PROOF; PRINCIPAL AND AGENT; QUESTIONS OF LAW AND FACT; RECEIVING STOLEN GOODS; RELEASE; RES ADJUDICATA; RESCISSION, CANCELLATION AND REFORMATION; REVENUE LAWS; SALES; SALVAGE; SET-OFF, RECOUPMENT AND COUNTERCLAIM; SHIPS AND SHIPPING; STATUTES; TRADEMARKS, TRADENAMES AND UNFAIR COMPETITION; TRUSTS AND TRUSTEES; UNDUE INFLUENCE; UNITED STATES; VENDOR AND PURCHASER.

As ground for injunction, see the title INJUNCTIONS. As affecting chattel mortgage, see the title CHATTEL MORTGAGES, vol. 3, p. 735, et seq. As affecting right to specific performance, see the title SPECIFIC PERFORMANCE. As affecting title by adverse possession, see the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION. As affecting lease, see the title LANDLORD AND TENANT. As affecting patents, see the title PATENTS. As affecting relation of principal and surety, see the title PRINCIPAL AND SURETY. As affecting public sales, see the titles AUCTIONS AND AUCTIONEERS, vol. 2, p. 746, et seq.; JUDICIAL SALES; SHERIFFS', CONSTABLES' AND MARSHALS' SALES, and the other titles treating of such sales. As basis of estoppel, see the title ESTOPPEL, vol. 5, p. 913. As cause for denying allowance of further proof, see the title PRIZE. As ground for bill of review, see the title BILL OF REVIEW, vol. 3, p. 249. As ground of forfeiture of corporate charter, see the title CORPORATIONS, vol. 4, p. 792. As ground of relief against judgment, see the title JUDGMENTS AND DECREES. As to law governing, see the title CONFLICT OF LAWS, vol. 3, p. 1079. As to dismissal as to portion of defendants jointly charged with fraud, see the title DISMISSAL, DIS-

CONTINUANCE AND NONSUIT, vol. 5, p. 385. As to declarations in evidence, see the titles DECLARATIONS AND ADMISSIONS, vol. 5, p. 227; RES GESTÆ. As to parol evidence of fraud to impeach writing, see the title PAROL EVIDENCE. As to damages and evidence thereof, see the title DAMAGES, vol. 5, p. 185. As to directing verdict, see the title VERDICT. As to jurisdiction of courts, see the titles COURTS, vol. 4, pp. 948, 971; JURISDICTION. As to joinder of actions and counts, see the title ACTIONS, vol. 1, p. 111. As to setting aside deeds for fraud and undue influence, see the titles RESCISSION, CANCELLATION AND REFORMATION; UNDUE INFLUENCE. As to assumpsit by person defrauded to recover payment, see the title ASSUMPSIT, vol. 2, p. 654. As to abatement, see the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 24. As to pleading fraud as set-off to action, see the title SET-OFF, RECOUPMENT AND COUNTERCLAIM. As to fraud in sale as defense to action by vendee against officer for levy thereon, see the title SHERIFFS AND CONSTABLES. As to certifying question of fraud to appellate court, see the title APPEAL AND ERROR, vol. 2, pp. 28, 32. As to invoices and appraisements as evidence, see the titles DOCUMENTARY EVIDENCE, vol. 5, p. 438; REVENUE LAWS. Conclusiveness, on appeal or error, of findings as to fraud, see the title APPEAL AND ERROR, vol. 1, p. 1005, et seq. As to seizure or exclusion from mails of fraudulent matter, see the title POSTAL LAWS. As to recovery of payment procured by fraud, see the titles ASSUMPSIT, vol. 2, pp. 461, et seq. 645; PAYMENT; POSTAL LAWS.

I. Scope of Title.

The scope of this article is general rather than special, and is not intended to include fraud in transactions between persons in particular personal relations, such as husband and wife, attorney and client, etc., for which see the specific titles; or fraud as committed by particular classes of persons, such as corporations, executors and administrators, trustees, guardians, etc.; or the effect of fraud on conveyances and instruments, other than deeds, such as mortgages, bonds, negotiable instruments, insurance policies, etc.; or fraud as ground for cancellation, rescission, or reformation of instruments; or fraud in the various sorts of public and fiduciary sales; or the effect of fraud on statutes of limitations; or fraud as a ground for particular remedies in actions, such as arrest, attachment, etc.; or particular classes of offenses involving fraud, such as forgery, embezzlement, etc. For all these, see the specific titles, to which the cross references refer. See, also, the specific internal references below.

II. Definitions.

Fraud.—While fraud is rather a legal conclusion than an independent fact,[1] and may consist in fraud in fact, involving moral turpitude, or implied fraud, which may exist without imputation of bad faith,[2] fraud in the sense of a court of equity, properly includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are

1. **A legal conclusion.**—"The word 'fraud,' as a term in legal proceedings, generally, is rather a legal conclusion than an independent fact." Wasatch Min. Co. *v.* Crescent Min. Co., 148 U. S. 293, 298, 37 L. Ed. 454. See post, "Fraud as Question of Law and Fact," III, A.

2. **Classification and distinction.**—Fraud may mean positive fraud, or fraud in fact involving moral turpitude or intentional wrong, or implied fraud, which may exist without an imputation of bad faith. Bullis *v.* O'Beirne, 195 U. S. 606, 620, 49 L. Ed. 340; Noble *v.* Hammond, 129 U. S. 65, 69, 32 L. Ed. 621; Ames *v.* Moir, 138 U. S. 306, 311, 312, 34 L. Ed. 951; Felix *v.* Patrick, 145 U. S. 317, 36 L. Ed. 719, and cases cited. See post, "Knowledge and Intent," III, D. See the title BANKRUPTCY, vol. 2, p. 862, et seq.

In Hume *v.* United States, 132 U. S. 406, 411, 33 L. Ed. 393, the classification by Lord Hardwicke in Chesterfield *v.* Janssen, 2 Ves. Sen. 125, 155, is quoted thus: "1. Then fraud, which is dolus malus, may be actual, arising from facts and circumstances of imposition; which is the plainest case. 2. It may be apparent from the intrinsic nature and subject of the bargain itself; such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair

injurious to another, or by which an undue and unconscientious advantage is taken of another.[3]

A fraudulent representation is one of existing material facts, which turn out to be false, made with knowledge of their falsity or with reckless disregard of whether they are true or false.[4]

Collusion.—Collusion is an agreement between two or more persons to defraud a person of his rights by the forms of law, or, to obtain an object forbidden by law.[5]

Covin.—Lord Coke defines covin to be a secret assent, determined in the hearts of two or more, to the defrauding and prejudice of another. Co. Litt. 357 c.[6]

III. Elements and General Principles.

A. Fraud as Question of Law and Fact.—Although it has been said that the question of fraud is one of fact,[7] the question of fraud or no fraud is one necessarily compounded of fact and of law; and without a correct and precise

man would accept on the other; which are unequitable and unconscientious bargains, and of such even the common law has taken notice."

An agreement between A and B by which A was to collect money and keep it until B called for it, cannot be taken to imply an obligation to keep and deliver the identical bills or coins. Nor can the subsequent mingling, by the plaintiff in error, of the money collected with his own, constitute an actual, positive fraud, but only such an implied fraud as is involved in most, or all, cases of conversion of property or of breach of contract Noble *v.* Hammond, 129 U. S. 65, 70, 32 L. Ed. 621.

As to distinction between intentional and constructive fraud or wrongdoing, see Kann *v.* King, 204 U. S. 43, 62, 51 L. Ed. 360.

3. **Definition.**—Moore *v.* Crawford, 130 U. S. 122, 128, 32 L. Ed. 878, citing 1 Story Eq. Jur., § 187.

4. **Fraudulent representation defined.**—Cooper *v.* Schlesinger, 111 U. S. 148, 28 L. Ed 382; Sawyer *v.* Prickett, 19 Wall 146, 163, 22 L. Ed. 105; Smith *v.* Richards, 13 Pet 26, 36, 10 L. Ed. 42.

In order to establish a charge of fraud the complainant must show by clear and decisive proof: First, that the defendant has made a representation in regard to a material fact; secondly, that such representation is false; thirdly, that such representation was not actually believed by the defendant, on reasonable grounds, to be true; fourthly, that it was made with intent that it should be acted on; fifthly, that it was acted on by complainant to his damage; and, sixthly, that in so acting on it the complainant was ignorant of its falsity, and reasonably believed it to be true. Southern Development Co. *v.* Silva, 125 U. S. 247, 250, 31 L. Ed. 678. See, also, Smith *v.* Richards, 13 Pet. 26, 37, 10 L. Ed. 42; Slaughter *v.* Gerson, 13 Wall. 379, 20 L. Ed. 627.

"In 1 Story's Equity, 201-2, it is thus stated: 'Where the party, intentionally, or by design, misrepresents a material fact, or produces a false impression, in order to mislead another, or to entrap or cheat him, or to obtain an undue advantage of him; in every such case, there is a positive fraud, in the truest sense of the terms; there is an evil act, with an evil intent; dolum malum, ad circumveniendum. And the misrepresentation may be as well by deeds or acts, as by words; by artifices to mislead, as by positive assertions.'" Smith *v.* Richards, 13 Pet. 26, 36, 10 L. Ed. 42.

"The requisites to sustain an action for deceit," says Baron Parke, in Watson *v.* Poulson, 15 Jurist, 1111, are "the telling of an untruth, knowing it to be an untruth, with intent to induce a man to alter his condition, and his altering his condition in consequence, whereby he sustains damage." Ming *v.* Woolfolk, 116 U. S. 599, 602, 29 L. Ed. 740.

5. **Collusion.**—Dickerman *v.* Northern Trust Co., 176 U. S. 181, 190, 44 L. Ed. 423, citing Bouvier.

"It implies the existence of fraud of some kind, the employment of fraudulent means, or lawful means for the accomplishment of an unlawful purpose; but if the action be founded upon a just judgment, and be conducted according to the forms of law and with a due regard to the rights of parties, it is no defense that the plaintiff may have had some ulterior object in view beyond the recovery of a judgment, so long as such object was not an unlawful one." Dickerman *v.* Northern Trust Co., 176 U. S. 181, 190, 44 L. Ed. 423.

6. **Covin.**—Conard *v.* Nicoll, 4 Pet. 291, 295, 7 L. Ed. 862; United States *v.* Arredondo, 6 Pet. 691, 716, 8 L. Ed. 547.

7. **Question of fraud one of fact.**—Clark *v.* United States, 131 U. S., appx. lxxxv, lxxxvi, 18 L. Ed. 915; Humes *v.* Scruggs, 94 U. S. 22, 28, 24 L. Ed. 51.

As to force of finding of court, see the title APPEAL AND ERROR, vol. 1, p. 1007.

knowledge of the facts from which the legal conclusion should be deduced, it is not easy to perceive how any legal conclusion can be reached.[8]

B. Falsity and Tendency to Deceive.—See ante, "Definitions," II; post, "Manner of Perpetration," IV. Falsity and tendency to deceive are essentials of fraud.[9]

C. Materiality.—A fraudulent misrepresentation must be of a material fact.[10]

D. Knowledge and Intent—1. FRAUDULENT INTENT.—**Implied fraud or fraud in law,** may exist without the imputation of bad faith or immorality.[11]

8. Mixed question of law and fact.—Ogilvie *v.* Knox Ins. Co., 18 How. 577, 581, 15 L. Ed. 490; Evans *v.* United States, 153 U. S. 584, 606, 38 L. Ed. 830 (per Field, J., dissenting); Wasatch Min. Co. *v.* Crescent Min. Co., 148 U. S. 293, 298, 37 L. Ed. 454; McLaughlin *v.* Bank, 7 How. 220, 228, 12 L. Ed. 675. See post, "Sufficiency and Weight," VI, G, 3.

9. Falsity and tendency to deceive.—United States *v.* Beebe, 180 U. S. 343, 350, 45 L. Ed. 563; Sawyer *v.* Prickett, 19 Wall. 146, 163, 22 L. Ed. 105; Claflin *v.* Commonwealth Ins. Co., 110 U. S. 81, 85, 28 L. Ed. 76; United States *v.* Minor, 114 U. S. 233, 239, 29 L. Ed. 110; Ming *v.* Woolfolk, 116 U. S. 599, 602, 29 L. Ed. 740; Marshall *v.* Hubbard, 117 U. S. 415, 417, 29 L. Ed. 919; Southern Development Co. *v.* Silva, 125 U. S. 247, 250, 31 L. Ed. 678; Farrar *v.* Churchill, 135 U. S. 609, 615, 34 L. Ed. 246; Farnsworth *v.* Duffner, 142 U. S. 43, 55, 35 L. Ed. 931.

It is impossible to found an allegation of fraud upon a representation made by and for the defendants in open court, which simply states as a fact that which the bill of the complainant itself distinctly avers was a fact. It is true the defendants, as the bill alleges, based their application for reduced judgments upon this fact of insolvency, but whether the application was or was not meritorious is quite immaterial upon the issue of fraud, so long as the statements upon which it was made were neither fraudulent nor even false. It is entirely plain there was no fraud in the case, and therefore this ground for complainant's relief cannot be sustained. United States *v.* Beebe, 180 U. S. 343, 350, 45 L. Ed. 563.

"A party can commit a legal fraud, in a business transaction with another, only by fraudulent misrepresentations of fact, or by such conduct or artifice, for a fraudulent purpose, as will mislead the other party, or throw him off his guard, and cause him to omit inquiry or examination which he would otherwise make." Cleveland *v.* Richardson, 132 U. S. 318, 329, 33 L. Ed. 384.

10. Materiality.—Johansson *v.* Stephanson, 154 U. S. 625, 23 L. Ed. 1009; McFerran *v.* Taylor, 3 Cranch 270, 2 L. Ed. 436; Smith *v.* Richards, 13 Pet. 26, 37, 10 L. Ed. 42; Slaughter *v.* Gerson, 13 Wall. 379, 20 L. Ed. 627; United States *v.* Minor, 114 U. S. 233, 239, 29 L. Ed. 110; Marshall *v.* Hubbard, 117 U. S. 415, 417, 29 L. Ed. 919; Southern Development Co. *v.* Silva, 125 U. S. 247, 250, 31 L. Ed. 678; Stewart *v.* Wyoming Cattle Ranche Co., 128 U. S. 383, 387, 32 L. Ed. 439; Farrar *v.* Churchill, 135 U. S. 609, 615, 34 L. Ed. 246; Farnsworth *v.* Duffner, 142 U. S. 43, 55, 35 L. Ed. 931; Lehigh Zinc, etc., Co. *v.* Bamford, 150 U. S. 665, 673, 37 L. Ed. 1215.

Where, had the fact claimed to have been misstated been correctly described, it would not have changed the conduct of the parties, it does not invalidate. Johansson *v.* Stephanson, 154 U. S. 625, 23 L. Ed. 1009.

It would hardly do to hold that a party was induced into a contract by false and fraudulent representations, because one of the vendors represented that he had been governor of the state, and was a member of the church, and president of a bank and a railroad company. If true, they certainly were not false and fraudulent representations, and, if false, they were not of a character to invalidate a contract. Farnsworth *v.* Duffner, 142 U. S. 43, 55, 35 L. Ed. 931.

Where the full amount which the purchaser had to pay was the amount named in the first instance, to wit, $21,500, and if, in fraud of the rights of their associates, the agents or committee with whom the sale was concluded changed the distribution of that sum, it was a wrong which only the parties injured can take advantage of. Farnsworth *v.* Duffner, 142 U. S. 43, 55, 35 L. Ed. 931.

As to concealment or nondisclosure, see post, "By Concealment or Nondisclosure," IV, C.

11. Bad faith not essential to implied fraud.—Ames *v.* Moir, 138 U. S. 306, 311, 34 L. Ed. 951, citing Neal *v.* Clark, 95 U. S. 704, 709, 24 L. Ed. 586; Wolf *v.* Stix, 99 U. S. 1, 7, 25 L. Ed. 309; Hennequin *v.* Clews, 111 U. S. 676, 682, 28 L. Ed. 565; Strang *v.* Bradner, 114 U. S. 555, 559, 29 L. Ed. 248; Noble *v.* Hammond, 129 U. S. 65, 69, 32 L. Ed. 621; Upshur *v.* Briscoe, 138 U. S. 365, 34 L. Ed. 931. See, also, Stephen *v.* Beall, 22 Wall. 329, 340, 22 L. Ed. 786.

Actual and constructive fraud compared.—The law regards an act in violation of the letter and policy of the law more leniently than if it had been committed with the actual intent to defraud any one. Such an act lacks the element of wicked-

Positive fraud or fraud in fact involves moral turpitude or intentional wrong.[12] Actual fraud is always attended by an intent to defraud, and the intent may be shown by any evidence that has a tendency to persuade the mind of its existence.[13] And there must be a purpose to influence the other party and an intent that he shall act thereon.[14] And a fraudulent intent may be inferred, prima facie, from willfully and knowingly doing an illegal act, necessarily injurious to another, but the inference is rebuttable.[15] And this without regard

ness necessary to constitute moral turpitude, and a court of equity is slow to disturb rights and titles founded in good faith thereon. Felix *v.* Patrick, 145 U. S. 317, 36 L. Ed. 719.

12. **Contra as to fraud in fact.**—Lehigh Zinc, etc., Co. *v.* Bamford, 150 U. S. 665, 673, 37 L. Ed. 1215; Moss *v.* Riddle, 5 Cranch 351, 3 L. Ed. 123; Smith *v.* Richards, 13 Pet. 26, 36, 10 L. Ed. 42; Butler *v.* Watkins, 13 Wall. 456, 464, 20 L. Ed. 629; Magee *v.* Manhattan Life Ins. Co., 92 U. S. 93, 98, 23 L. Ed. 699; Ming *v.* Woolfolk, 116 U. S. 599, 602, 29 L. Ed. 740; Marshall *v.* Hubbard, 117 U. S. 415, 417, 29 L. Ed. 919; Wecker *v.* National Enameling, etc., Co., 204 U. S. 176, 185, 51 L. Ed. 430.

13. **Same.**—Butler *v.* Watkins, 13 Wall. 456, 464, 20 L. Ed. 629; Wood *v.* United States, 16 Pet. 342, 360, 10 L. Ed. 987.

14. **Intent to influence.**—Lehigh Zinc, etc., Co. *v.* Bamford, 150 U. S. 665, 673, 37 L. Ed. 1215; Marshall *v.* Hubbard, 117 U. S. 415, 29 L. Ed. 919. See post, "Knowledge," III, D, 2.

"A representation as to a fact, made knowingly, falsely and fraudulently for the purpose of obtaining money from another, and by means of which such money is obtained, creates a debt by means of a fraud involving moral turpitude and intentional wrong." Forsyth *v.* Vehmeyer, 177 U. S. 177, 182, 44 L. Ed. 723.

If a representation—as the jury, in effect, found—was made with the intent to deceive the plaintiffs in reference to the actual state of things, and to induce them to do what defendants knew they would not otherwise have done, or been asked to do, if this conduct does not constitute positive fraud, or fraud in fact, involving intentional wrong, it is difficult to conceive what circumstances would have amounted to fraud of that character. Strang *v.* Bradner, 114 U. S. 555, 560, 29 L. Ed. 248.

"Fraud must always principally depend upon the quo animo." Wiscart *v.* D'Auchy, 3 Dall. 321, 330, 1 L. Ed. 619.

"From a view of all that has been said by learned judges and jurists upon this subject, it may be safely laid down, that, to constitute actual fraud between two or more persons, to the prejudice of a third, contrivance and design to injure such third person, by depriving him of some right, or otherwise impairing it, must be shown. In the case of Chesterfield *v.* Jansen, 2 Ves. 155, Lord Hardwicke terms it dolus malus. Lord Coke defines covin to be a secret assent determined in the hearts of two or more, to the defrauding and prejudice of another. Co. Litt. 357 c. The acts of 13th Eliz., ch. 5, and 27th Eliz., ch. 4, which did little more than affirm the doctrines of the common law, afford substantially the same definition. The case stated by Lord Mansfield, in Worseley *v.* DeMattos, 1 Burr. 474 (see also Cadogan *v.* Kennet, Cowp. 434), of a person, who knowing that a creditor has obtained judgment against his debtor, buys the debtor's goods, though for a full price, with a view to defeat the execution of the creditor, is a strong illustration of the same principle; the purchase was declared to be fraudulent, not because a man may not lawfully purchase the property of a defendant against whom there is a judgment, but because of the intention with which it was made." Conard *v.* Nicoll, 4 Pet. 291, 295, 7 L. Ed. 862; United States *v.* Arredondo, 6 Pet. 691, 716, 8 L. Ed. 547.

There is no arbitrary rule by which the good faith of a transaction can be tested, although it may be that ordinary men in similar circumstances would have acted differently. Tiffany *v.* Lucas, 15 Wall. 410, 422, 21 L. Ed. 198.

Instruction.—See post, "Instructions," VI, E.

Harmless error in decree.—See post, "Verdict and Decree," VI, F.

15. **Presumptive intent to defraud by illegal act.**—Agnew *v.* United States, 165 U. S. 36, 49, 41 L. Ed. 624.

"The law presumes that every man intends the legitimate consequence of his own acts. Wrongful acts knowingly or intentionally committed can neither be justified or excused on the ground of innocent intent. The color of the act determines the complexion of the intent. The intent to injure or defraud is presumed when the unlawful act, which results in loss or injury, is proved to have been knowingly committed. It is a well-settled rule, which the law applies in both criminal and civil cases, that the intent is presumed and inferred from the result of the action." Agnew *v.* United States, 165 U. S. 36, 53, 41 L. Ed. 624. See, also, St. Louis, etc., R. Co. *v.* Johnston, 133 U. S. 566, 577, 33 L. Ed. 683.

"'Fraud,' said Mr. Justice Catron, in Lord *v.* Goddard, 13 How. 198, 14 L. Ed. 111, 'means an intention to deceive.' 'Where one,' said Shipley, Ch. J., in Hammatt *v.* Emerson, 27 Maine 308, 326, 'has made a false representation, knowing it

to an intent to make future reparation,[16] or the want of specific intent to prejudice party to whom made.[17] If a motive exist prompting to a particular line of conduct, and it be shown that in pursuing that line a defendant has deceived and defrauded one person, it may justly be inferred that similar conduct towards another, at about the same time, and in relation to a like subject, was actuated by the same spirit.[18]

2. KNOWLEDGE.—But actual knowledge of the falsity of the representations is not necessary; it may be presumed from their nature.[19] But such knowledge

to be false, the law infers that he did so with an intention to deceive.' 'If a person tells a falsehood, the natural and obvious consequences of which, if acted on, is injury to another, that is fraud in law.'" Claflin *v.* Commonwealth Ins. Co., 110 U. S. 81, 95, 28 L. Ed. 76.

Rebuttable.—The presumption of the intent to injure and defraud, if the facts were found as stated, was not conclusive, but its strength was such that it could only be overcome by evidence that created a reasonable doubt of its correctness; in other words, that as the presumption put the intent beyond reasonable doubt, it must prevail, unless evidence of at least equivalent weight were adduced to the contrary. Agnew *v.* United States, 165 U. S. 36, 50, 41 L. Ed. 624.

16. Intent to make reparation.—The question of the intent is to be determined by the facts and circumstances and the surroundings at the time of the transaction, without reference to an intent to make reparation in the future. Agnew *v.* United States, 165 U. S. 36, 57, 41 L. Ed. 624.

17. Personal malice unnecessary.—The false statement of a material matter, knowingly and willfully made, with the intent to deceive is fraudulent, and it is no palliation of the fraud that the party making same did not mean thereby to prejudice the parties to whom it was made, but merely to promote his own personal interest in a matter not involved in the contract with them. Claflin *v.* Commonwealth Ins. Co., 110 U. S. 81, 97, 28 L. Ed. 76. See the title INSURANCE.

"No one can be permitted to say, in respect to his own statements upon a material matter, that he did not expect to be believed; and if they are knowingly false, and willfully made, the fact that they are material is proof of an attempted fraud, because their materiality, in the eye of the law, consists in their tendency to influence the conduct of the party who has an interest in them, and to whom they are addressed." Claflin *v.* Commonwealth Ins. Co., 110 U. S. 81, 95, 28 L. Ed. 76.

"'A banker who is, to his own knowledge, hopelessly insolvent, cannot honestly continue his business and receive the money of his customers; and although having no actual intent to cheat and defraud a particular customer, he will be held to have intended the inevitable consequences of his act, i. e., to cheat and defraud all persons whose money he receives, and whom he fails to pay before he is compelled to stop business.'" St. Louis, etc., R. Co. *v.* Johnston, 133 U. S. 566, 577, 33 L. Ed. 683. See the title BANKS AND BANKING, vol. 3, p. 23.

18. Inference from motive prompting similar acts.—Butler *v.* Watkins, 13 Wall. 456, 464, 20 L. Ed. 629.

19. Presumptive knowledge of falsity.—Lehigh Zinc, etc., Co. *v.* Bamford, 150 U. S. 665, 673, 37 L. Ed. 1215; Wecker *v.* National Enameling, etc., Co., 204 U. S. 176, 185, 51 L. Ed. 430.

"As a general rule, fraud upon the part of a vendor or lessor, by means of representations of existing material facts, is not established, unless it appears such representations were made for the purpose of influencing the purchaser or lessee, and with knowledge that they were untrue; but where the representations are material and are made by the vendor or lessor for the purpose of their being acted upon, and they relate to matters which he is bound to know, or is presumed to know, his actual knowledge of them being untrue is not essential." Lehigh Zinc, etc., Co. *v.* Bamford, 150 U. S. 665, 673, 37 L. Ed. 1215.

"Whether the party thus misrepresenting a fact, knew it to be false, or made the assertion, without knowing whether it were true or false, is wholly immaterial; for the affirmation of what one does not know, or believe to be true, is equally, in morals and law, as unjustifiable, as the affirmation of what is known to be positively false. And even if the party innocently misrepresents a fact by mistake, it is equally conclusive; for it operates as a surprise and imposition on the other party. Or, as Lord Thurlow expresses it, in Nevill *v.* Wilkinson, 'it misleads the parties contracting, on the subject of the contract.'" Smith *v.* Richards, 13 Pet. 26, 36, 10 L. Ed. 42; McFerran *v.* Taylor, 3 Cranch 270, 281, 2 L. Ed. 436.

"A person who makes representations of material facts, assuming or intending to convey the impression that he has actual knowledge of the existence of such facts, when he is conscious that he has no such knowledge, is as much responsible for the injurious consequences of such representations, to one who believes and acts upon them, as if he had actual knowledge of their falsity." Lehigh Zinc, etc., Co. *v.* Bamford, 150 U. S. 665, 673, 37 L. Ed.

is not to be presumed from the mere fact of falsity.[20]

E. Reliance.—Justifiable reliance, by the party claiming to have been defrauded, upon the alleged fraudulent representations, is essential to relief therefor.[21] Independent and unhindered investigation, and reliance thereon, or the opportunity to investigate where the circumstances make it a duty to investigate, will bar any relief.[22] Although it need not have been the sole reliance, if it

1215. See, also, Southern Development Co. *v.* Silva, 125 U. S. 247, 250, 31 L. Ed. 678; Cooper *v.* Schlesinger, 111 U. S. 148, 155, 28 L. Ed. 382.

"Even in cases where the direct issue of fraud is involved, knowledge may be imputed where one willfully closes his eyes to information within his reach." Wecker *v.* National Enameling, etc., Co., 204 U. S. 176, 185, 51 L. Ed. 430. See ante, "Definitions," II.

The cases holding that a misrepresentation of material facts inducing a contract, though made in ignorance, may, in many cases, be the foundation of a suit for its cancellation or modification, apply only where the contract, of which a rescission or modification is sought, was obtained by the party claiming its benefit, and the misrepresentations related to the consideration given for it, and not where they were made by another party, not the agent of the party claiming the benefit of the contract, and without his participation, and not relating to the consideration thereof. Lumber Co. *v.* Buchtel, 101 U. S. 633, 636, 25 L. Ed. 1072. See also, post, "By Misrepresentations," IV, B.

20. Not presumed from mere falsity.—"The law raises no presumption of knowledge of falsity from the single fact per se that the representation was false. There must be something further to establish the defendant's knowledge." Southern Development Co. *v.* Silva, 125 U. S. 247, 258, 31 L. Ed 678.

21. Justifiable reliance essential.—Farrar *v.* Churchill, 135 U. S. 609, 615, 34 L. Ed. 246; Slaughter *v.* Gerson, 13 Wall. 379, 20 L. Ed. 627; Sawyer *v.* Prickett, 19 Wall. 146, 163, 22 L. Ed. 105; United States *v.* Minor, 114 U. S. 233, 239, 29 L. Ed. 110; Ming *v.* Woolfolk, 116 U. S. 599, 602, 29 L. Ed. 740; Marshall *v.* Hubbard, 117 U. S. 415, 417, 29 L. Ed. 919; Southern Development Co. *v.* Silva, 125 U. S. 247, 250, 31 L. Ed. 678; Baker *v.* Cummings, 169 U. S. 189, 196, 42 L. Ed. 711, reaffirmed in Baker *v.* Cummings, 181 U. S. 117, 45 L. Ed. 776.

"Misrepresentation entitling to relief must be in reference to some material thing unknown to the purchaser, either from not having examined, or from want of opportunity to be informed, or from entire confidence reposed in the vendor." Farrar *v.* Churchill, 135 U. S. 609, 616, 34 L. Ed. 246; Cleaveland *v.* Richardson, 132 U. S. 318, 329, 33 L. Ed. 384; Slaughter *v.* Gerson, 13 Wall. 379, 20 L. Ed. 627; Smith *v.* Richards, 13 Pet. 26, 37, 10 L. Ed. 42.

One who, in making an exchange of property, did not rely upon what was said by the other party, but acted upon his own judgment and upon information obtained by him from third persons, cannot afterwards set up fraud and misrepresentation. Hoyt *v.* Hanbury, 128 U. S. 584, 585, 32 L. Ed. 565.

"In order to justify a recovery, it must be shown by proof that the plaintiff's agent relied upon the alleged false representations, and made them the ground and basis of his report, but that he was so circumstanced as to justify him in so relying upon and placing confidence in said representations; and if it appears that he had other knowledge, or had received other representations and statements, conflicting therewith, sufficient to raise reasonable doubts as to the correctness of such representations, then there can be no recovery." Stewart *v.* Wyoming Cattle Ranche Co., 128 U. S. 383, 387, 32 L. Ed. 439.

22. Independent investigation or opportunity therefor.—Shappirio *v.* Goldberg, 192 U. S. 232, 241, 48 L. Ed. 419, citing Slaughter *v.* Gerson, 13 Wall. 379, 20 L. Ed. 627; Southern Development Co. *v.* Silva, 125 U. S. 247, 31 L. Ed. 678; Farrar *v.* Churchill, 135 U. S. 609, 34 L. Ed. 246; Farnsworth *v.* Duffner, 142 U. S. 43, 48, 35 L. Ed. 931; Baker *v.* Cummings, 169 U. S. 189, 196, 42 L. Ed. 711, reaffirmed in Baker *v.* Cummings, 181 U. S. 117, 45 L. Ed. 776.

"If the purchaser investigates for himself and nothing is done to prevent his investigation from being as full as he chooses, he cannot say that he relied on the vendor's representations. Southern Development Co. *v.* Silva, 125 U. S. 247, 31 L. Ed. 678. 'If the party to whom the representations were made,' remarked Lord Langdale, in Clapham *v.* Shillito, 7 Beavan 146, 149, 'himself resorted to the proper means of verification, before he entered into the contract, it may appear that he relied on the result of his own investigation and inquiry, and not upon the representations made to him by the other party; or if the means of investigation and verification be at hand, and the attention of the party receiving the representations be drawn to them, the circumstances of the case may be such, as to make it incumbent on a court of justice to impute to him a knowledge of the result, which, upon due inquiry, he ought to have obtained, and thus the notion of reliance on the representations made to him may be excluded.'" Farrar *v.* Churchill, 135 U. S. 609, 615, 34 L. Ed. 246. See, also,

were proximate, immediate and material.[23]

Facts open to ordinary observation and notice are not such as to be the subject of concealment and misrepresentation.[24]

Facts, as to which notice is chargeable to the party complaining of fraud, cannot be the subject of fraudulent misrepresentations.[25]

F. Damage.—An action for a deceit must fail, where, conceding the alleged representation to have been made by the defendant and to have been false, the plaintiffs were not induced thereby to change their condition, and, moreover, have suffered no damage.[26]

Shappirio *v.* Goldber, 192 U. S. 232, 241, 48 L. Ed. 419; Farnsworth *v.* Duffner, 142 U. S. 43, 47, 35 L. Ed. 931; Southern Development Co. *v.* Silva, 125 U. S. 247, 31 L. Ed. 678; Andrus *v.* St. Louis Smelting, etc., Co., 130 U. S. 643, 647, 32 L. Ed. 1054; Slaughter *v.* Gerson, 13 Wall. 379, 383, 20 L. Ed. 627.

Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say, in impeachment of the contract of sale, that he was deceived by the vendor's misrepresentations. Slaughter *v.* Gerson, 13 Wall. 379, 20 L. Ed. 627; Farnsworth *v.* Duffner, 142 U. S. 43, 47, 35 L. Ed. 931; Shappirio *v.* Goldberg, 192 U. S. 232, 241, 48 L. Ed. 419; Smith *v.* Richards, 13 Pet. 26, 37, 10 L. Ed. 42.

Thus, where a correct description of the property was given in the deed and recorded chain of title, and the agent who made the sale was intrusted by vendee with the examination of the deed and title, and thirty days were given to complete the purchase, for this purpose the agent was the agent of vendee and it not appearing in the proof that he was misled by the representations of vendor, or that by any scheme or plan he was kept from a full examination of the title and the description of the property contained in the deed furnished, he must be held chargeable with knowledge which the opportunity before him afforded to investigate the extent and nature of the property conveyed and which he undertook to examine for the purchaser, and his knowledge and means of information must be imputed to the purchaser. Shappirio *v.* Goldberg, 192 U. S. 232, 241, 48 L. Ed. 419. See ante, "Fraudulent Intent," III, D, 1; post, "By Misrepresentations," IV, B.

Inattention and carelessness not relieved against.—"A court of equity will not undertake, any more than a court of law, to relieve a party from the consequences of his own inattention and carelessness." Slaughter *v.* Gerson, 13 Wall. 379, 383, 20 L. Ed. 627.

But "there are cases where misrepresentations are made which deceive the purchaser, in which it is no defense to say that had the plaintiff declined to believe the representations and investigated for himself he would not have been deceived." Shappirio *v.* Goldberg, 192 U. S. 232, 241, 48 L. Ed. 419. See ante, "Fraudulent Intent," III, D, 1; post, "By Misrepresentations," IV, B.

23. **Need not be sole reliance.**—It must be acted upon by the other party in ignorance of its falsity and with a reasonable belief that it was true. It must be the very ground on which the transaction took place, although it is not necessary that it should have been the sole cause, if it were proximate, immediate and material. Farrar *v.* Churchill, 135 U. S. 609, 615, 34 L. Ed. 246.

24. **Facts open to ordinary observation.**—Synnott *v.* Shaughnessy, 130 U. S. 572, 580, 32 L. Ed. 1038.

The law does not afford relief on the ground of fraud or misrepresentation of the other party to one who suffers by not using the ordinary means of information, whether his neglect be attributable to indifference or credulity, nor will industrious activity in other directions, to the neglect of such means, be of any avail. Andrus *v.* St. Louis Smelting, etc., Co., 130 U. S. 643, 647, 32 L. Ed. 1054; Slaughter *v.* Gerson, 13 Wall. 379, 385, 20 L. Ed. 627.

25. **Facts of which notice is chargeable to complainants.**—A charge, by the holder of coupon bonds of a railroad, that he exchanged unpaid coupons for certificates of preferred stock, and was induced to do so by a fraud practiced upon him by the president of the company, on whose representations he relied, cannot be based upon allegations that the company had no authority under its charter to issue such stock, and if it had, the certificates were invalid for want of the common seal of the company to them. The court said that these questions need not be decided, as they depend upon either the general statutory law of the state, or the charter of the company, of both of which the complainant must be presumed to have had notice. Coddington *v.* Railroad Co., 103 U. S. 409, 26 L. Ed. 400.

Matters of law.—See post, "Must Be of Existing or Past Fact, Not of Mere Opinion," IV, B, 1.

26. **Damage.**—Ming *v.* Woolfolk, 116 U. S. 599, 602, 29 L. Ed. 740; Johansson *v.* Stephanson, 154 U. S. 625, 23 L. Ed. 1009; Southern Development Co. *v.* Silva, 125 U. S. 247, 250, 31 L. Ed. 678; Slaughter *v.* Gerson, 13 Wall. 379, 20 L. Ed. 627.

Fraud without damage is no ground for

G. Construction of Statutes against Fraud.—Laws enacted to prevent fraud, although revenue laws, are to be considered remedial rather than penal in character, and are to be construed so as most effectually to carry out the object of the legislature.[27]

Fraud upon Statute as Violation Thereof.—A fraud upon a statute is a violation of the statute.[28]

IV. Manner of Perpetration.

A. In General—1. By Agent.—No one can claim the benefit of an executory contract fraudulently obtained for him by an agent, after the discovery of the fraud, without approving and sanctioning it.[29] And a sale made through

relief. Garrow *v.* Davis, 15 How. 272, 277, 14 L. Ed. 692; Smith *v.* Richards, 13 Pet. 26, 37, 10 L. Ed. 42; Marshall *v.* Hubbard, 117 U. S. 415, 417, 29 L. Ed. 919; Angle *v.* Chicago, etc., R. Co., 151 U. S. 1, 10, 38 L. Ed. 55; Farnsworth *v.* Duffner, 147 U. S. 43, 55, 35 L. Ed. 931.

"In equity, as at law, fraud and injury must concur, to furnish ground for judicial action; a mere fraudulent intent, unaccompanied by any injurious act, is not the subject of judicial cognizance. Truly, there are strong grounds of suspicion; but fraud ought to be conceived; it must be proved, and expressly found." Clarke *v.* White, 12 Pet. 178, 196, 9 L. Ed. 1046; Conard *v.* Nicoll, 4 Pet. 291, 297, 7 L. Ed. 862; United States *v.* Arredondo, 6 Pet. 691, 716, 8 L. Ed. 547.

Legal or equitable interest essential.—B., as agent for the owners, contracted to sell a large quantity of land in Maine, which contract was assigned by the vendee, until it came, through mesne assignments, into the hands of M. and others. Payments were made from time to time on account; but at length, in consequence of a failure to make the payments stipulated in the contract, and by virtue of a clause contained in it, the contract became void. In this state of things M. employed one P. to ascertain from B. the lowest price that he would take for the land, and then to sell to others for the highest price that he could get. P. sold and assigned the contract to D. for $1,050. Upon the theory that P. and D. entered into a fraudulent combination, still, M. and others are not entitled to demand that a court of equity should consider D. as a trustee of the lands for their use. They had no interest in them, legal or equitable, nor anything but a good will, which alone, was the subject matter of the fraud, if there was any. But the evidence shows that this good will did not exist; for B. was not willing to sell to M. and others for a less price than to any other person Garrow *v.* Davis, 15 How. 272, 14 L. Ed. 692.

"To entitle themselves to relief, the complainants must prove fraud and damage; or, to state the principle less abstractly, they must show that their agent disposed of what he was employed to sell, for less than its value, and that he did this fraudulently." Garrow *v.* Davis, 15 How. 272, 277, 14 L. Ed. 692.

Although P. represented himself to be acting for M. and others, when in reality he was representing D., yet he did not obtain the land at a reduced price thereby; but on the contrary, at its fair market value. The charges of fraud in the bill are denied in the answers, and the evidence is not sufficient to sustain the allegations. Garrow *v.* Davis, 15 How. 272, 14 L. Ed. 692.

27. Construction of statutes.—Cliquot's Champagne, 3 Wall. 114, 145, 18 L. Ed. 116; United States Bank *v.* Lee, 13 Pet. 107, 10 L. Ed. 81; Taylor *v.* United States, 3 How. 197, 11 L. Ed. 559; Smythe *v.* Fiske, 23 Wall. 374, 22 L. Ed. 47; United States *v.* Stowell, 133 U. S. 1, 33 L. Ed. 555. And see the title FRAUDULENT AND VOLUNTARY CONVEYANCES.

"Laws enacted for the prevention of fraud, for the suppression of a public wrong, or to effect a public good, are not, in the strict sense, penal acts, although they may inflict a penalty for violating them." Taylor *v.* United States, 3 How. 197, 210, 11 L. Ed. 559; Wood *v.* United States, 16 Pet. 342, 10 L. Ed. 987.

28. Fraud upon statute.—Bank *v.* Owens, 2 Pet. 527, 7 L. Ed. 508.

Whatever is done in fraud of law is done in violation of it. Lee *v.* Lee, 8 Pet. 44, 8 L. Ed. 860; The William King, 2 Wheat. 148, 4 L. Ed. 206. See, generally, the title STATUTES.

29. By agent.—New York Life Ins. Co. *v.* Fletcher, 117 U. S. 519, 535, 29 L. Ed. 934. See Sawyer *v.* Prickett, 19 Wall. 146, 163, 22 L. Ed. 105; National Bank, etc., Co. *v.* Petrie, 189 U. S. 423, 425, 47 L. Ed. 879. See the title PRINCIPAL AND AGENT.

Same.—And it does not lie with one to claim property through the fraudulent act of another, whether partner or agent, without being affected by that act the same as if it were his own. Castle *v.* Bullard, 23 How. 172, 189, 16 L. Ed. 424. And the same principle must apply in a case like the present, where a firm doing business as commission merchants have received the fruits of the fraud in the commissions earned for transacting the business.

Fraud may be imputed to the parties,

fraud of an agent, may be annulled or relieved against.[30]

2. Under Forms of Law.—Some of the most atrocious frauds are committed according to the forms of law. Indeed, the greater the fraud intended, the more particular the parties to it often are to proceed according to the strictest forms of law.[31]

3. Not Imputable to Government.—Fraud is not imputable to a government.[32]

4. Fraud and Deceit May Precede Its Perpetration.—The fraud and deceit which enable the offender to do the wrong may precede its perpetration. The length of time is not material, provided there is the relation of design and its consummation.[33]

B. By Misrepresentations—1. Must Be of Existing or Past Fact, Not a Mere Opinion.—**Statement of Rule.**—In order to recover on the ground of false representations, such false representations must be shown to be of a then-existing matter of fact material to the transaction; and no expression of opinion or judgment or estimation, not involving the assertion of an unconditional fact, can constitute actionable false representation.[34] Mere expressions of opinion do not amount to fraudulent misrepresentation,[35] such as estimates of

either by direct co-operation in the original design, at the time of its concoction, or by constructive co-operation, from notice of it, and carrying the design, upon such notice, into operation. Magniac *v.* Thimson, 7 Pet. 348, 8 L. Ed. 709; Lincoln *v.* Claflin, 7 Wall. 132, 138, 19 L. Ed. 106. See the title CONSPIRACY, vol. 3, p. 1108, et seq.

30. Fraudulent sale.—"If a principal ratify a sale by his agent, and take the benefit of it, and it afterwards turn out that fraud or mistake existed in the sale, the latter may be annulled, and the parties placed in statu quo; or they may, where the case and the wrong are divisible, be at times relieved to the extent of the injury." Veazie *v.* Williams, 8 How. 134, 157, 12 L. Ed. 1018.

"Where one assuming to be an agent had committed a fraud in a sale, it was held, in Taylor *v.* Green, 8 Car. and P. 316, that the mere adoption of the sale and the receipt of the money, by the person for whom the sale was made, rendered him liable for the fraud." Castle *v.* Bullard, 23 How. 172, 189, 16 L. Ed. 424. See, also, post, "Makes Transaction Voidable," V, A, 1.

Agency must be shown.—But, to bind one by the fraud of another, an agency must be affirmatively shown. Lumber Co. *v.* Buchtel, 101 U. S. 633, 25 L. Ed. 1072.

31. Fraud under forms of law.—Graffam *v.* Burgess, 117 U. S. 180, 186, 29 L. Ed. 839; Monger *v.* Shirley, 131 U. S., appx., cxxxi, cxxxiv, 22 L. Ed. 449; McIntire *v.* Pryor, 173 U. S. 38, 43 L. Ed. 606. As to weight of evidence, see post, "In General," VI, G, 3, a, (1).

32. Not imputable to government.—Governeur *v.* Robertson, 11 Wheat. 332, 359, 6 L. Ed. 488. See Fackler *v.* Ford, 24 How. 322, 330, 16 L. Ed. 690.

Fraud or bad faith not imputable to legislature.—United States *v.* Des Moines, etc., Co., 142 U. S. 510, 544, 35 L. Ed. 1099. See the title CONSTITUTIONAL LAW, vol. 4, p. 269, et seq.

33. Fraud prior to perpetration.—Wood *v.* Carpenter, 101 U. S. 135, 143, 25 L. Ed. 807.

34. Facts not opinions.—Stewart *v.* Wyoming Cattle Ranche Co., 128 U. S. 383, 387, 32 L. Ed. 439; Smith *v.* Richards, 13 Pet. 26, 38, 10 L. Ed. 42.

35. Expressions of opinion.—Johansson *v.* Stephanson, 154 U. S. 625, 23 L. Ed. 1009; Andrus *v.* St Louis Smelting, etc., Co., 130 U. S. 643, 647, 32 L. Ed. 1054; Southern Development Co. *v.* Silva, 125 U. S. 247, 250, 31 L. Ed. 678; Mutual Life Ins. Co. *v.* Phinney, 178 U. S. 327, 343, 44 L. Ed. 1088; Upton *v.* Tribilcock, 91 U. S. 45, 50, 23 L. Ed. 203; Connor *v.* Featherstone, 12 Wheat. 199, 204, 6 L. Ed. 601.

The quantity of ore "in sight" in a mine, as that term is understood among miners, is at best a mere matter of opinion. It cannot be calculated with mathematical or even with approximate certainty. The opinions of expert miners, on a question of this kind, might reasonably differ quite materially. And so with statements as to the nature of the bottom of an ore chamber in a mine which was covered with loose ore slacked down from the ore body, even if proven to have been made, which is doubtful. Southern Development Co. *v.* Silva, 125 U. S. 247, 252, 31 L. Ed. 678.

Positive statement of width and dimensions of veins.—The appellant, in giving a description of a mine in Virginia, which he desired to be exhibited to the appellee in New York, says that one hundred feet on the vein had been developed, which proved to be very rich, much richer than anything yet discovered in the United States. That the surface was rich in gold; that the formation was quite wide, and in one place twelve feet; that the veins were disseminated throughout the whole

value,[36] or a misrepresentation of law,[37] whether they turn out to have been accurate or the reverse;[38] or the fitness of the property for a particular purpose;[39]

formation, in threads of from two to six inches wide; and that there was ore from the mine that would, without doubt, give several hundred pennyweights of gold to the hundred pounds. Now as to one of these statements, beyond all question, it was a matter of fact; i. e., the one which describes the width of the formation and veins. Smith *v.* Richards, 13 Pet. 26 39, 10 L. Ed. 42.

"Having made a personal examination, he declares the formation to be wide, gives the actual width in one place, and then the width of the veins, in terms not of conjecture, but of the most positive assertion. He gives their dimensions by feet and inches. This statement, then, comes up to the standard of mathematical certainty. And even in regard to the others, he does not profess to speak of them from conjecture, but speaks of them as they are, without qualification." Smith *v.* Richards, 13 Pet. 26, 39, 10 L. Ed. 42. And see the title MINES AND MINERALS.

36. Estimates of value.—This excludes (excepting in peculiar cases) statements by the owner and vendor of property in respect to its value. They are mere trade talk and opinion. Southern Development Co. *v.* Silva, 125 U. S. 247, 250, 31 L. Ed. 678; Cathcart *v.* Robinson, 5 Pet. 264, 271, 8 L. Ed. 120.

"Something more than overestimate of value on the purchaser's part is necessary before it can be said that on this account the debt was fraudulently contracted. A deliberate overestimate and an intention to defraud are essential." South Branch Lumber Co *v.* Ott, 142 U. S. 622, 632, 35 L. Ed. 1136.

"General assertions by a vendor or lessor, that the property offered for sale or to be leased is valuable or very valuable, although such assertions turn out to be untrue, are not misrepresentations, amounting to deceit, nor are they to be regarded as statements of existing facts, upon which an action for deceit may be based, but rather as the expressions of opinions or beliefs." Lehigh Zinc, etc., Co. *v.* Bamford, 150 U. S. 665, 673, 37 L. Ed. 1215.

"The law does not hold one responsible for the extravagant notions he may entertain of the value of property, dependent upon its future successful exploitation, or the result of future enterprises; nor for expressing them to one acquainted with its general character and condition." Gordon *v.* Butler, 105 U. S. 553, 557, 26 L. Ed. 1166.

"The case of Holbrook *v.* Connor, which arose in the supreme court of Maine, illustrates this doctrine. There the vendor and his agent represented, among other things, that lands sold by them contained large deposits of oil, and were of great value for the purpose of digging, boring for, and manufacturing it; and upon the representations the purchasers acted. The evidence tended to show that the representations were false and fraudulent, and the plaintiff obtained a verdict; but the supreme court set it aside. It appeared that the land had not been tested; and it was unknown to both parties whether it was valuable as oil land, except so far as might be inferred from the production of wells on neighboring lands, and a single well upon the land in question. The court held that under these circumstances the representation was to be regarded as a matter of opinion, and would not support the action. 60 Me. 578." Gordon *v.* Butler, 105 U. S. 553, 557, 26 L. Ed. 1166.

37. A mere expression of opinion as to a matter of law in respect to which both parties were equally chargeable with knowledge, could not constitute false representation or deceit, as to a condition of the contract. Mutual Life Ins. Co. *v.* Phinney, 178 U. S. 327, 343, 44 L. Ed. 1088; Upton *v.* Tribilcock, 91 U. S. 45, 50, 23 L. Ed. 203.

38. Independent of their accuracy.—A statement of an opinion assigning a certain value to property like a mine or quarry not yet opened is not to be pronounced fraudulent because the property upon subsequent development may prove to be worthless; nor is it to be pronounced honest because the property may turn out of much higher value. And no action will lie for its expression, however fallacious it may prove. Gordan *v.* Butler, 105 U. S. 553, 557, 26 L. Ed. 1166.

Where, on the subject of value, the answer charges vendor, not with any positive assertion that the property was worth a specific sum, but that it had cost him more than $8,000, and that he had held it at $10,000, the former being proved and the latter not disproved, misrepresentation is not justly imputable to him. Cathcart *v.* Robinson, 5 Pet. 264, 271, 8 L. Ed. 120.

"A mistaken opinion of the value of the property, if honestly entertained, and stated as opinion merely, unaccompanied by an assertion or statement, untrue in fact, can never be considered as a fraudulent misrepresentation." Hepburn *v.* Dunlop, 1 Wheat. 179, 189, 4 L. Ed. 65.

39. Fitness for special purpose.—Cathcart *v.* Robinson, 5 Pet. 264, 271, 8 L. Ed. 120. So far as the fitness of a property for an academy depended on situation or on the buildings, vendee was capable of deciding for himself, and must have acted on his own judgment, and a representation by the vendor in regard thereto is matter of opinion and not fraudulent.

or its healthiness;[40] or mere promissory statements.[41] They must be of an existing or ascertainable fact, as distinguished from a mere matter of opinion or advice.[42]

Exceptions to Rule.—But the rule is different as to opinions upon matters capable of accurate estimation, or opinions of an expert upon the subject,[43] or

40. Healthiness.—So far as it depended on health, the testimony in the cause proves that general reputation was in its favor, and that families from the city sometimes repaired to it for the sake of health. The representation was mere matter of opinion, and the record affords no reason for believing it was not his real opinion. It is true, that vendee's family, after settling on the place, was sickly; but this circumstance may have been produced by other causes, and is not certainly attributable to the place. Cathcart *v.* Robinson, 5 Pet. 264, 271, 8 L. Ed. 120.

41. Promissory statements.—Thorwegan *v.* King, 111 U. S. 549, 550, 28 L. Ed. 514; Blease *v.* Garlington, 92 U. S. 1, 9, 23 L. Ed. 521; Sawyer *v.* Prickett, 19 Wall. 146, 160, 22 L. Ed. 105.

Charges in the complaint in an action of deceit or fraud in the sale of a chattel (a ship)—that the defendant stated he would pay off the encumbrances and liabilities before transferring the boat to prospective corporation, and would convey to it a title free and clear of all liability, on account of an existing debt—were of statements promissory in their nature, relating to the future, dependent on contract merely, and could not be, of themselves the foundation of an action for deceit. At most, it would be but a warranty of the title against encumbrances and liability for debts, for breach of which an action on the agreement would accrue. Thorwegan *v.* King, 111 U. S. 549, 550, 28 L. Ed. 514.

"The law gives a different effect to a representation of existing facts, from that given to a representation of facts to come into existence. To make a false representation the subject of an indictment, or of an action, two things are generally necessary, viz, that it should be a statement likely to impose upon one exercising common prudence and caution, and that it should be the statement of an existing fact. A promissory statement is not, ordinarily, the subject either of an indictment or of an action." Sawyer *v.* Prickett, 19 Wall. 146, 160, 22 L. Ed. 105.

So, too, as to all alleged undertakings on the part of vendor of a claim against a debtor to obtain judgment on the claim. There is no allegation that he was not proceeding for that purpose, without unnecessary delay, up to the time of the death of the debtor, or that vendee, when debtor did die, was not in as good condition, for all the purposes of collection, without a judgment, as he could have been with. Therefore the answer, if taken as true, did not present a valid defense; and, as the defendant could not make any defense by his proof different from that set out in his pleading, the court below very properly refused to hear any testimony in support of the answer. Blease *v.* Garlington, 92 U. S. 1, 9, 23 L. Ed. 521.

It is difficult to see how an action or a defense can be based upon promissory representations of the character of expressions of hopes, expectations, and beliefs, where neither party understood, or had the right to understand, that they were to be received as statements of facts which any one was bound to make good, or upon which the validity of the contract should depend. Sawyer *v.* Prickett, 19 Wall. 146, 163, 22 L. Ed. 105.

42. Must be of existing or past fact.—Cooper *v.* Schlesinger, 111 U. S 148, 28 L. Ed. 382.

Where the essence of the charge against three defendants in an action for deceit is a conspiracy to defraud the plaintiff, carried into execution by a false and fraudulent certificate of valuation of the property given as security for a loan to one of them and the certificate, given by the other two is that, in the best judgment of each, the lots were worth the sums severally stated, to justify any imputation of fraud in giving a certificate, it was necessary to show that the parties signing it had knowledge, at the time, that the value of the property was materially less than their estimate. And from the nature of the property, and its imperfectly developed condition, such knowledge was impossible. No one could know its actual value until further development was made. Until then, any estimate must have been entirely speculative and conjectural. It would depend as much, perhaps, upon the temperament and expectations of the party making it, as upon any knowledge of facts. Gordon *v.* Butler, 105 U. S. 553, 556, 26 L. Ed. 1166.

So as to an expression of opinion, upon a doubtful state of the boundary, as to whether a tract of land lay in one state or another. Connor *v.* Featherstone, 12 Wheat. 199, 204, 6 L. Ed. 601.

43. Exceptions to rule.—"For opinions upon matters capable of accurate estimation by application of mathematical rules or scientific principles, such, for example, as the capacity of boilers, or the strength of materials, the case may be different. So, also, for opinions of parties possessing special learning or knowledge upon the subjects in respect to which their opinions are given, as of a mechanic upon the working of a machine he has seen in use, or of a lawyer upon the title or property

promissory statements peculiarly within the means of knowledge of the party making same.[44] And a sale "with all faults" does not exempt the seller from liability for any defect but what was consistent with its being the thing described, even where the other party had full opportunity for examination,[45] or when the parties are not dealing on equal terms, and with equal means of information.[46]

Opinion as to Solvency and Credit.—See post, "Financial Standing," IV, B, 2, a.

2. SUBJECTS OF MISREPRESENTATION—a. *Financial Standing*—(1) *Of Person Making Representation.*—See post, "Fraudulent Purchase of Goods on Credit," IV, C, 2.[47]

(2) *Of Another.*—**In General.**—A fraudulent recommendation will subject the person giving it to the damages sustained by the person trusting to it.[48]

which he has examined. Opinions upon such matters are capable of approximating to the truth, and for a false statement of them, where deception is designed, and injury has followed from reliance on them, an action may lie. But to this class the present case does not belong." Gordon *v.* Butler, 105 U. S. 553, 558, 26 L. Ed. 1166.

44. Promissory statements based on special knowledge.—"The law also gives a different effect to those promissory statements based upon general knowledge, information, and judgment, and those representations which, from knowledge peculiarly his own, a party may certainly know, will prove to be true or false." Sawyer *v.* Prickett, 19 Wall. 146, 160, 22 L. Ed. 105.

"Wherever a sale is made of property, not present, but at a remote distance, which the seller knows the purchaser has never seen, but which he buys upon the representation of the seller, relying on its truth, then the representation, in effect, amounts to a warranty; at least, that the seller is bound to make good the representation." Smith *v.* Richards, 13 Pet. 26, 42, 10 L. Ed. 42. See ante, "Knowledge," III, D, 2.

45. Sale "with all faults, as they lie."—The words, "with all faults, as they lie," are very large to exclude the buyer from calling upon the seller for any defect in the things sold; but if the seller was guilty of any positive fraud in the case, these words will not protect him. There might be such fraud, either in a false representation, or in using means to conceal some defect. Smith *v.* Richards, 13 Pet. 26, 41, 10 L. Ed. 42.

In this case, where the vendee had no opportunity for examination, the terms of the sale put upon the vendee no hazard or risk but those which were consistent with the mine being such as it was described; those terms in no degree exempted vendor from liability for misrepresentation; but if the mine had been such as described, then they would have exempted him from any liability for failure in its anticipated produce. It may be that the vendor made the representation under the influence of delusion; but it is sufficient, to decide this case, that the representation was untrue in material parts of it. Smith *v.* Richards, 13 Pet. 26, 43, 10 L. Ed. 42. See ante, "Reliance," III, E.

46. Parties not dealing on equal terms.—Smith *v.* Richards, 13 Pet. 26, 38, 10 L. Ed. 42. See post, "By Concealment or Nondisclosure," IV, C.

Under statutes.—But the rule may be changed by statute for the prevention of fraud. Durland *v.* United States, 161 U. S. 306, 40 L. Ed. 709; Public Clearing House *v.* Coyne, 194 U. S. 497, 516, 48 L. Ed. 1092. See post, "Criminal Fraud," VII. See the title POSTAL LAWS.

47. In compromise with creditors.—The representation that a debtor was unable to pay the debt of the plaintiff in full was not equivalent to a representation that the mortgaged property, surrendered under a compromise with his creditors, was all he owned. Liberally construed, the former representation was not inconsistent with the retention of a part of his means for the support of his family or to meet the demands of other creditors. Hoffman *v.* Overbey, 137 U. S. 465, 472, 34 L. Ed. 754. See the title COMPROMISE AND SETTLEMENT, vol. 3, p. 998.

48. Fraudulent recommendation.—Russell *v.* Clarke, 7 Cranch 69, 94, 3 L. Ed. 271.

The question how far merchants are responsible for the character they give each other, is one of much delicacy, and of great importance to the commercial world. That a fraudulent recommendation (and a recommendation, known at the time, to be untrue, would be deemed fraudulent) would subject the person giving it to damages sustained by the person trusting to it, seems now to be generally admitted. Russell *v.* Clarke, 7 Cranch 69, 94, 3 L. Ed. 271.

In an action for making false representations as to the pecuniary condition of a third party by which loss was caused to plaintiff, if an impression, not only of their solvency but of their success in business, so that by selling largely to them no more than the ordinary risks of business were incurred, was made and authorized by the letters, in which the representations were made, while, at the same time, their true

But a misrepresentation of the solidity of a mercantile house, made under a mistake of the fact without any interest of fraudulent intention, will not sustain an action, although the plaintiff may have suffered damage by reason of such misrepresentation.[49] Parol evidence is competent to show such in-

condition was known to the defendant, which did not authorize such a representation, and which was intended to deceive and mislead the plaintiffs, the defendant may be justly held responsible. Iasigi *v.* Brown, 17 How. 183, 196, 15 L. Ed. 205.

In Castle *v.* Bullard, 23 How. 172, 180, 16 L. Ed. 424, it was alleged that the defendants fraudulently sold on credit, to one C., certain goods belonging to the plaintiff, and which he had previously intrusted to them, as commission merchants, for sale; and that the purchaser, at the time of the sale, was in failing circumstances and irresponsible; charging, in the same connection, that the defendants, at the time of the transaction, well knew that the purchaser was insolvent, and wholly unfit to be trusted; and that they negotiated the sale with intent to deceive and defraud the plaintiff, whereby he suffered loss to an amount equal to the value of the goods so sold and delivered. And it was also alleged, in other counts, that the defendants, prior to the sale of the goods, and at the time when it was made, represented to plaintiff that the said C. was worth at least eight thousand dollars above all his liabilities; that he was not embarrassed in his business affairs, or much indebted, and that he was a safe, cautious business man, and every way worthy of credit. Those representations, the plaintiff alleged, were false, and that the defendants well knew they were so at the time of the negotiation, and when the goods were delivered; and that they were so made by the defendants with intent to deceive and defraud him in the premises, and had the effect to induce him to consent to the sale, and to deliver the goods, whereby he suffered loss, as is alleged in the other counts. On a plea of not guilty, no question was made as to the right of action if the allegations were proved.

Advances to uphold credit.—"That a false representation by one person of the credit of another, by which a third person is deceived and injured, is a fraud upon the parties so deceived, is undeniable. A letter of credit, giving to the person in whose favor it is written a character for solidity, which the writer knows to be untrue, is of this description. But to uphold the credit of a merchant, by advances to any amount, made by his friends, or by his creditors, for the purpose of preventing his failure, and of enabling him to go on, under the expectation that he may thereby acquire the means of discharging his debts, and of maintaining a standing in the commercial world, has never yet been decided, by any English or American court, to be a fraud upon any third person, who, misled by appearances, may have dealt with and given credit to the person so assisted. No case resembling it has been produced or alluded to. There is, in fact, an absence of that kind of suggestio falsi, or suppressio veri, which the law considers as amounting to actual or even constructive fraud." Conard *v.* Nicoll, 4 Pet. 291, 299, 7 L. Ed. 862.

49. Intent to deceive essential to liability.—Russell *v.* Clarke, 7 Cranch 69, 3 L. Ed. 271; Lord *v.* Goddard, 13 How. 198, 211, 14 L. Ed. 111.

"Merchants know the circumstances under which recommendations of this description must be given. They know that when one commercial man speaks of another in extensive business, he must be presumed to speak from that knowledge only which is given by reputation. He is not supposed to have inspected all the books and transactions of his friend, with the critical eye which is employed in a case of bankruptcy. He must, therefore, be supposed to speak of the credit, not of the actual known funds of the person he recommends; of his apparent, not of his real solidity. In such a case, it is certainly incautious and indiscreet to use terms which imply absolute and positive knowledge. It may, perhaps, be admitted, that, in such a case, fraud may be presumed on slighter evidence than would be required in a case where a letter was written with more circumspection. Yet, even in such a case, where the communication is honestly made, and the party making it has no interest in the transaction, he has never been declared to be responsible for its actual verity. The reason of the rule is, that merchants generally possess, and are therefore presumed, in their correspondence, to speak from that knowledge only of the circumstances of other merchants, which may be acquired by observing their course of business, their punctuality and their general credit." Russell *v.* Clarke, 7 Cranch 69, 95, 3 L. Ed. 271.

Where an action was brought against certain persons for giving a commercial letter of recommendation with intention to defraud and deceive, whereby the party to whom the letter was addressed gave credit and sustained a loss, the question for the jury ought to have been whether or not there was fraud and an intention to deceive, in giving the letter. The gist of the action is fraud in the defendants, and damages to the plaintiff. Fraud means an intention to deceive. If there was no such intention; if the party honestly stated his own opinion, believing at the time that he stated the truth, he is not liable in this form of action, al-

tent,[50] and circumstantial evidence is freely admitted.[51]

b. *Title to Property and Matters Collateral Thereto.*—False and fraudulent representations upon the sale of real property may undoubtedly be ground for an action for damages, when the representations relate to some matter collateral to the title of the property and the right of possession which follows its acquisition, such as the location, quantity, quality and condition of the land, the privileges connected with it, or the rents and profits derived therefrom.[52] Or they may be ground for setting aside a contract of sale.[53]

Obtaining Credit by Pretense of Title.—If A sells or conveys his lands or slaves to B, and then produces to another his previous paper title, and obtains

though the representation turned out to be entirely untrue. Lord *v.* Goddard, 13 How. 198, 211, 14 L. Ed. 111.

Opinion as to value of claim sold.—Where a party, knowing the pecuniary condition of a debtor, purchased a claim against him of an ascertained amount, an opinion, however erroneous, expressed by the seller as to the value of the claim, does not affect the validity of the sale. Under such circumstances, each party is presumed to rely upon his own judgment. Blease *v.* Garlington, 92 U. S. 1, 23 L. Ed. 521.

50. Parol evidence to show intent.—"No individual can be held responsible for a statement of facts, however injurious they may be to an individual or company. But when there is a misstatement of facts in regard to the pecuniary ability of an individual or company, and, especially, if this be done through interested motives or a fraudulent intent, by reason of which a credit is given and the debt is lost, the facts which conduce to establish the liability must, as in this case, be outside of the writing. And if these facts may not be established by parol evidence, there can be no remedy in such cases, however gross the fraud or ruinous the consequences may be." Iasigi *v.* Brown, 17 How. 183, 194, 15 L. Ed. 205. See the title PAROL EVIDENCE.

51. Circumstantial evidence.—Where the cause of action against the defendants was that they had fraudulently sold the goods of the plaintiff, evidence was admissible to show that the purchaser was largely in debt and insolvent, and that the defendants represented him to be in good credit. The force and effect of such circumstantial evidence is for the jury to judge of the intent. Castle *v.* Bullard, 23 How. 172, 16 L. Ed. 424.

Competency of evidence of other fraudulent representations.—See the title EVIDENCE, vol. 5, p. 1019, et seq.

Instruction.—See post, "Instructions," VI, E.

Questions for jury.—See post, "Question for Jury," VI, G, 3, d.

52. Title to property and collateral matters.—Andrus *v.* St. Louis Smelting, etc., Co., 130 U. S. 643, 648, 32 L. Ed. 1054; Farrar *v.* Churchill, 135 U. S. 609, 614, 34 L. Ed. 246.

"Such representations by the vendor as to his having title to the premises sold may also be the ground of action where he is not in possession, and has neither color nor claim of title under any instrument purporting to convey the premises, or any judgment establishing his right to them. Thus in Wardell *v.* Fosdick, 13 Johns, 325, an action for deceit was sustained against the vendor of land which had no actual existence, the court holding that in such case the purchaser might treat the deed as a nullity. The land not being in existence there could be no possession, and of course no eviction, and consequently no remedy upon the covenants, and the purchaser would be remediless if he could not maintain the action." Andrus *v.* St. Louis Smelting, etc., Co., 130 U. S. 643, 648, 32 L. Ed. 1054.

It was held in Andrus *v.* St. Louis Smelting, etc., Co., 130 U. S. 643, 646, 32 L. Ed. 1054, that the gist of the action was the alleged deceit practised upon the plaintiff by the agents, attorneys and officers of the defendant company to induce him to purchase from it a lot in Leadville, by representing that it had obtained a release of the right of all claimants to the land, and could put him into immediate possession; whereas, upon attempting to enter upon the land purchased, he found another in possession, who refused to surrender it, and thus he was kept out of possession from the time of his purchase, March 27, 1879, to February 22, 1883, during which period he lost its rental value. There could be no recovery, as no misrepresentation was shown and if any were made, they had been merged in the covenant for quiet possession contained in the deed, which had not been broken. See the title VENDOR AND PURCHASER.

53. Same—Rescission.—Where a person desired to purchase land from a party who was ignorant that he had any title to it, or where the land was situated; and the purchaser made fraudulent representations as to the quantity and quality of the land, and also as to a lien which he professed to have for taxes which he had paid; and finally bought the land for a grossly inadequate price, the sale will be set aside. Tyler *v.* Black, 13 How. 230, 14 L. Ed. 124. See the title RESCISSION, CANCELLATION AND REFORMATION.

credit on the goods or lands, by pledging them for money loaned, he is guilty of fraud.[54]

c. *Boundaries of Land.*—See the title VENDOR AND PURCHASER.

d. *Consideration of Negotiable Paper.*—See the title BILLS, NOTES AND CHECKS, vol. 3, p. 306.

e. *Matter of Law.*—See ante, "Reliance," III, E; "Must Be of Existing or Past Fact, Not of Mere Opinion," IV, B, 1.

C. By Concealment or Nondisclosure—1. CONCEALMENT OR SUPPRESSION.—**Statement of Principle.**—A suppression of a material fact, which one was bound in good faith to disclose, is equivalent to a false representation.[55] The gist of the action of deceit is fraudulently producing a false impression upon the mind of the other party; and if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant, or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff.[56] But to constitute fraud, the intent to

54. Obtaining false credit.—United States Bank *v.* Lee, 13 Pet. 107, 10 L. Ed. 81. As to estoppel of true owner by silence, see the title ESTOPPEL, vol. 5, p. 913.

55. Suppression of facts.—Tyler *v.* Savage, 143 U. S. 79, 98, 36 L. Ed. 82; Smith *v.* Richards, 13 Pet. 26, 10 L. Ed. 42; Michoud *v.* Girod, 4 How. 503, 561, 11 L. Ed. 1076; Hager *v.* Thomson, 1 Black 80, 7 L. Ed. 41; Insurance Co. *v.* Lyman, 15 Wall. 664, 670, 21 L. Ed. 246; Magee *v.* Manhattan Life Ins. Co., 92 U. S. 93, 98, 23 L. Ed. 699; Stewart *v.* Wyoming Cattle Ranche Co., 128 U. S. 383, 388, 32 L. Ed. 439. See, also, Wheeler *v.* New Brunswick, etc., R. Co., 115 U. S. 29, 36, 29 L. Ed. 341. See the title ESTOPPEL, vol. 5, p. 913.

Any concealment of material facts, when there is a duty to make full disclosure, is fraudulent, in law at least, if not in fact. Griswold *v.* Hazard, 141 U. S. 260, 286, 35 L. Ed. 678.

In a court of conscience deliberate concealment is equivalent to deliberate falsehood. When a living man speaks in such a court to enforce a dead man's contract with himself against parties who he knows are ignorant of the facts, he must be frank in his statements, unless he is willing to take the risk of presumptions against him. Crosby *v.* Buchanan, 23 Wall. 420, 23 L. Ed. 138.

"Honesty of purpose prompts frankness of statement. Concealment is indicative of fraud." Crosby *v.* Buchanan, 23 Wall. 420, 457, 23 L. Ed. 138.

By applicant for insurance.—See the title INSURANCE.

Failure to disclose value of baggage to carrier.—See the title CARRIERS, vol. 3, p. 584.

56. Production of false impression the gist of the matter.—Stewart *v.* Wyoming Cattle Ranche Co., 128 U. S. 383, 388, 32 L. Ed. 439.

"At the same time, silence may be under some circumstances equivalent to false representation. Stewart *v.* Wyoming Cattle Ranche Co., 128 U. S. 383, 388, 32 L. Ed. 439, where it is stated: 'In an action of deceit, it is true that silence as to a material fact is not necessarily, as matter of law, equivalent to a false representation. But mere silence is quite different from concealment; aliud est tacere, aliud celare; a suppression of the truth may amount to a suggestion of falsehood; and if, with intent to deceive, either party to a contract of sale conceals or suppresses a material fact, which he is in good faith bound to disclose, this is evidence of an equivalent to a false representation, because the concealment or suppression is in effect a representation that what is disclosed is the whole truth.' Applying these rules to the case in hand, we find no adequate ground for disturbing the decree." Farrar *v.* Churchill, 135 U. S. 609, 616, 34 L. Ed. 246. See Morgan *v.* Railroad Co., 96 U. S. 716, 720, 24 L. Ed. 743; Armstrong *v.* Ashley, 204 U. S. 272, 286, 51 L. Ed. 482. See, also, Wiser *v.* Lawler, 189 U. S. 260, 271, 47 L. Ed. 802; Wheeler *v.* New Brunswick, etc., R. Co., 115 U. S. 29, 29 L. Ed. 341.

Examples.—"The case of Laidlaw *v.* Organ, 2 Wheat. 178, 4 L. Ed. 214, is much in point. In an action by the buyer of tobacco against the sellers to recover possession of it, there was evidence that before the sale the buyer, upon being asked by Girault, one of the sellers, whether there was any news which was calculated to enhance its price or value, was silent, although he had received news, which the seller had not, of the Treaty of Ghent. The court below, 'there being no evidence that the plaintiff had asserted or suggested anything to the said Girault, calculated to impose upon him with respect to the said news, and to induce him, to think or believe that it did not exist,' directed a verdict for the plaintiff. Upon a bill of exceptions to that direction, this court, in an opinion delivered by Chief Justice Marshall, held that while it could not be laid down, as a matter of law, that the intelligence of extrinsic circumstances which might influence the price of the commodity, and which was exclusively

deceive must clearly appear.[57]

Confidential Relation or Inequality.—Where there is a relation of trust and confidence between the parties, or they are not dealing upon equal terms, the duty to make full disclosure is more peremptory.[58] And the facts must not be known or ascertainable by the other party or his agent or attorney.[59]

Estoppel by Silence or Nondisclosure.—See the title ESTOPPEL, vol. 5, p. 913. See, also, ante, "Reliance," III, E.

Instruction.—See post, "Instructions," VI, E.

2. FRAUDULENT PURCHASE OF GOODS ON CREDIT.—If a person buy goods on

within the knowledge of the vendee, ought to have been communicated by him to the vendor, yet, at the same time, each party must take care not to say or do anything tending to impose upon the other, and that the absolute instruction of the judge was erroneous, and the question whether any imposition was practised by the vendee upon the vendor ought to have been submitted to the jury." Stewart *v.* Wyoming Cattle Ranche Co., 128 U. S. 383, 388, 32 L. Ed. 439.

In the case at bar, an action for deceit, the words and conduct relied on as amounting to false representations were those of the seller of a large herd of cattle ranging over an extensive territory, and related to the number of the herd itself, of which he had full knowledge, or means of information, not readily accessible to a purchaser coming from abroad; and the plaintiff introduced evidence tending to show that the defendant, while going over the ranche with the plaintiff's agent, made positive false representations as to the number of calves branded during the year, and also fraudulently prevented him from procuring other information as to the number of calves and consequently as to the number of cattle on the ranche, all this was properly submitted to the jury to pass on the question of fraud. Stewart *v.* Wyoming Cattle Ranche Co., 128 U. S. 383, 389, 32 L. Ed. 439.

In a purchase of the stock of C. corporation by T. through an agent for the account of T.'s wife, from A., trustee in bankruptcy of the holder, where T. was a stockholder, officer, and trustee of the company, and had been, from the first, actively engaged in the management of its affairs, and as trustee was solely intrusted with the custody of the assets, books, and papers of the corporation, and had full and complete knowledge of all matters pertaining to the assets and business of the company, knowing that the plaintiff or his bankrupt estate was entitled to dividends amounting to at least $10,500, received by T. upon entering upon the discharge of his duties as trustee, which fact he concealed and misrepresented the value of these assets and induced the sale to his wife, she knowing the circumstances, for the price of $1,200, property which the state circuit court found to be of the value of $15,000, the charge of fraud made in the petition was, therefore, fully sustained. Traer *v.* Clews, 115 U. S. 528, 534, 29 L. Ed. 467.

Where cattle, the subject of an agistment contract, were to be up to a certain average, of which a third party was to be the judge, if the latter was deceived by one of the parties to the contract, the cattle owner, by not putting him in full possession of the knowledge possessed by him and necessary for the proper discharge of his duties as umpire, the other party would not be bound by his decision, and in that case, and only in that case, might go behind his acts by proof of resulting injury to such other party. Teal *v.* Bilby, 123 U. S. 572, 579, 31 L. Ed. 263. See the titles ANIMALS, vol. 1, p. 324; ARBITRATION AND AWARD, vol. 2, p. 486.

In Southern Development Co. *v.* Silva, 125 U. S. 247, 258, 31 L. Ed. 678, it was held that the testimony, and all the other facts and circumstances of record, did not substantiate complainant's theory of the case on the question of fraud by concealment of material facts, in other words, there was not a satisfactory case of fraudulent representation on this point made out—not such a case as would justify the interposition of a court of equity to set aside the contract under consideration on the ground of fraudulent representations.

57. Intent to deceive essential.—Magee *v.* Manhattan Life Ins. Co., 92 U. S. 93, 98, 23 L. Ed. 699.

"The concealment must be willful and intentional. De Gol. on Guar. and Sur. 366. The test is, whether one of the parties knowingly suffered the other to deal under a delusion. 2 Kent's Com. (Const. Ed.) 643." Magee *v.* Manhattan Life Ins. Co., 92 U. S. 93, 99, 23 L. Ed. 699. See ante, "Fraudulent Intent," III, B, 1.

58. Confidential relation or inequality.—Graffam *v.* Burgess, 117 U. S. 180, 187, 29 L. Ed. 839; Taylor *v.* Taylor, 8 How. 183, 199, 12 L. Ed. 1040; Brooks *v.* Martin, 2 Wall. 70, 82, 17 L. Ed. 732; Selden *v.* Myers, 20 How. 506, 15 L. Ed. 976. See post, "By Violation of Confidential Relations," IV, D.

59. Facts known or ascertainable by other party.—Clark *v.* Reeder, 158 U. S. 505, 526, 39 L. Ed. 1079. See the title RESCISSION, CANCELLATION AND REFORMATION.

credit in good faith, knowing that he is unable to pay for them at the time, but believing that he will be able to pay for them at the maturity of the bill, he is guilty of no offense even if he be disappointed in making such payment. But if he purchases them, knowing that he will not be able to pay for them, and with an intent to cheat the vendor, this is a plain fraud, and made punishable as such by statutes in many of the states.[60] Caveat venditor is the rule.[61] And the vendor is entitled to disaffirm and recover the goods, where no other rights intervene.[62] Although the purchaser has become bankrupt.[63]

D. By Violation of Confidential Relations.—The rules of law controlling the contracts of parties not standing on an equality are peculiar, and are intended to protect them against their own imprudence. And fraud may be predicated of transactions between such parties, which would be unimpeachable if they stood on an equality with each other.[64]

60. Purchase of goods on credit.—Durland *v.* United States, 161 U. S. 306, 313, 40 L. Ed. 709; Evans *v.* United States, 153 U. S. 584, 592, 38 L. Ed. 830; Donaldson *v.* Farwell, 93 U. S. 631, 633, 23 L. Ed. 993.

Semble, that a trader who was hopelessly insolvent, knew that he could not pay his debts and that he must fail in business and thus disappoint his creditors, could not honestly take advantage of a credit induced by his apparent prosperity and thus obtain property which he had every reason to believe he could never pay for. In such a case he does an act, the necessary result of which will be to cheat and defraud another, and the intention to cheat will be inferred. St. Louis, etc.. R. Co. *v.* Johnston, 133 U. S. 566, 576, 33 L. Ed. 683.

Insolvency between purchase and delivery.—Where A. had purchased wine, to be delivered to him on call between certain dates, and to be paid for on delivery, when the wines were delivered vendors were entitled to payment. Delivery and payment were, substantially, concurrent acts. And if A. made his call, with the knowledge that he was then insolvent, and with the purpose of getting possession of the wines and shipping them out of the state without paying for them according to the terms of the executory agreement of June 9, and received them with that preconceived intent—and there was evidence that justified the jury in so finding—he was guilty of fraud in fact, involving moral turpitude or intentional wrong. Ames *v.* Moir, 138 U. S. 306, 312, 34 L. Ed. 951.

Fraudulent combination to obtain goods.—An action on the case will lie against two defendants, for fraudulently obtaining the property of the plaintiffs, alleging a combination and prearrangement between them, by which one purchased goods to a large amount of different parties in New York, and among others of the plaintiffs, upon false and fraudulent representations of his means and business, and the other sold them at St. Louis, within a few days afterwards, at auction, for less than their cost price, and appropriated the proceeds to his own use; the whole thing being alleged to have been done with intent to defraud the vendors of their property. Lincoln *v.* Claflin, 7 Wall. 132, 19 L. Ed. 106. See the title CONSPIRACY, vol. 3, p. 1108.

61. Caveat venditor the rule.—"While caveat emptor is the rule as to the thing sold, caveat venditor is also the rule as to the pecuniary condition and solvency of the purchaser." South Branch Lumber Co. *v.* Ott, 142 U. S. 622, 632, 35 L. Ed. 1136.

62. Right to disaffirm.—Where a party, by fraudulently concealing his insolvency and his intent not to pay for goods, induces the owner to sell them to him on credit, the vendor, if no innocent third party has acquired an interest in them, is entitled to disaffirm the contract and recover the goods. Donaldson *v.* Farwell, 93 U. S. 631, 23 L. Ed. 993. See the title RESCISSION, CANCELLATION AND REFORMATION.

63. Purchaser a bankrupt.—The defeasible title of the vendee to the goods so acquired vests in his assignee in bankruptcy, and is subject to be determined by the prompt disaffirmance of the contract by the vendor. Donaldson *v.* Farwell, 93 U. S. 631, 23 L. Ed. 993. See the title BANKRUPTCY, vol. 2, p. 893, et seq.

64. Confidential relations.—Taylor *v.* Taylor, 8 How. 183, 199, 12 L. Ed. 1040; Brooks *v.* Martin, 2 Wall. 70, 82, 17 L. Ed. 732.

"The rules of law supposed to control the contracts of parties who do not stand upon a perfect equality, but who deal at a disadvantage on the one side, whether applicable to the relations of parent and child, trustee and cestui que trust, attorney and client, or principal and agent, have been laid down in various cases in the courts both of England and of our own country. To trace these rules to the several cases by which they have been propounded would be an undertaking rather of curiosity, than of necessity or usefulness here, as the extent to which this court has applied them, or is disposed to apply them in cases resembling the present, may be found within a familiar and direct range of inquiry. They are aptly exemplified by the late Justice Story,

Concealment or Nondisclosure.—Where two parties are not dealing on equal terms mere inaction and nondisclosure may amount to fraud.[65] But courts of equity will not arrest or set aside an act or contract, merely because a man of more honor would not have entered into it. There must be some relation between the parties which compels the one to make a full discovery to the other, or to abstain from all selfish projects. But when such a relation does exist, courts of equity, acting upon this superinduced ground, in aid of general morals, will not suffer one party, standing in a situation of which he can avail himself against the other, to derive advantage from that circumstance.[66]

in his treaties on Equity Jurisprudence, vol 1, § 307, where, speaking of frauds which 'arise from some peculiar confidence or fiduciary relation between the parties,' he remarks: 'In this class of cases there is often found some intermixture of deceit, imposition, overreaching, unconscionable advantage, or other mark of direct and positive fraud. But the principle on which courts of equity act in regard thereto stands independent of any such ingredients, upon a motive of public policy; and it is designed in some degree as a protection to the parties against the effects of overweening confidence and self-delusion, and the infirmities of hasty and precipitate judgment. These courts will therefore often interfere in such cases, where, but for such peculiar relations, they would wholly abstain from granting relief, or grant it in a very modified and abstemious manner.'" Taylor *v.* Taylor, 8 How 183, 199, 12 L. Ed. 1040.

65. By concealment and nondisclosure. —Graffam *v.* Burgess, 117 U. S. 180, 187, 29 L. Ed 839. See ante, "By Concealment or Nondisclosure," IV, C.

In this case standing by and seeing the other laying out money, and letting her go on without informing her of her position and of his rights, considering the haracter of the respective parties, was uself a fraud. Graffam *v.* Burgess, 117 U. S. 180, 187, 29 L. Ed. 839.

Thus, a person dealing with an unlettered man who can neither read nor write, and taking from him a promissory note for the payment of money and a deed for property, in trust, to secure the payment, is bound to show, when he seeks to enforce them, that they, or the material parts of them, were read and fully explained to the party before they were executed, and that he fully understood their meaning and effect. Held, that in this case no fraud was shown Selden *v* Myers, 20 How 506, 15 L. Ed. 976

Quære, what concealment or suppression of material facts, in a contract where both parties have not equal access to the means of information, will avoid the contract? Etting *v.* United States Bank, 11 Wheat. 59, 6 L. Ed. 419.

Parol evidence.—If this fact is established by positive and unimpeached testimony, parol evidence cannot be received, to show that the contract was different from that expressed in the writings, or that nothing was at that time due from the party who executed the instruments. Selden *v.* Myers, 20 How. 506, 15 L. Ed. 976. See the title PAROL EVIDENCE.

66. Duty to speak must exist.—Taylor *v.* Taylor, 8 How. 183, 200; 12 L. Ed. 1040; Brooks *v.* Martin, 2 Wall. 70, 82, 17 L. Ed. 732.

But where there is no such relation of trust or confidence between the parties as imposes upon one an obligation to give full information to the other, the latter cannot proceed blindly, omitting all inquiry and examination, and then complain that the other did not volunteer to give the information he had. Cleaveland *v.* Richardson, 132 U. S. 318, 329, 33 L. Ed. 384; Armstrong *v.* Ashley, 204 U. S. 272, 286, 51 L. Ed. 482; Brooks *v.* Martin, 2 Wall. 70, 82, 17 L. Ed. 732, where the contract was an executed one.

A concealment of material facts known to the vendor and unknown to the vendee, which are calculated to influence the action or operate to the prejudice of the vendee, is fraudulent, but where the facts lie equally open to both vendor and vendee, with equal opportunities of examination, and the vendee undertakes to examine for himself, without relying on the statements of the vendor, it is no evidence of fraud in such case that the vendor knows facts not known to the vendee and conceals them from him. Farrar *v.* Churchill, 135 U. S. 609, 676, 34 L. Ed. 246; Cleaveland *v.* Richardson, 132 U. S. 318, 329, 33 L. Ed. 384; Laidlaw *v.* Organ, 2 Wheat. 178, 4 L. Ed. 214.

"It was said by the court of appeals of New York in Viele *v.* Judson, 82 N. Y. 32, 40, of the cases holding a party to be estopped by his silence: 'In all of them the silence operated as a fraud and actually itself misled. In all there was both the specific opportunity and apparent duty to speak. And, in all, the party maintaining silence knew that some one else was relying upon that silence, and either acting or about to act as he would not have done had the truth been told. These elements are essential to create a duty to speak.'" Wiser *v.* Lawler, 189 U. S. 260, 272, 47 L Ed 802. See, also, Laidlaw *v.* Organ, 2 Wheat. 178, 195, 4 L. Ed. 214.

Thus, when two or more persons have a common interest in a security, equity will not allow one to appropriate it ex-

E. Fraudulent Incorporation.—The facts attending the organization of a corporation may be such as to constitute a fraudulent incorporation.[67]

F. Purchase of Public Land with Purpose of Paying in Scrip.—If, under the law of a state, revenue bond scrip could be used in meeting any obligations due to it, it could not be regarded as a fraud to do what the law allowed to be done. Nor was it, in any legal sense, a fraud for purchasers of land from the state to form the purpose of tendering such scrip in payment in order that there might be a judicial determination of the question of its validity.[68]

G. Retention of Property after Lien Extinguished.—The retention of property, after the extinguishment of a lien, becomes a fraudulent possession.[69]

H. Unfair Competition.—Competition in efforts to secure the market is doubtless lawful. A manufacturer may by superior energy, or enterprise, supply all the buyers of a particular article, and thus leave no market for similar articles manufactured by others. But he may not fraudulently or by deceitful representations induce another to withhold from sale his products without being answerable for the injury occasioned by the fraud.[70]

clusively to himself, or to impair its worth to the others. Community of interest involves mutual obligation. If, ex. gr., a corporation issue many bonds and give a mortgage on all its estates to secure them, one holder of the bonds—admitting that he has a right to make use of the mortgage to enforce the payment of the bonds which he holds—has no right to employ it as an instrument by which he may become the owner of the property mortgaged at the lowest price at which it can be obtained, leaving the bonds held by his associate holders unpaid. His duty, if he uses it at all, is to make it productive of the most that can be obtained for all who are interested in it, and if he seek to make a profit out of it at the expense of those whose rights in it were the same at his own, he is guilty of fraud. Jackson *v.* Ludeling, 21 Wall. 616, 22 L. Ed. 492. See the titles ATTORNEY AND CLIENT, vol. 2, p. 703; INFANTS; INSANITY; PARENT AND CHILD; PRINCIPAL AND AGENT; TRUSTS AND TRUSTEES; UNDUE INFLUENCE, etc. See, also, the title ESTOPPEL, vol. 5, p. 939, et seq.; 950, et seq.

67. **Fraudulent incorporation.**—It was held in Lloyd *v.* Preston, 146 U. S. 630, 36 L. Ed. 1111, that the bare statement of the facts attending the organization of the railroad company in question fully justified the opinion of the court below "that the entire organization was grossly fraudulent from first to last, without a single honest incident or redeeming feature." See the titles CORPORATIONS, vol. 4, pp. 661, 792; RAILROADS.

As to effect of such fraud on stock subscriptions and liability thereunder, see the titles STOCK AND STOCKHOLDERS. See, also, the title RAILROADS.

Effect on status of bonds.—Assuming that the facts make out a case of fraud in the organization of a corporation to take over paper mill properties and pay therefor in money and stock of the corporation, and in the purchase of the mill properties, it is difficult to see how they affect the validity of bonds issued by such corporation and secured by mortgage on the properties, as a whole, and the right of the trustee to foreclose, or how they can entitle the complainant to compel the bondholders, so far at least as they were innocent holders, to set off their indebtedness to the paper company for stock, against the indebtedness of the company upon the bonds. Dickerman *v.* Northern Trust Co., 176 U. S. 181, 200, 44 L. Ed. 423.

68. **Purchase of public land for scrip.**—Tindal *v.* Wesley, 167 U. S. 204, 209, 42 L. Ed. 137. If the deed had been obtained under assurances that the deferred installments of purchase price should be paid in money and not in revenue bond scrip, it may be that the commissioners, in a proper proceeding, could have obtained a rescission of the contract.

If the legal title passed by a valid deed from the commissioners of the sinking fund then the right of the grantee to possession was not impaired by the circumstance that he intended to insist upon paying the deferred installments of purchase money in revenue bond scrip, and possession could not be withheld on the ground that this was a fraud. Tindal *v.* Wesley, 167 U. S. 204, 208, 42 L. Ed. 137.

69. **Retention of property after lien extinguished.**—Randel *v.* Brown, 2 How. 406, 11 L. Ed. 318. See the title LIENS.

70. **Unfair competition.**—Butler *v.* Watkins, 13 Wall. 456, 463, 20 L. Ed. 629. "Whether negotiations for a purchase never concluded were in fact fraudulent; whether they were commenced and continued solely with the purpose of dishonestly inducing the plaintiff to forego offering his goods until the market had been supplied, and whether such was the consequence of the defendants' fraudulent conduct, were questions of fact which should have been submitted to the jury on the evidence. If answered affirmatively,

I. Other Modes of Perpetration.—See cross references in note.[71]

V. Operation and Effect.

A. Effect on Validity of Transaction—1. MAKES TRANSACTION VOIDABLE.—General Rule.—Fraud will vitiate any, even the most solemn, transac-

the action was sustainable." See the title TRADEMARKS, TRADENAMES AND UNFAIR COMPETITION.

71. **Bank receiving deposits while insolvent.**—See the title BANKS AND BANKING, vol. 3, pp. 22, 23, 176, 177.

Conspiracy to defraud.—See the title CONSPIRACY, vol. 3, pp. 1108, 1109.

Constructively fraudulent issue of car-trust certificates.—See the title RAILROADS.

Constructively fraudulent leases of rolling stock.—See the title RAILROADS.

Debts created by fraud under bankruptcy act, see the title BANKRUPTCY, vol. 2, p. 862, et seq.

Dismissal of suit obtained by fraud.—See the title DISMISSAL, DISCONTINUANCE AND NONSUIT, vol. 5, p. 389.

False representation or warranty of personalty.—See the title SALES.

False warranty of realty.—See the titles COVENANTS, vol. 5, p. 12; WARRANTY.

Fraud by public officers and effect on bonds.—See the titles PUBLIC OFFICERS; UNITED STATES.

Fraud in account stated.—See the title ACCOUNTS AND ACCOUNTING, vol. 1, p. 72.

Fraud in assessments for taxation.—See the title TAXATION.

Fraud in auction sales.—See the title AUCTIONS AND AUCTIONEERS, vol. 2, p. 746.

Fraud in compromise or family settlement.—See the title COMPROMISE AND SETTLEMENT, vol. 3, pp. 998, 1001. See, also, ante, "Of Person Making Representation," IV, B, 2, a, (1).

Fraud in laying special assessments.—See the title SPECIAL ASSESSMENTS.

Fraud in negotiable paper and rights of holder.—See the title BILLS, NOTES AND CHECKS, vol. 3, pp. 296, et seq.; 306.

Fraud in passage of statute.—See the title STATUTES. See, also, as to weight of evidence, post, "In General," VI, G, 3, a, (1).

Fraud in procuring guaranty.—See the title GUARANTY.

Fraud in procuring order of release in admiralty.—See the title ADMIRALTY, vol. 1, pp. 174, 175.

Fraud in sale by pledgee of pledged property.—See the title PLEDGE AND COLLATERAL SECURITY.

Fraud of master of vessel in preserving ship.—See the title MASTERS OF VESSELS.

Fraud of officer of corporation.—See the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

Fraud on stockholders by officers of corporation.—See the titles OFFICERS AND AGENTS OF PRIVATE CORPORATIONS; STOCK AND STOCKHOLDERS.

Fraudulent sale of or subscription to stock.—See the title STOCK AND STOCKHOLDERS.

Fraud in sale of pretensed title—Bona fide purchaser.—See the titles CHAMPERTY AND MAINTENANCE, vol. 3, p. 670; VENDOR AND PURCHASER.

Fraud in sale of ship or steamboat.—See the title SHIPS AND SHIPPING.

Fraud in working contracts.—See the title WORKING CONTRACTS.

Fraud of bank or bank officer or agent.—See the title BANKS AND BANKING, vol. 3, pp. 22, 96, et seq.

Fraudulent bill of lading.—See the titles BANKS AND BANKING, vol. 3, pp. 66, 67; BILL OF LADING, vol. 3, p. 232. See, also, the title BILLS, NOTES AND CHECKS, vol. 3, p. 291.

Fraudulent delivery of deed in escrow contrary to condition.—See the title ESCROW, vol. 5, p. 900.

Fraudulent intermingling of goods.—See the title CONFUSION OF GOODS, vol. 3, p. 1093.

Fraudulent loan.—See the titles CONSPIRACY, vol. 3, p. 1109; LOANS.

Fraudulent omission to record.—See the title RECORDING ACTS.

Fraudulent pledge.—See the title PLEDGE AND COLLATERAL SECURITY.

Fraudulent release.—See post, "In General," VI, G, 3, a, (1). See, also, the title RELEASE.

Fraudulent sealing with corporate seal.—See the title CORPORATIONS, vol. 4, p. 650.

Fraudulent trademarks, etc.—See the title TRADEMARKS, TRADENAMES AND UNFAIR COMPETITION.

Fraudulent use of mails and fraud orders.—See the title POSTAL LAWS.

Fraudulent wills, and effect of fraud on will.—See the title WILLS.

Fraud upon intoxicated person.—See the title DRUNKENNESS, vol. 5, p. 496.

Fraud upon jurisdiction of federal courts.—See the title COURTS, vol. 4, p. 973.

Fraud upon customs and revenue laws.—See the title REVENUE LAWS.

Land frauds and fraudulent patents and grants.—See the title PUBLIC LANDS. See, also, as to weight of evidence, post, "In General," VI, G, 3, a, (1).

Obtaining title to land belonging equi-

tions; and any asserted title, founded upon it, is utterly void,[72] and renders every transaction into which it enters, voidable, at the election of the parties affected thereby.[73]

Effect on Public Sales.—See the titles AUCTIONS AND AUCTIONEERS, vol. 2, p. 746, et seq.; JUDICIAL SALES; SHERIFFS', CONSTABLES' AND MARSHALS' SALES, and other titles treating of such sales.

Effect on Written Agreement.—It cannot be doubted, that reducing an

tably to another.—See the title TRUSTS AND TRUSTEES.

Pension frauds.—See the title PENSIONS.

Promoters' frauds.—See the title CORPORATIONS, vol. 4, p. 659.

Purchase of trust or fiduciary property by trustee or fiduciary as constructive fraud.—See the title TRUSTS AND TRUSTEES and the various fiduciary titles.

Representations as to quantity of land conveyed.—See the title VENDOR AND PURCHASER.

Transactions fraudulent and void under statutes of frauds.—See the title FRAUDS, STATUTE OF.

72. Fraud vitiates all transactions or titles.—The Amistad, 15 Pet. 518, 10 L. Ed. 826; Nudd *v.* Burrows, 91 U. S. 426, 440, 23 L. Ed. 286.

"Fraud vitiates all transactions. It makes void a judgment which is a much more solemn act than the issuing of a patent." Stoddard *v.* Chambers, 2 How. 284, 318, 11 L. Ed. 269. See, also, Hartshorn *v.* Day, 19 How. 211, 222, 15 L. Ed. 605; Insurance Co. *v.* Lyman, 15 Wall. 664, 670, 21 L. Ed. 246; United States *v.* Throckmorton, 98 U. S. 61, 64, 25 L. Ed. 93; Field *v.* Seabury, 19 How. 323, 331, 15 L. Ed. 650, where this is said, of cases where the actual or constructive fraud grows out of the conduct of parties directly to each other, or is consequential from such conduct.

"Wherever there is a gross misrepresentation of facts, relating to the subject of a contract, the contract is fraudulent and void. If, therefore, the jury shall be of opinion that such a misrepresentation was made, in the present instance, they should consider the conveyance as no payment, although the plaintiffs agreed, under the deception, to accept it in satisfaction; and the verdict must be for damages to the whole amount of the demand." Cochran *v.* Cummings, 4 Dall. 250, 1 L. Ed. 820.

Although public documents of the government, accompanying property found on board of the private ships of a foreign nation, are to be deemed prima facie evidence of the facts which they state, yet they are always open to be impugned for fraud; and whether that fraud be in the original obtaining of those documents, or in the subsequent fraudulent and illegal use of them, where once it is satisfactorily established, it overthrows all their sanctity, and destroys them as proof. The Amistad, 15 Pet. 518, 10 L. Ed. 826.

73. Makes transaction voidable.—Thomas *v.* Brownville, etc., R. Co., 109 U. S. 522, 27 L. Ed. 1018; Fletcher *v.* Peck, 6 Cranch 87, 133, 3 L. Ed. 162; Smith *v.* Richards, 13 Pet. 26, 10 L. Ed. 42; Hager *v.* Thomson, 1 Black 80, 17 L. Ed. 41; Ewell *v.* Daggs, 108 U. S. 143, 149, 27 L. Ed. 682; United States *v.* Minor, 114 U. S. 233, 239, 29 L. Ed. 110; United States *v.* Bitter Root Development Co., 200 U. S. 451, 473, 50 L. Ed. 550.

"The most solemn transactions and judgments may, at the instance of the parties, be set aside or rendered inoperative for fraud. The fact of being a party does not estop a person from obtaining in a court of equity relief against fraud. It is generally parties that are the victims of fraud. The court of chancery is always open to hear complaints against it, whether committed in pais or in or by means of judicial proceedings." Johnson *v.* Waters, 111 U. S. 640, 667, 28 L. Ed. 547. See the title RESCISSION, CANCELLATION AND REFORMATION, for full treatment.

"Void" often used in sense of "voidable."—The word "void" is often used in statutes and legal documents, such as deeds, leases, bonds, mortgages, and others, in the sense of voidable merely, that is capable of being avoided, and not as meaning that the act or transaction is absolutely a nullity, as if it never had existed, incapable of giving rise to any rights or obligations under any circumstances. Thus we speak of conveyances void as to creditors, meaning that creditors may avoid them, but not others. Leases which contain a forfeiture of lessee's estate for nonpayment of rent, or breach of other condition, declare that on the happening of the contingency the demise shall thereupon become null and void, meaning that the forfeiture may be enforced by reentry, at the option of the lessor. It is sometimes said that a deed obtained by fraud is void, meaning that the party defrauded may, at his election, treat it as void. Ewell *v.* Daggs, 108 U. S. 143, 149, 27 L. Ed. 682.

Collusion as affecting question of res adjudicata or stare decisis.—See the titles RES ADJUDICATA; STARE DECISIS.

Effect on chattel mortgage.—See the title CHATTEL MORTGAGES, vol. 3, p. 735, et seq.

Effect on foreign judgments.—See the title FOREIGN JUDGMENTS, REC-

agreement to writing is, in most cases, an argument against fraud; but it is very far from a conclusive argument; the doctrine will not be contended for, that a written agreement cannot be relieved against, on the ground of false suggestions.[75]

Fraud of Agent.—Although the fraud has been that of an agent.[76]

Fraud in Other Transactions.—But the fraud must be shown in the particular transaction involved, or be connected with or forming a part of it.[77]

Deeds.—Deeds fraudulently obtained may be collaterally avoided at law.[78]

2. EXTENT OF INVALIDITY.—**Where Connection with Fraud Indirect.**—But only the instruments of transactions immediately connected with the fraud are invalidated thereby. A subsidiary undertaking, although relating to a fraudulent transaction, is not necessarily affected.[79]

ORDS AND JUDICIAL PROCEEDINGS.

Effect on land grants, patents and claims.—See the title PUBLIC LANDS.

Effect on lease.—See the title LANDLORD AND TENANT.

Effect on marriage and divorce.—See the titles DIVORCE AND ALIMONY, vol. 5, p. 412; MARRIAGE.

Effect on negotiable instruments.—See the titles BILLS, NOTES AND CHECKS, vol. 3, p. 257; BONDS, vol. 3, p. 382.

Effect on patents.—See the title PATENTS.

Effect on right to specific performance.—See the title SPECIFIC PERFORMANCE.

Effect on sealed instruments.—See post, "Remedy at Law Must Be Inadequate," VI, A, 1, b. See, also, the titles BONDS, vol. 3, pp. 424, 435; SEALS AND SEALED INSTRUMENTS.

Effect on subscriptions to corporate stock.—See the titles BANKS AND BANKING, vol. 3, p. 125; STOCK AND STOCKHOLDERS.

Effect on suretyship contract.—See the title PRINCIPAL AND SURETY.

Effect on title by adverse possession.—See the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION.

Fraud affecting discharge in bankruptcy.—See the title BANKRUPTCY, vol. 2, pp. 862, 868.

Fraud of agent as forfeiting right to compensation or commissions.—See the titles BROKERS, vol. 3, p. 531; FACTORS AND COMMISSION MERCHANTTS, ante, p. 232; PRINCIPAL AND AGENT.

Fraud of bailor or shipper as relieving bailor or carrier of responsibility for goods taken from him by true owner.—See the title BAILMENTS, vol. 2, pp. 789, 790.

Fraudulent claim in prize court.—See the title PRIZE.

Representations operating a fraud as estoppel.—See the title ESTOPPEL, vol. 5, p. 939 et seq.; 947, et seq.

75. Effect on writing.—Boyce *v.* Grundy, 3 Pet. 210, 7 L. Ed. 655. See the title FRAUDS, STATUTE OF.

As to parol evidence, see post, "Parol Evidence," VI, G, 2, d.

76. **Fraud of agent.**—If a principal relies upon a sale he must take it with the burden of the fraud. He must adopt the whole transaction or no part of it, and cannot affirm what is for his advantage and repudiate the rest. Cases where the action is on the illegal contract do not apply. National Bank, etc., Co. *v.* Petrie, 189 U. S. 423, 425, 47 L. Ed. 879. See ante, "By Agent," IV, A, 1.

77. The true rule as to the interference of a court of equity in relation to contracts, in which fraud is alleged, was laid down in Conard *v.* Nicoll, 4 Pet. 291, 297, 7 L. Ed. 862: "If the person against whom fraud is alleged, should be proved to have been guilty of it in any number of instances; still, if the particular act sought to be avoided, be not shown to be tainted with fraud, it cannot be affected by those other frauds, unless in some way or other it be connected with, or form a part of them." Clarke *v.* White, 12 Pet. 178, 9 L. Ed. 1046. See post, "Extent of Invalidity," V, A, 2. See the title EVIDENCE, vol. 5, p. 1019.

78. **Deeds.**—Field *v.* Seabury, 19 How. 323, 332, 15 L. Ed. 650; Gregg *v.* Sayre, 8 Pet. 244, 8 L. Ed. 932; Swayze *v.* Burke, 12 Pet. 11, 9 L. Ed. 980; McCall *v.* Carpenter, 18 How. 297, 15 L. Ed. 389.

Although a decree had been entered in a subsequent partition suit involving the land conveyed, the question of fraud not being involved in such suit or adjudicated therein. McCall *v.* Carpenter, 18 How. 297, 15 L. Ed. 389. See the title RES ADJUDICATA.

79. **Matters not directly connected with the fraud.**—Clarke *v.* White, 12 Pet. 178, 9 L. Ed. 1046; Conard *v.* Nicoll, 4 Pet. 291, 7 L. Ed. 862; McKittrick *v.* Arkansas Cent. R. Co., 152 U. S. 473, 38 L. Ed. 518.

Fraud in the procurement of state bonds in aid of a railroad company, although a wrong to the state, can have no connection in law with a mortgage executed by the company to secure its guaranty of said bonds. A sale under such mortgage is not affected thereby. McKittrick *v.* Arkansas Cent. R. Co., 152

Partial Invalidity.—As respects fraud in law as contradistinguished from fraud in fact, where that which is valid can be separated from that which is invalid, without defeating the general intent, the maxim, "void in part, void in toto," does not necessarily apply, and the instrument may be sustained notwithstanding the invalidity of a particular provision.[80]

3. NEMO ALLEGANS RULE.—And no one is allowed by the law to profit by

U. S. 473, 498, 38 L. Ed. 518. See the title RAILROADS.

As to evidence of other frauds, see the title EVIDENCE, vol. 5, p. 1019.

Effect of fraud on joint adventure—Title to property purchased.—A contract for the purchase of lands was made between S. and B. by which S. was to contribute to the venture his equitable title in the greater part of the lands to be purchased, as well as his own services; B. was to contribute all the money required to carry out the enterprise; the legal title was to be taken in S.'s name, and conveyed by him to B; S. was to attend to preparing the lands for sale, and to sell them, subject to B.'s approval; S. was to receive a commission of five per cent. on the gross amount of sales; out of the rest of the proceeds, B. was to be repaid his advances; and after B. had been reimbursed, the property was to belong, three-fifths to B. and two-fifths to S., and to be divided between them accordingly, either in lands or in money. It was held that, taking into consideration the whole scope of the contract, and the fact that, before it was made, S. had an equitable interest in the greater part of the lands, which was in fact, and was evidently considered by both parties to be, of greater value than the price which he had agreed to pay for them; that the title to all the lands was to be taken in S.'s name in the first instance, and to be conveyed by him to B.; and especially the express stipulation, after B. should have been fully reimbursed for his advances, out of the proceeds of sales, for the division of the remainder, the conclusion appears to be inevitable, that the conveyance of the legal title to B., like the deposit of proceeds of sales to B.'s credit, was intended as security only for B.'s advances; that S. was to have and retain an equitable title in two-fifths of the land, subject to the claim of B. for reimbursement; and that S.'s fraudulent misconduct, while it might properly defeat any claim of his for commissions, did not divest him of his equitable title in the lands, as recognized and stipulated for in the contract. Shaeffer *v.* Blair, 149 U. S. 248, 257, 37 L. Ed. 721.

Effect on rights under contract.—This contract contains no expression to indicate an intention of the parties to become partners, and it seems that there was no partnership created between B. & S. Whether a party to a contract was acting as a partner, or only as an agent, in performing the duties required of him by the contract, fraudulent misconduct proved against him deprived him of the right to the stipulated commissions. Shaeffer *v.* Blair, 149 U. S. 248, 258, 37 L. Ed. 721, citing Denver *v.* Roane, 99 U. S. 355, 25 L. Ed. 476; Wadsworth *v.* Adams, 138 U. S. 380, 34 L. Ed. 984. See the titles PARTNERSHIP; PRINCIPAL AND AGENT.

Effect on fraudulent contraction of debt and subsequent assignment.—Even if it were established beyond doubt that an assigning debtor, with deliberate purpose to defraud an attaching creditor contesting the validity of the assignment on that account, contracted the debt in question, this would not determine the scope or effect of his assignment under a statute avoiding general assignments by insolvents with preferences as showing a formed intent to make the assignment at that time. It were as reasonable to suppose that, having made the personal gain he designed, his interest ceased, and that he never contemplated an assignment until the very moment of its execution. Indeed, if he were guilty of fraud, in the first instance, it would imply a state of mind indifferent to all results after the primary purpose of his own profit had been secured. Here the question was whether the preference of this debt on the day before the assignment was a part thereof so as to vitiate it under this statute, the assignment being on its face general and without preferences. South Branch Lumber Co. *v.* Ott, 142 U. S. 622, 631, 35 L. Ed. 1136. See the title ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, vol. 2, p. 617, et seq.

80. Partial invalidity.—Peters *v.* Bain, 133 U. S. 670, 688, 33 L. Ed. 696; Cunningham *v.* Norton, 125 U. S. 77, 31 L. Ed. 624; Denny *v.* Bennett, 128 U. S. 489, 496, 32 L. Ed. 491; Muller *v.* Norton, 132 U. S. 501, 33 L. Ed. 397. See post, "Nemo Allegans Rule," V, A, 3.

There are cases where grants and securities made contrary to the prohibitions of a statute, in part, are, upon the true construction of the intent of the statute, void in toto; but it is very different, in cases standing merely on the common law; and, therefore, at the common law, in order to make a grant void in toto for fraud or covin, the fraud or covin must infect the whole transaction, or be so mixed up in it, as not to be capable of a distinct and separate consideration. A grant may be good for part of the land granted, and bad as to other parts of the same. Winn *v.* Patterson, 9 Pet. 663, 9 L. Ed. 266.

his own fraud or turpitude,[81] but such conduct must be immediately connected with the matter at issue,[82] or to allege his own turpitude as a ground of recovery in a suit,[83] whether he be plaintiff or defendant.[84] Thus, a person cannot avail himself of a lien, the discharge of which has been fraudulently prevented by his own acts.[85]

81. Nemo allegans rule.—Carrington *v.* Pratt, 18 How. 63, 68, 15 L. Ed. 267; Clarke *v.* White, 12 Pet. 178, 9 L. Ed. 1046; Catts *v.* Phalen, 2 How. 376, 11 L. Ed. 306; Carpenter *v.* Providence, etc., Ins. Co., 4 How 185, 224, 11 L. Ed. 931; Creath *v.* Sims, 5 How. 192, 12 L. Ed. 111; United States *v.* Girault, 11 How. 22, 30, 13 L. Ed. 587; Randon *v.* Toby, 11 How. 493, 518, 13 L. Ed. 784; Hickox *v.* Buckingham, 18 How. 182, 15 L. Ed. 341; Shute *v.* Thompson, 15 Wall. 151, 21 L. Ed. 123; Mutual Life Ins. Co. *v.* Hill, 193 U. S. 551; 560, 48 L. Ed. 788; Shepherd *v.* Thompson, 122 U. S. 231, 237, 30 L. Ed. 1156. See, the title ESTOPPEL, vol. 5, p. 950.

"Parties engaged in a fraudulent attempt to obtain a neighbor's property are not the objects of the special solicitude of the courts. If they are caught in their own toils, and are themselves the sufferers, it is a legitimate consequence of their violation of the rules of law and morality. Those who violate these laws must suffer the penalty." Neblett *v.* Macfarland, 92 U. S. 101, 105, 23 L. Ed. 471.

Even if actual fraud does not appear, but it is evident the complainant did not come in with an unaffected conscience, in that case, he cannot call upon the active power of the court for relief; in the phrase of early times, the complainant must come into equity with clean hands. Clarke *v.* White, 12 Pet. 178, 193, 9 L. Ed. 1046.

82. Connection with transaction must be immediate.—Clarke *v.* White, 12 Pet. 178, 193, 9 L. Ed. 1046. See ante, "Extent of Invalidity," V, A, 2.

As to proof of other frauds, see the title EVIDENCE, vol. 5, p. 1004.

83. Same.—Columbia Ins. Co. *v.* Lawrence, 10 Pet. 507, 518, 9 L. Ed. 512.

An arrangement between K. and R., joint owners of lands, by which the latter surrendered his claim to the lands, accepted bonds in payment of the debt due him, and assumed a trust of other bonds, even if it was such as the plaintiff alleges, was fraudulently obtained by K. It was held that it was impossible to separate the receipt which R. gave for the bonds from the arrangement by which he gave up his title to the moiety of the lands, and the engagement of K. to secure to him $10,000, the understood value of his half of the lands. They are all parts of one transaction. The assent of R. to a rescission of the contract by which he had become the equitable owner of that moiety, the acceptance of some of the bonds as security for payment of the consideration for the surrender, and the undertaking to invest the remaining bonds in the purchase of land from the trustees of the railroad company, were all induced by the representations of K. and they were obtained at the same time. Kitchen *v.* Rayburn, 19 Wall. 254, 260, 22 L. Ed. 64.

The complainants, then, do not come into court with clean hands. They are seeking the benefit of a contract obtained by their fraud, or by the fraud of K. Hence they can have no standing in a court of equity. Such a court will not lend its power to assist or protect a fraud. It will not even enforce an unconscionable bargain. In Bein *v.* Heath, 6 How. 228, 247, 12 L. Ed. 416, it was said to be a principle in chancery "that he who asks relief must have acted in good faith. The equitable powers of this court can never be exerted in behalf of one who has acted fraudulently, or who by deceit or any unfair means has gained an advantage. To aid a party in such a case would make this court the abettor of iniquity." For this reason, if for no other, the plaintiffs cannot succeed. They are seeking in a court of equity to derive an advantage from their own wrong. Kitchen *v.* Rayburn, 19 Wall. 254, 263, 22 L. Ed. 64. See, also, ante, "Extent of Invalidity," V, A, 2.

84. As plaintiff or defendant.—Shutte *v.* Thompson, 15 Wall. 151, 159, 21 L. Ed. 123; Fenemore *v.* United States, 3 Dall. 357, 364, 1 L. Ed. 634.

"Parties to suits at law may assert their rights to the fullest extent; but neither a plaintiff nor a defendant is at liberty to deceive, either actively or passively, his adversary, and a court whose province it is to administer justice will take care that on the trial of every cause neither party shall reap any advantage from his own fraud." Shutte *v.* Thompson, 15 Wall. 151, 159, 21 L. Ed. 123.

One who covenants to sell lands which he expects to purchase at the public sales of the United States cannot afterwards plead his own fraud in obtaining his title from the government in bar of decree for specific performance of his agreement. Fackler *v.* Ford, 24 How. 322, 16 L. Ed. 690. See post, "Fraud as Defense," VI, B, 4. See the title PUBLIC LANDS.

Maxim as to coming into equity with clean hands.—See the titles EQUITY, vol. 5, p. 803; MAXIMS.

85. Estoppel to set up lien fraudulently preserved.—Carey *v.* Brown, 92 U. S. 171, 175, 23 L. Ed. 479. See the titles ESTOPPEL, vol. 5, p. 950; LIENS.

4. In Pari Delicto Rule.—Although the mere fact that the parties were attempting a transaction forbidden by law, does not always bar relief,[86] and when a right is claimed to repudiate a contract induced by fraudulent representations, the party who denies the right is the one who relies upon the contract, and that party must take it as it was made,[87] a court administering justice upon principles of equity will not lend its aid to enforce the fulfillment of a contract in favor of a party to it, which is founded in fraud. In such cases, the court leaves both parties where the law finds them, giving no relief or countenance to claims of this description.[88] Where men have been partners in fraud neither can claim a preference over the other on account of honesty of purpose or fairness in dealing.[89]

86. In pari delicto rule—Preliminary fraud.—Where the question is, assuming that the parties were attempting a transaction forbidden by the law, whether the nature of the attempt prevents one of them from withdrawing from the bargain on the ground of preliminary fraud, if the withdrawal were on the ground of repentance alone, the law might, or might not, leave the parties where it found them. See Central Transp. Co. *v.* Pullman's Palace Car Co., 139 U. S. 24, 60, 61, 35 L. Ed. 55; Pullman's Palace Car Co. *v.* Central Transp. Co., 171 U. S. 138, 150, 43 L. Ed. 108. But a person does not become an outlaw and lose all rights by doing an illegal act. See Connolly *v.* Union, Sewer Pipe Co., 184 U. S. 540, 46 L. Ed. 679. The right not to be led by fraud to change one's situation is anterior to and independent of the contract. The fraud is a tort. Its usual consequence is that as between the parties the one who is defrauded has a right, if possible, to be restored to his former position. That right is not taken away because the consequence of its exercise will be the undoing of a forbidden deed. That is a consequence to which the law can have no objection, and the fraudulent party, who otherwise might have been allowed to disclaim any different obligation from that with which the other had been content, has lost his right to object because he has brought about the other's consent by wrong. National Bank, etc., Co. *v.* Petrie, 189 U. S. 423, 424, 47 L. Ed. 879. See, Pullman's Palace Car Co. *v.* Central Transp. Co., 171 U. S. 138, 151, 43 L. Ed. 108.

87. Party repudiating does not come within rule.—National Bank, etc., Co. *v.* Petrie, 189 U. S. 423, 426, 47 L. Ed. 879.

88. Parties in pari delicto not entitled to relief.—Carrington *v.* Pratt, 18 How. 63, 66, 15 L. Ed. 267; 2 Story's Equity, § 298; Wheeler *v.* Sage, 1 Wall. 518, 530, 17 L. Ed. 646.

Whosoever would seek admission into a court of equity must come with clean hands, and such a court will never interfere in opposition to conscience or good faith, or be called into activity to remedy the consequences of laches or neglect, or the want of reasonable diligence. Therefore, where a complainant prays to be relieved from the fulfillment of a contract, which was intentionally made in fraud of the law, the answer is, that however unworthy may have been the conduct of his opponent, the parties are in pari delicto. The complainant cannot be admitted to plead his own demerits. Creath *v.* Sims, 5 How. 192, 12 L. Ed. 111.

One fraud-doer cannot obtain relief in equity against his particeps criminis. Railroad Co. *v.* Soutter, 13 Wall. 517, 525, 20 L. Ed. 543.

Fraud upon third parties.—Thus neither party can enforce against the other a contract made between themselves to injure a third person, in fraud of the law. Randall *v.* Howard, 2 Black 585, 17 L. Ed. 269; Selz *v.* Unna, 6 Wall. 327, 336, 18 L. Ed. 799.

Nor will the character of such agreement be changed by showing that the claim of the third party, whose rights were to be affected by it, was also fraudulent. Randall *v.* Howard, 2 Black 585, 17 L. Ed. 269.

Where the objectionable items are fictitious, and inserted in the bond with the intent to defraud third persons, the entire security in such cases becomes tainted with the fraud, and a particeps criminis is not allowed to come into court to enforce it, even for the money advanced or expended; for to permit it would afford countenance to the fraud by giving partial effect to it. The rule of equity—and which is the rule of admiralty in such cases—refuses to interfere for relief, and leaves the parties where the law finds them. Carrington *v.* Pratt, 18 How. 63, 67, 15 L. Ed. 267.

The case is different where improper items were embraced in the bond from inadvertence or mistake, consistently with good faith in the parties to the transaction. In such case it may stand good for the amount actually advanced. Carrington *v.* Pratt, 18 How. 63, 67, 15 L. Ed. 267.

89. Honesty of purpose between wrongdoers immaterial.—Crosby *v.* Buchanan, 23 Wall. 420, 458, 23 L. Ed. 138.

"Generally, when a party obtains an advantage by fraud, he is to be regarded as the trustee of the party defrauded, and compelled to account. But if a party seeks relief in equity, he must be able to show that on his part there has been

B. Fraud as Giving Rise to Trust.—Where the legal title to property belonging in equity to another has been obtained by fraudulent and wrongful conduct, such guilty party will be held a trustee thereof in equity for the party defrauded and as to those having legal claims against him.[90]

C. Bona Fide Purchasers' Rights—1. IN GENERAL.—Fraud, of course, gives rise only to a personal claim. It goes to the motives, not to the formal constituents of a legal transfer, and the rule is familiar that it can affect a title only when the owner takes with notice or without having given value.[91] It is, indeed, an elementary doctrine of equity that where a grantor has been induced by fraud to part with the legal title to his property, he cannot reclaim it from subsequent innocent purchasers for value.[92]

2. INQUIRY INTO VALIDITY OF CLAIM.—One who enters into an ordinary and reasonable contract for the purchase of property from another is not bound to presume that the vendor is a wrongdoer, and that, therefore, he must make a searching inquiry as to the validity of his claim to the property.[93]

honesty and fair dealing. If he has been engaged in an illegal business and been cheated, equity will not help him." Wheeler *v.* Sage, 1 Wall. 518, 529, 17 L. Ed. 646.

Fraudulent combination against creditors.—See the title FRAUDULENT AND VOLUNTARY CONVEYANCES.

90. Guilty party a trustee.—Angle *v.* Chicago, etc., R. Co., 151 U. S. 1, 38 L. Ed. 55; Wheeler *v.* Sage, 1 Wall. 518, 529, 17 L. Ed. 646.

Constructive trusts and trustees ex maleficio.—See the title TRUSTS AND TRUSTEES.

91. Bona fide purchaser's rights.—Fidelity Mut. Life Ins. Co. *v.* Clark, 203 U. S. 64, 73, 51 L. Ed. 91; Fletcher *v.* Peck, 6 Cranch 87, 133, 3 L. Ed. 162; Winn *v.* Patterson, 9 Pet. 663, 679, 9 L. Ed. 266; Boone *v.* Chiles, 10 Pet. 177, 9 L. Ed. 383; Swayze *v.* Burke, 12 Pet. 11, 24, 9 L. Ed. 980. See The Eliza Lines, 199 U. S. 119, 131, 50 L. Ed. 115.

The bona fide transferee for value of property takes a good title, although the legal title thereto was obtained by the transferrer through fraud. This is true of money as well as other property, as where an insurance company has been compelled to pay a fraudulent claim by a successful suit, and afterwards discovers conclusive evidence of the fraud. Attorneys for the fraudulent claimant, who have received contingent fees out of the sum paid, cannot be compelled to refund. Fidelity Mut. Life Ins. Co. *v.* Clark, 203 U. S. 64, 73, 51 L. Ed. 91.

If a suit brought to set aside a conveyance obtained by fraud, and the fraud be clearly proved, the conveyance will be set aside, as between the parties; but the rights of third persons, who are purchasers without notice, for a valuable consideration, cannot be disregarded. Fletcher *v.* Peck, 6 Cranch 87, 133, 3 L. Ed. 162; Swayze *v.* Burke, 12 Pet. 11, 24, 9 L. Ed. 980

If the equitable owner of a thing has permitted another to hold the legal title accompanied with the usual documentary evidence of it, with full possession and with declarations of ownership corresponding to the legal title, he cannot set up his equity against a bona fide purchaser, who had no notice of it, the agent having fraudulently sold it as his own property. Calais Steamboat Co. *v.* Scudder, 2 Black 372, 17 L. Ed. 282. See the title PRINCIPAL AND AGENT.

Secret instructions from the equitable to the legal owner, which produced no change in the apparent relation of the latter to the thing will not affect the right of the purchaser. Proof of knowledge to affect such purchaser, must be direct and unequivocal. Calais Steamboat Co. *v.* Scudder, 2 Black 372, 17 L. Ed. 282.

Receipt of embezzled funds.—See the title EMBEZZLEMENT, vol. 5, p. 742.

Bona fide holder of negotiable paper.—See the title BILLS, NOTES AND CHECKS, vol. 3, pp. 296, et seq.; 306.

Bona fide assignee of fraudulent claim against insurance company.—See the title INSURANCE.

Liability of United States to owner fraudulently deprived of his property.—See the title UNITED STATES.

92. Same.—Colorado, etc., Iron Co. *v.* United States, 123 U. S. 307, 314, 31 L. Ed. 182. See, generally, the title VENDOR AND PURCHASER.

93. Inquiry into validity of claim.—United States *v.* Detroit, etc., Lumber Co., 200 U. S. 321, 332, 50 L. Ed. 499.

The rule of law in respect to purchases of land or timber is the same as that which obtains in other commercial transactions, and a contrary rule would shake the foundations of commercial business. No one is bound to assume that the party with whom he deals is a wrongdoer, and if he presents property, the title to which is apparently valid, and there are no circumstances disclosed which cast suspicion upon the title, he may rightfully deal with him, and, paying full value for the same, acquire the rights of a purchaser in good faith. Jones *v.* Simpson, 116 U. S. 609, 615, 29 L. Ed. 742. He is not bound to make a searching examination of all the account books of the vendor

3. Effect of Notice.—The portion of an unperformed contract which is completed after notice of a fraud is not within the principle which protects a bona fide purchaser.[94] But a purchaser with notice may protect himself by obtaining the title of a purchaser for a valuable consideration without notice, unless he be the original party to the fraud.[95]

Burden of Proof.—The burden of proof rests upon the equitable owner of property fraudulently sold by the apparent owner, his agent, to show that the purchaser had notice of his rights in due time.[96]

4. Necessity for Legal Title and Payment of Purchase Money.—No person can claim to occupy the position of a bona fide purchaser, without notice, unless he has acquired the legal title, and paid the purchase money in full.[97]

D. Loss Therefrom as between Innocent Parties.—It is a familiar principle of law that where one of two innocent parties must suffer by the fraud of another, the loss should fall upon him who enabled such third person to commit the fraud.[98] But the case of the issue of a false bill of lading by the

nor to hunt for something to cast a suspicion upon the integrity of the title. United States *v.* Detroit, etc., Lumber Co., 200 U. S. 321, 332, 50 L. Ed. 499.

94. After notice.—Dresser *v.* Missouri, etc., R. Const. Co., 93 U. S. 92, 96, 23 L. Ed. 815.

To holder of negotiable paper.—See the title BILLS, NOTES AND CHECKS, vol. 3, p. 312.

95. Acquisition of bona fide purchaser's title by purchaser with notice.—Swayze *v.* Burke, 12 Pet. 11, 24, 9 L. Ed. 980; Rogers *v.* Lindsey, 13 How. 441, 446, 14 L. Ed. 215. The bona fide purchase purges away the equity from the title in the hands of all persons who may obtain a derivative title, except it be that of the original party, whose conscience stands bound by the violation of the trust, and a meditated fraud. 1 Story, Eq. Jur., 397, 398, and cases.

A bona fide purchaser, without notice, is not affected by the fraud of his grantor; and it is admitted, that a conveyance by such purchaser, to a person who may have knowledge of the fraud, would be valid. But a purchase and conveyance cannot be considered as coming within this rule, where in the first place, purchaser did not purchase with the intention of holding the property, as was declared publicly at the sale; and some time before it took place, the same determination was made known by him to the administrator; and, in the second place, it appears the purchase was never perfected. He received the sheriff's deed, but he paid no part of the consideration. Swayze *v.* Burke, 12 Pet. 11, 24, 9 L. Ed. 980.

96. Burden of proof.—Calais Steamboat Co. *v.* Scudder, 2 Black 372, 17 L. Ed. 282.

Constructive notice and trusts arising therefrom.—See the titles NOTICE; TRUSTS AND TRUSTEES.

Notice of fraud in obtaining judgment as affecting assignees.—See the title JUDGMENTS AND DECREES.

97. Legal title and payment of money.—Swayze *v.* Burke, 12 Pet. 11, 9 L. Ed. 980; Villa *v.* Rodriguez, 12 Wall. 323, 338, 20 L. Ed. 406. See the title VENDOR AND PURCHASER.

98. Loss between innocent parties.—Friedlander *v.* Texas, etc., R. Co., 130 U. S. 416, 425, 32 L. Ed. 991; Calais Steamboat Co. *v.* Scudder, 2 Black 372, 17 L. Ed. 282.

"If one of two innocent persons must suffer by a deceit, it is more consonant to reason that he who 'puts trust and confidence in the deceiver should be a loser rather than a stranger.'" Carpenter *v.* Longan, 16 Wall. 271, 273, 21 L. Ed. 313; Warner *v.* Martin, 11 How. 209, 222, 13 L. Ed. 667; Bank *v.* Neal, 22 How. 96, 111, 16 L. Ed. 323.

Examples.—In a case where the relation between the party committing the fraud and A was that of executor and legatee, and that between such party and B, that of attorney and client, but as between themselves, A and B were absolute strangers, A received from the party guilty of fraud, in payment of a legacy, the identical money which the latter had received from B for a special purpose, but A had no notice of such fact until after the amount of the legacy had been applied to the purposes for which it was intended, A being a charitable organization. It was held, there being no evidence of negligence on the part of A in demanding and enforcing payment of the legacy, or any suspicion of the insolvency or fraud of the executor, and upon a general consideration of the facts, that, as against A, B has no equities; and even if it could be said that the equities were equal, a court of equity will not transfer a loss that has already fallen upon one innocent party to another equally innocent. Holly *v.* Missionary Soc., 180 U. S. 284, 45 L. Ed. 531.

"It is absolutely necessary for practical business transactions that the payee of money in due course of business shall not be put upon inquiry at his peril as to the title of the payer. Money has no ear marks." Holly *v.* Missionary Soc., 180 U.

agent of a common carrier, without the receipt of the goods, is not within this rule, so as to make the carrier liable to a bona fide holder for value.[99]

E. Fraud as Ground for Arrest.—See the titles BAIL AND RECOGNIZANCE, vol. 2, p. 767; EXECUTION AGAINST THE BODY AND ARREST IN CIVIL CASES, ante, p. 80.

F. Fraud as Ground for Attachment.—See the title ATTACHMENT AND GARNISHMENT, vol. 2, p. 672.

G. Civil Liability or Responsibility.—This will be found treated elsewhere.[1]

H. Ratification, Waiver and Estoppel.—He who alleges that fraud has been practiced upon him, must, as soon as he learns of the alleged fraud, repudiate the transaction in which it occurred, and when he does not do so but allows other parties to acquire rights thereunder and stands by without objection, he cannot afterwards set it aside.[2] Lapse of time may cure the invalidity.[3] Recognition of liability, after full knowledge of misrepresentations, is ratification, and is equivalent to an original promise under similar circumstances.[4]

S. 284, 293, 45 L. Ed. 531. See ante, "Bona Fide Purchasers' Rights," V, C.

As to recovery of payments generally, see the title PAYMENT.

"In State Bank *v.* United States, 114 U. S. 401, 29 L. Ed. 149, it was held that where, by the connivance of a clerk in the office of an assistant treasurer of the United States, a person unlawfully obtains from that office money belonging to the United States, and to replace it pays to the clerk money which he obtains by fraud from a bank, the clerk having no knowledge of the means by which the latter money was obtained, the United States are not liable to refund the money to the bank." Holly *v.* Missionary Soc., 180 U. S. 284, 294, 45 L. Ed. 531. See the title, UNITED STATES.

Fraudulent filling of blanks in negotiable paper.—See the titles ALTERATION OF INSTRUMENTS, vol. 1, p. 268; BILLS, NOTES AND CHECKS, vol. 3, p. 306.

99. Liability of carrier to holder of false bill of lading.—"The law can punish roguery, but cannot always protect a purchaser from loss, and so fraud perpetuated through the device of a false bill of lading may work injury to an innocent party, which cannot be redressed by a change of victim." Friedlander *v.* Texas, etc., R. Co., 130 U. S. 416, 426, 32 L. Ed. 991. See the title BILL OF LADING, vol. 3, p. 233.

1. Civil liability or responsibility.—See ante, "Manner of Perpetration," IV.

Liability of bank holding collateral for fraud of owner.—See the title BANKS AND BANKING, vol. 3, p. 67.

Liability of corporation for fraud.—See the title CORPORATIONS, vol. 4, p. 761.

2. Ratification, waiver and estoppel.—Hunt *v.* Oliver, 118 U. S. 211, 220, 30 L. Ed. 128; McLean *v.* Clapp, 141 U. S. 429, 35 L. Ed. 804; Hoyt *v.* Latham, 143 U. S. 553, 567; 36 L. Ed. 259; Baker *v.* Cummings, 169 U. S. 189, 42 L. Ed. 711.

In this case, even if the complainant did not, with full knowledge, give his assent to the transaction in advance, he afterwards ratified it and treated it as binding. Hunt *v.* Oliver, 118 U. S. 211, 220, 30 L. Ed. 128.

"One who claims to have been drawn into a fraudulent purchase must exercise care and vigilance to discover the fraud, and must be prompt in repudiating his contract on the ground of such fraud." Upton *v.* Tribilcock, 91 U. S. 45, 54, 23 L. Ed. 203.

Fraud in a sale may be waived, as when vendors elect to sue for the price and confirm the sale. Adler *v.* Fenton, 24 How. 407, 411, 16 L. Ed. 696.

3. Lapse of time.—Moore *v.* Greene, 19 How. 69, 15 L. Ed. 533.

"There is no question of the general doctrine that fraud vitiates the most solemn contracts, documents, and even judgments. There is also no question that many rights originally founded in fraud become—by lapse of time, by the difficulty of proving the fraud, and by the protection which the law throws around rights once established by formal judicial proceedings in tribunals established by law, according to the methods of the law—no longer open to inquiry in the usual and ordinary methods." United States *v.* Throckmorton, 98 U. S. 61, 64, 25 L. Ed. 93. See the titles LACHES; LIMITATION OF ACTIONS AND ADVERSE POSSESSION.

It is too late to set up fraud after party claiming to have been defrauded himself has carried the agreement into execution, and acted under it, receiving its benefits for some three years. Day *v.* Union India Rubber Co., 20 How. 216, 218, 15 L. Ed. 883. And see the titles LACHES; LIMITATION OF ACTIONS AND ADVERSE POSSESSION; RESCISSION, CANCELLATION AND REFORMATION.

4. Ratification.—If the defendant, after he had a full knowledge of the misrepresentations, continued to recognize his liability to plaintiffs, and promised to pay, after he had acquired such knowledge,

Acquiescence and waiver are questions of fact, and full knowledge is essential thereto. Reasonable diligence is required of the party defrauded, but extreme vigilance and promptitude to rescind are not required.[5]

Action for Damages as Affirmance.—An action for damages affirms the contract and relies on it.[6]

VI. Actions and Remedies.

A. Jurisdiction—1. In Equity—a. *Fraud a General Ground of Relief.*—Fraud is one of the general grounds for relief in a court of equity.[7] Courts of

he will be estopped to make such defense. A subsequent promise, with full knowledge of the facts, is certainly equivalent to an original promise made under similar circumstances; and no one, acting with full knowledge, can justly say that he has been deceived by false representations. Volenti non fit injuria. Fitzpatrick *v.* Flannagan, 106 U. S. 648, 660, 27 L. Ed. 211.

Where fraud is charged in the procurement of the execution of a power by the donee thereof, the positive co-operation of the donee in the arrangements for the sale of the property, and her acquiescence in that sale until after the title had been made to the purchaser, furnish such presumption of the absence of fraud in the transactions complained of, which, if it is not absolutely conclusive, certainly calls for contravening evidence of a direct and powerful character—evidence of force sufficient to overthrow and set aside the complainant's own acts and declarations. Ladd *v.* Ladd, 8 How. 10, 28, 12 L. Ed. 967.

5. **Questions of fact—Promptitude required.**—Pence *v.* Langdon, 99 U. S. 578, 581, 25 L. Ed. 420.

"Acquiescence and waiver are always questions of fact. There can be neither without knowledge. The terms import this foundation for such action. One cannot waive or acquiesce in a wrong while ignorant that it has been committed. Current suspicion and rumor are not enough. There must be knowledge of facts which will enable the party to take effectual action. Nothing short of this will do. But he may not willfully shut his eyes to what he might readily and ought to have known. When fully advised, he must decide and act with reasonable dispatch. He cannot rest until the rights of third persons are involved and the situation of the wrongdoer is materially changed. Under such circumstances he loses the right to rescind, and must seek compensation in damages. But the wrongdoer cannot make extreme vigilance and promptitude conditions of rescission. It does not lie in his mouth to complain of delay unaccompanied by acts of ownership, and by which he has not been affected. The election to rescind or not to rescind, once made, is final and conclusive." Pence *v.* Langdon, 99 U. S. 578, 581, 25 L. Ed. 420.

Where upwards of six years elapsed after the sale alleged to have been fraudulent, and before the suit was brought; and the vendees, who do not pretend to have been ignorant of the alleged fraud during any considerable part of that period of time, did not offer to rescind the contract, nor did they, at any time, either return or offer to return the property sold, the fraud is waived. Hendrickson *v.* Hinckley, 17 How. 443, 445, 15 L. Ed. 124.

Assuming a representation to be a fraud which would avoid the contract, on the question whether the defendant discharged his duty in discovering that fraud, and repudiating the contract on account of that fraud, and not on account of another fraud not now in question, the plaintiff was entitled to the opinion of the jury, and on that precise question. A charge which refused him this right was erroneous. Upton *v.* Tribilcock, 91 U. S. 45, 53, 23 L. Ed. 203.

Estoppel to impeach instrument by claim thereunder.—See the title ESTOPPEL, vol. 5, p. 913.

Instruction.—See post, "Instructions," VI, E.

6. **By action for damages.**—National Bank, etc., Co. *v.* Petrie, 189 U. S. 423, 425, 47 L. Ed. 879. See post, "Right of Action and Relief Afforded," VI, B.

As to election of remedies, see post, "Election of Remedies," VI, B, 1.

7. **Fraud as ground of equitable relief.**—Kann *v.* King, 204 U. S. 43, 57, 51 L. Ed. 360; Hunt *v.* Rousmanier, 8 Wheat. 173, 5 L. Ed. 589; Atkins *v.* Dick, 14 Pet. 114, 10 L. Ed. 378; Davis *v.* Tileston, 6 How. 114, 120, 12 L. Ed. 366; Shelton *v.* Tiffin, 6 How. 163, 185, 12 L. Ed. 387; Lytle *v.* Arkansas, 22 How. 193, 16 L. Ed. 306; Hager *v.* Thomson, 1 Black 80, 91, 17 L. Ed. 41; Slater *v.* Maxwell, 6 Wall. 268, 18 L. Ed. 796; Jones *v.* Bolles, 9 Wall. 364, 19 L. Ed. 734; Moore *v.* Robbins, 96 U. S. 530, 24 L. Ed. 848; Quinby *v.* Conlan, 104 U. S. 420, 426, 26 L. Ed. 800; Griffith *v.* Godey, 113 U. S. 89, 91, 28 L. Ed. 934; Kirby *v.* Lake Shore, etc., Railroad, 120 U. S. 130, 134, 30 L. Ed. 569; United States *v.* American Bell Tel. Co., 128 U. S. 315, 359, 32 L. Ed. 450; Simmons Creek Coal Co. *v.* Doran, 142 U. S. 417, 35 L. Ed. 1062; Tyler *v.* Savage, 143 U. S. 79, 95, 36 L. Ed. 82; United States *v.* American Bell Tel. Co., 159 U. S. 548, 40 L. Ed. 255. See, generally, the title EQUITY, vol. 5, p. 803.

equity grant relief, in cases of fraud and mistake, which cannot be obtained in courts of law. In such cases, a court of equity may carry the intention of the parties into execution, where the written agreement fails to express that intention,[8] whether the fraud be constructive, or direct and positive.[9] But a mere charge of fraud will not sustain the jurisdiction. It must be proved.[10]

b. *Remedy at Law Must Be Inadequate.*—And where a party has been deprived of his rights by fraud, and has no remedy at law, a court of equity will grant relief, but the remedy at law must be wanting or inadequate.[11]

Continuing Wrong.—Where an agreement against which a complainant in equity asks to have relief, is perpetuate in its nature, and the keeping of it on foot is a fraud against the party complaining, so that the only effectual relief against it is to have it annulled, the case is one for equity, not for law.[12]

Fiduciary Relationship Requiring Accounting and Discovery.—Equity has jurisdiction of a bill seeking relief on the ground of fraud, where the parties stood in a fiduciary relation towards each other, and the transactions, as to some of which fraud was charged, were all parts of one general enterprise, and

8. **Same.**—Sprigg *v.* Bank, 14 Pet. 201, 206, 10 L. Ed. 419.

"Equity has always had jurisdiction of fraud, misrepresentation, and concealment, and it does not depend upon discovery." Craig *v.* Leitensdorfer, 123 U. S. 189, 210, 31 L. Ed. 114; Jones *v.* Bolles, 9 Wall. 364, 369, 19 L. Ed. 734.

Everything is relieved against, to the extent to which it is wrong or fraudulent, but nothing beyond it. Veazie *v.* Williams, 8 How. 134, 160, 12 L. Ed. 1018.

At suit of the United States.—"The circuit courts of the United States have the same jurisdiction in equity, in a case where the United States itself is plaintiff, that they have where a citizen is plaintiff, to relieve against accident, mistake, fraud, covin and deceit." United States *v.* American Bell Tel. Co., 128 U. S. 315, 352, 32 L. Ed. 450.

Operates upon the person.—In a case of fraud, or trust, or of contract, the jurisdiction of a court of chancery is sustainable, wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree. Massie *v.* Watts, 6 Cranch 148, 160, 3 L. Ed. 181. See the title JURISDICTION.

Fraud of third party.—A court of equity will not afford relief for an injury sustained by the fraud of a person who is no party to a contract induced by that fraud. Russell *v.* Clarke, 7 Cranch 69, 91, 3 L. Ed. 271.

9. **Whether constructive or positive fraud.**—Eyre *v.* Potter, 15 How. 42, 56, 14 L. Ed. 592.

10. **Charge of fraud without proof not enough.**—See post, "Fraud Never Presumed, but to Be Proved," VI, G, 1, a.

11. **Inadequacy of remedy at law essential.**—Metcalf *v.* Williams, 104 U. S. 93, 95, 26 L. Ed. 665; Russell *v.* Clarke, 7 Cranch 69, 91, 3 L. Ed. 271; Insurance Co. *v.* Bailey, 13 Wall. 616, 20 L. Ed. 501, where it was held that equity would not take jurisdiction of a bill for the cancellation of an insurance policy for fraud, because the fraud could be perfectly well availed of as a defense to a suit on the policy.

Where the relief obtainable in equity upon the ground of fraud is simply what plaintiffs could recover, if they could recover at all, in an action at law, there is no reason why a court of equity should be resorted to for this remedy; nor is there anything in the nature of the transaction, since no actual fraud on the part of defendants is proved, why an action at law should not have been the appropriate one to recover these damages. The case is by no means a complex or difficult one. The facts are few and easily proved. The transactions are open and patent to everybody, and an action at law would afford complete and ample remedy for the wrong complained of. Lacombe *v.* Forstall's Sons, 123 U. S. 562, 570, 31 L. Ed. 255.

A mere allegation of fraud where the pleadings show a plain and adequate remedy at law, will not give equity jurisdiction. Smyth *v.* New Orleans Canal, etc., Co., 141 U. S. 656, 35 L. Ed. 891. See the title EQUITY, vol. 5, p. 803.

"The allegation of fraudulent proceedings respecting the acquisition of the title does not convert an action at law into a suit in equity." Smyth *v.* New Orleans Canal, etc., Co., 141 U. S. 656, 661, 35 L. Ed. 891.

12. **Fraud working a continuing injury.**—Jones *v.* Bolles, 9 Wall. 364, 19 L. Ed. 734.

A suit in equity to enforce a legal right can be brought where an agreement procured by fraud is of a continuing nature and its rescission will prevent a multiplicity of suits, as in Boyce *v.* Grundy, 3 Pet. 210, 215, 7 L. Ed. 655, and in Jones *v.* Bolles, 9 Wall. 364, 369, 19 L. Ed. 734. Buzard *v.* Houston, 119 U. S. 347, 352, 30 L. Ed. 451.

the claims of a character involving trust relations, and requiring an accounting.[13]

Sealed Instruments.—The general rule is, that in an action upon a sealed instrument in a court of law, failure of consideration, or fraud in the consideration, for the purpose of avoiding the obligation, is not admissible as between

13. **Fiduciary relationship requiring accounting and discovery.**—Kilbourn *v.* Sunderland, 130 U. S. 505, 515, 32 L. Ed. 1005.

"The remedy at law in the case in hand was rendered embarrassed and doubtful by the conduct of the defendants, and fraud has in equity a more extensive signification than at law, and, as charged here, involved the consideration of the principles applicable to fiduciary and trust relations between the parties throughout the period of their connection." Kilbourn *v.* Sunderland, 130 U. S. 505, 515, 32 L. Ed. 1005.

It was held in Tyler *v.* Savage, 143 U. S. 79, 94, 36 L. Ed. 82, that the bill set out a case of fraud practised upon the plaintiff by defendant T. in that, in order to induce her to purchase the $10,000 of stock, he, as president of the company, sent to her a letter of April 10, 1884, upon the statements in which she relied and had a right to rely, it being alleged in the bill that the letter, both by its statements and its omissions, was false and deceitful, and operated as a fraud upon the plaintiff, and that $10,000 having been obtained from her unlawfully, by the misrepresentations of the affairs of the company by T., its president and duly-authorized agent, and having gone into its treasury and been expended by it, that sum was justly due her by T. and the company, with interest, and she had a right to require all the proper assets of the company to be gotten in and applied to the debts due to her and others; that the company was insolvent, and that a receiver ought to be appointed for it; and the bill also required from the defendants answers to the interrogatories which it contained. The information obtained from the answers to the interrogatories and from the proofs in the books showed the insolvent condition of the company on June 1, 1884, and that, as the master reported, it was at that date bankrupt. T. must be held to have had knowledge at that time of the condition of the company, as he was its president, and commenced keeping its books about March, 1883; and he is chargeable with knowledge of the facts, reported by the master, that of the $10,000 paid by the plaintiff he received personally the benefit of $6,200. The recovery by the plaintiff thus depended largely on the information in the possession of the company and of T., and which was sought for by the bill; and an application of the assets of the company, to replace such of the money paid by the plaintiff as had been used by it, was necessary before Tyler could be made responsible individually for what the assets of the company would not pay. Thus there were in the case, as ingredients to support the jurisdiction of equity, discovery, account, fraud, misrepresentation and concealment. Story Eq. Jur., §§ 64k, 67, 184, 191. Jones *v.* Bolles, 9 Wall. 364, 369, 19 L. Ed. 734.

As to the decree being outside the case made in the bill, the allegations of the bill as to the fraud are adequate, and the statement of the decree that the company was represented to the plaintiff by T., its president, to be in a flourishing condition, when in fact it was insolvent, is a sufficient support of the allegations of fraud made in the bill. Tyler *v.* Savage, 143 U. S. 79, 97, 36 L. Ed. 82.

"In Parkersburg *v.* Brown, 106 U. S. 487, 500, 27 L. Ed. 238, it was held that there was a plain, adequate and complete remedy at law for the relief granted by the decree. In the present case, discovery was prayed for and made, the affairs of an insolvent corporation were settled up, the subscription to stock made by the plaintiff was substantially canceled, part of the proceeds of the assets of the company were applied to the repayment of the $10,000 and a decree for the balance was made against Tyler, the agent of the company, who had committed the fraud." Tyler *v.* Savage, 143 U. S 79, 96, 36 L. Ed. 82.

Relief against conveyance of dower interest obtained by fraud.—Where, upon the facts alleged in the amended bill, and admitted by the demurrer, the defendant J. had obtained a conveyance of the plaintiff's dower interest by fraud, and held that interest in trust for her, and the defendant D., taking the property with full notice, was equally affected by the fraud and bound by the trust, but parts of the property, having been conveyed to bona fide purchasers, were beyond the reach of the plaintiff, full, adequate and complete relief, either by awarding to the plaintiff her dower in the whole out of the part not so conveyed, or by awarding her dower in that part only, with damages for having been fraudulently deprived of her interest in the rest, could not be had in an action at law. The case made in the bill, therefore, by reason of the fraud, the trust, and the peculiar relief which the conduct of the defendants has made necessary to be given in order fully to indemnify the plaintiff, is clearly within the jurisdiction of a court of equity. Jones *v.* Van Doren, 130 U. S. 684, 691, 32 L. Ed. 1077, citing Herbert *v.* Wren, 7 Cranch 370, 3 L. Ed. 374.

Although the prayer of the bill, being apparently drawn upon the supposition that the plaintiff might be held bound by

parties and privies to the deed; and, more especially, where there has been a part execution of the contract, and equity takes jurisdiction.[14]

To Prevent Inequitable Defense from Being Set Up at Law.—Where, in the bill, there is an averment of fraud, and, at the close, a general prayer for any suitable relief, it seems plausible that the court might, if satisfied of the existence of fraud, estop the party guilty of it from profiting through his own wrong, by preventing him from setting up, as a defense, the want of an acknowledgment in writing, when such want was the result or the instrument of his own misbehavior.[15]

Recovery of Damages.—Unless under peculiar circumstances, it seems that damages cannot be given in a court of equity, but the parties must be left to a court of law to recover them.[16]

the mortgage by vendee, is chiefly directed towards securing a right to redeem, and, in that aspect of the case, she properly offered to redeem the whole property, by paying off the whole mortgage, because she could not, unless at the election of the mortgagee, redeem by paying less, Collins *v.* Riggs, 14 Wall. 491, 20 L. Ed. 723; McCabe *v.* Bellows, 7 Gray 148, yet the general object of the bill is to secure to the plaintiff the dower interest of which she has been defrauded, and the bill contains a prayer for general relief. This is sufficient to enable a court of equity to decree such relief as the facts stated in the bill justify. Jones *v.* Van Doren, 130 U. S. 684, 692, 32 L. Ed. 1077, citing English *v.* Foxall, 2 Pet. 595, 7 L. Ed. 531; Taylor *v.* Merchants' Fire Ins. Co., 9 How. 390, 13 L. Ed. 187; Texas *v.* Hardenberg, 10 Wall. 68, 19 L. Ed. 839.

Dismissed if discovery only incidental to relief sought.—And, if a bill in equity, showing ground for legal and not for equitable relief, prays for a discovery as incidental only to the relief sought, and the answer discloses nothing, but the plaintiff supports the claim by independent evidence, the bill ought to be dismissed, without prejudice to an action at law. Tyler *v.* Savage, 143 U. S. 79, 96, 36 L. Ed. 82; Buzard *v.* Houston, 119 U. S. 347, 30 L. Ed. 451. And see, generally, the title DISCOVERY, vol. 5, p. 350.

14. Sealed instruments.—Hartshorn *v.* Day, 19 How. 211, 222, 15 L. Ed. 605. The difficulties are in adjusting the rights and equities of the parties in a court of law; and hence, in the states where the two systems of jurisprudence prevail, by equity and the common law, a court of law refuses to open the question of fraud in the consideration, or in the transaction out of which the consideration arises, in a suit upon the sealed instrument, but turns the party over to a court of equity, where the instrument can be set aside upon such terms as, under all the circumstances, may be equitable and just between the parties. A court of law can hold no middle course; the question is limited to the validity or invalidity of the deed.

In a court of law, between parties or privies, evidence of fraud is admissible only where it goes to the question whether or not the instrument ever had any legal existence. But it was especially proper to exclude it in this case, where the agreement had been partly executed, and rights of long standing had grown up under it. Hartshorn *v.* Day, 19 How. 211, 15 L. Ed. 605.

Quære, whether a material misrepresentation, not fraudulent, can be pleaded in avoidance of a sealed instrument. Hodgson *v.* Marine Ins. Co., 5 Cranch 100, 110, 3 L. Ed. 48.

15. To prevent inequitable defense from being set up at law.—Carpenter *v.* Providence, etc., Ins. Co., 4 How. 185, 224, 11 L. Ed. 931.

And courts of equity will not only interfere in cases of fraud to set aside acts done, but will also, if acts have by fraud been prevented from being done by the parties, interfere and treat the case exactly as if the acts had been done. Moore *v.* Crawford, 130 U. S. 122, 128, 32 L. Ed. 878; Carpenter *v.* Providence, etc., Ins. Co., 4 How. 185, 223, 11 L. Ed. 931.

16. Recovery of damages.—Veazie *v.* Williams, 8 How. 134, 160, 12 L. Ed. 1018. See post, "Action of Deceit," VI, B, 2.

"In cases of fraud or mistake, as under any other head of chancery jurisdiction, a court of the United States will not sustain a bill in equity to obtain only a decree for the payment of money by way of damages, when the like amount can be recovered at law in an action sounding in tort or for money had and received." Buzard *v.* Houston, 119 U. S. 347, 352, 30 L. Ed. 451; Parkersburg *v.* Brown, 106 U. S. 487, 500, 27 L. Ed. 238; Ambler *v.* Choteau, 107 U. S. 586, 27 L. Ed. 322; Litchfield *v.* Ballou, 114 U. S. 190, 29 L. Ed. 132; Tyler *v.* Savage, 143 U. S. 79, 96, 36 L. Ed. 82.

"In England, indeed, the court of chancery, in cases of fraud, has sometimes maintained bills in equity to recover the same damages which might be recovered in an action for money had and received. But the reason for this, as clearly brought out by Lords Justices Knight Bruce and Turner in Silm *v.* Croucher, 1 D., F. & J. 518, 527, 528, was that such cases were within the ancient and original juris-

Partition Proceedings.—The question of fraud is not appropriate to a proceeding in partition; if raised, the proceedings are usually suspended, and the question sent to a court of law.[17]

Will Obtained by Fraud.—In cases of fraud equity has a concurrent jurisdiction with a court of law, but in regard to a will charged to have been obtained through fraud, this rule does not hold.[18]

2. At Law.—That fraud is cognizable in a court of law, as well as in a court of equity, is a well-established principle; it has often been so ruled in the supreme court.[19] Fraud in the execution of the instrument has always been admitted in a court of law, as where it has been misread, or some other fraud or imposition has been practiced upon the party in procuring his signature and seal. The fraud in this aspect goes to the question whether or not the instrument ever had any legal existence.[20]

diction in chancery, before any court of law had acquired jurisdiction of them, and that the assumption of jurisdiction by the courts of law, by gradually extending their powers, did not displace the earlier jurisdiction of the court of chancery. Upon any other ground, such bills could not be maintained." Buzard *v.* Houston, 119 U. S. 347, 352, 30 L. Ed. 451.

Where A and B had made a valid agreement for the sale of cattle by A to B, and B filed a bill in equity against A, alleging that A, by false and fraudulent representations, had induced B to release A from his agreement and take in lieu thereof an assignment of a similar agreement between C and A, and repay A what he claimed to have paid C under said agreement, and praying a rescission of the substituted contract and a reinstatement and confirmation of the former agreement and repayment of the moneys paid by B to A by reason of the false representations; it was held, on demurrer and appeal from decree of dismissal, that the bill stated a case for an action of deceit at law, which would afford full, adequate and complete remedy, and that the bill in equity would not lie. Buzard *v.* Houston, 119 U. S. 347, 30 L. Ed. 451.

In an action of deceit the plaintiffs might treat the assignment of the contract with C. as void, and, upon delivering up that contract to the defendant, recover full damages for the nonperformance of the original agreement. No relief is sought against C., and he is not made a party to the bill. The obligation executed by the plaintiffs to the defendant is not negotiable, so that there is no need of an injunction. A judgment for pecuniary damages would adjust and determine all the rights of the parties, and is the only redress to which the plaintiffs, if they prove their allegations, are entitled. There is therefore no ground upon which the bill can be maintained. Buzard *v.* Houston, 119 U. S. 347, 353, 30 L. Ed. 451. See the title RESCISSION, CANCELLATION AND REFORMATION.

"The mere breach of a verbal promise for the purchase of lands will not justify the interference of a court of equity. Purcell *v.* Miner, 4 Wall. 513, 18 L. Ed. 435. There is no fraud in such a refusal. The party who so refuses stands upon the law and has a right to refuse. Under the circumstances of this case the statute is as binding on a court of equity as on a court of law. If the mere refusal of a party to perform a parol contract for the sale of lands could be construed to be such a fraud as would give a court of equity jurisdiction to enforce it, the statute of frauds would be rendered vain and nugatory." Dunphy *v.* Ryan, 116 U. S. 491, 498, 29 L. Ed. 703. See the title FRAUDS, STATUTE OF.

Fraudulent conspiracy.—"As regards a claim to recover $20,000 damages) for a fraudulent conspiracy) we see no reason for going into equity. If such a recovery can be had at all it can be had as well at law. It is a proper case for a jury to determine whether there has been a combination to cheat and defraud plaintiff, and the amount he should recover for such fraud." Nougue *v.* Clapp, 101 U. S. 551, 553, 29 L. Ed. 1026; Ambler *v.* Choteau, 107 U. S. 586, 591, 27 L. Ed. 322; Francis *v.* Flinn, 118 U. S. 385, 30 L. Ed. 165. See the title CONSPIRACY, vol. 3, p. 1109.

17. Partition proceedings.—McCall *v.* Carpenter, 18 How. 297, 15 L. Ed. 389. See the title PARTITION.

18. Fraudulent will.—Case of Broaderick's Will, 21 Wall. 503, 513, 22 L. Ed. 599. See the title WILLS.

19. Jurisdiction at law.—Swayze *v.* Burke, 12 Pet. 11, 9 L. Ed. 980; Bagnell *v.* Broderick, 13 Pet. 436, 455, 10 L. Ed. 235; Gregg *v.* Sayre, 8 Pet. 244, 8 L. Ed. 932.

It is an admitted principle, that a court of law has concurrent jurisdiction with a court of chancery, in cases of fraud; but when matters alleged to be fraudulent are investigated in a court of law, it is the province of a jury to find the facts, and determine their character. Gregg *v.* Sayre, 8 Pet. 244, 8 L. Ed. 932.

20. Same.—Hartshorn *v.* Day, 19 How. 211, 222, 15 L. Ed. 605. "It is said that fraud vitiates all contracts, and even records, which is doubtless true in a general sense. But it must be reached in some regular and authoritative mode; and this may depend upon the forum in which

B. Right of Action and Relief Afforded—1. ELECTION OF REMEDIES.—When a party discovers that he has been deceived in a transaction he may resort to an action at law to recover damages, or he may have the transaction set aside in which he has been wronged, by the rescission of the contract. If he choose the latter remedy, he must act promptly, "announce his purpose and adhere to it," and not by acts of ownership continue to assert right and title over the property as though it belonged to him.[21] Taking any steps to enforce the contract was a conclusive election not to rescind it on account of any thing known at the time. After that the option no longer existed, and is of no consequence whether or not the plaintiffs made their choice effective.[22] But the election must be made with full knowledge of the facts, to be binding, where innocent parties have acquired no rights.[23]

it is presented, and also upon the parties to the litigation. A record of judgment may be avoided for fraud, but not between the parties or privies in a court of law." See, also, ante, "Remedy at Law Must Be Inadequate," VI, A, 1, b.

As to admissibility of evidence, see post, "Competency," VI, G, 2.

21. Election of remedies.—Shappirio *v.* Goldberg, 192 U. S. 232, 242, 48 L. Ed. 419; Grymes *v.* Sanders, 93 U. S. 55, 23 L. Ed. 798; McLean *v.* Clapp, 141 U. S. 429, 35 L. Ed. 804; Robb *v.* Vos, 155 U. S. 13, 41, 39 L. Ed. 52; Dickson *v.* Patterson, 160 U. S. 584, 592, 40 L. Ed. 543.

It is entirely true that, upon being satisfied that the goods had been purchased upon fraudulent representations, the vendors had an election of remedies. They might rescind the sale and replevy the goods, or they might affirm the sale, sue for the purchase price, and attach the goods upon the ground that they had been fraudulently purchased. Browning *v.* De Ford, 178 U. S. 196, 201, 44 L. Ed. 1033.

"But such election went no farther than to affirm the sale, under which they were at liberty to attach the goods as still belonging to the vendees. They were bound no farther by the fraudulent mortgage of such goods than they would have been by the fraudulent assignment of them, and no class of cases is more common than that of attachments sued out for goods which are claimed to have been fraudulently assigned." Browning *v.* De Ford, 178 U. S. 196, 202, 44 L. Ed. 1033. See the title CHATTEL MORTGAGES, vol. 3, p. 699.

Where one of the parties to an exchange of stock for land, i. e., the owner of the land, brings an action at law against the other to recover of him damages for his fraudulent misrepresentation of the value of this stock at the time of the trade, this was in effect an action for a part of the purchase price of the real estate which they had conveyed, although it was in form an action for deceit. It could be brought and maintained on the ground that the sale or trade of the real estate was valid and its title was vested in the other and on no other theory, and it was a distinct and affirmative ratification of the transfer of this stock and the conveyance of the real estate, after full knowledge of all the facts, and it barred plaintiff of all right to rescind the trade thereafter. Stuart *v.* Hayden, 169 U. S. 1, 15, 42 L. Ed. 639.

22. Steps toward enforcement—Action on same.—Robb *v.* Vos, 155 U. S. 13, 42, 39 L. Ed. 52.

The rule established by the cases is that any decisive act by a party, with knowledge of his rights and of the facts, determines his election in the case of inconsistent remedies, and that one of the most unequivocal methods of showing ratification of an agent's act is the bringing of an action based upon such an act. It is final when made with full knowledge. Robb *v.* Vos, 155 U. S. 13, 43, 39 L. Ed. 52; Adler *v.* Fenton, 24 How. 407, 411, 16 L. Ed. 696.

23. Dickson *v.* Patterson, 160 U. S. 584, 588, 40 L. Ed. 543; Robb *v.* Vos, 155 U. S. 13, 43, 39 L. Ed. 52.

While the plaintiff might, after acquiring knowledge of the fraud, elect to retain what he had received from the sale of the land in question, and to pursue his claim for moneys claimed to be still due, the fraud alleged having come to his knowledge, he was bound promptly to make his election, and having elected to let the sale stand, he could not thereafter maintain an action to set it aside, yet, if, when the alleged election was made, as the evidence shows, the real facts were concealed from him by one from whom he had reason to expect a frank disclosure of all the material circumstances as they occurred, he is not, for that reason—no rights of innocent third parties having intervened—to be denied the fullest relief to which according to the principles of equity he is entitled. Dickson *v.* Patterson, 160 U. S. 584, 588, 592, 40 L. Ed. 543. See the title RESCISSION, CANCELLATION AND REFORMATION.

As to delay as ratification or waiver, see ante, "Ratification, Waiver and Estoppel," V, H.

Affirmance and recovery in assumpsit.—Fenemore *v.* United States, 3 Dall. 357, 363, 1 L. Ed. 634. See the title ASSUMPSIT, vol. 2, p. 641, et seq.

2. Action of Deceit—a. *Nature of Action.*—An action of deceit is not an action for breach of contract.[24] In order to maintain an action for fraud it is sufficient to show that the defendant was guilty of deceit, with a design to deprive the plaintiff of some profit or advantage, and to acquire it for himself, whenever loss or damage has resulted from the deceit.[25]

b. *Defenses.*—An action for damages caused by fraudulent representations which induced a contract, affirms the contract and relies upon it, and therefore may be subject to the same defenses as an action brought directly upon the contract.[25a]

c. *Damages.*—See, generally, the title Damages, vol. 5, p. 157. Where a person is induced by false representations to buy an article at an agreed price, to be delivered on his future order, he can recover as damages, in an action for the injury caused by the deceit, the diminution caused thereby in the market price at the time of delivery.[26]

3. Rescission and Recovery of Property or Proceeds.—See the titles Rescission, Cancellation and Reformation; Vendor and Purchaser.

In General.—Where one has been defrauded of money or property, any appropriate action may be maintained by him to recover it back from the party so obtaining it.[27]

Reclamation of Property or Proceeds in Equity.—Where property has been obtained by fraud, equity recognizes the law to be that the property always belongs to the true owner, and therefore its proceeds must also belong to him and may be reclaimed in a suit in equity against the voluntary assignee or one holding in bad faith.[28]

Recovery by Government.—The government, like an individual, may maintain any appropriate action to recover property of which it has been defrauded.[29]

4. Fraud as Defense.—While the general rule is that the performance of every contract may be resisted on the ground of fraud, at law as well as in equity, yet upon a contract of sale, the defendant, having accepted performance, cannot interpose this defense to defeat the contract, unless he returns the article or proves it to have been entirely worthless, though he may ordinarily re-

24. **Not an action for breach of contract.**—Smith *v.* Bolles, 132 U. S. 125, 129, 33 L. Ed. 279.

But its gist is fraudulently producing a false impression upon the mind of the other party by words or acts, or concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff. Stewart *v.* Wyoming Cattle Ranche Co., 128 U. S. 383, 388, 32 L. Ed. 439.

25. **When action of deceit lies.**—Butler *v.* Watkins, 13 Wall. 456, 464, 20 L. Ed. 629; Angle *v.* Chicago, etc., R. Co., 151 U. S. 1, 10, 38 L. Ed. 55. See, generally, ante, "Definitions," II.

As to legal nature of remedy, see ante, "Remedy at Law Must Be Inadequate," VI, A, 1, b.

25a. **Defenses.**—National Bank *v.* Petrie, 189 U. S. 423, 425, 47 L. Ed. 879.

26. **Measure of damages.**—Cooper *v.* Schlesinger, 111 U. S. 148, 28 L. Ed. 382. See the title DAMAGES, vol. 5, p. 163, et seq.

Speculative profits and expenditures.—See the title DAMAGES, vol. 5, pp. 184, 185.

Damages for breach of unconscionable contract.—See the title DAMAGES, vol. 5, p. 193.

27. **Recovery generally.**—United States *v.* Piatt, 157 U. S. 113, 118, 39 L. Ed. 639; United States *v.* Stinson, 197 U. S. 200, 204, 49 L. Ed. 724.

28. **Reclamation in equity.**—United States *v.* Bitter Root Development Co., 200 U. S. 451, 473, 50 L. Ed. 550. See the title DISCOVERY, vol. 5, p. 351.

29. **Recovery by government.**—United States *v.* Stinson, 197 U. S. 200, 204, 49 L. Ed. 724.

Excessive payments made under a contract, induced by fraudulent representations in the transaction leading to their disbursement, may be recovered back from the payee by the party defrauded, in this case the government. United States *v.* Piatt, 157 U. S. 113, 118, 39 L. Ed. 639. See the titles PAYMENT; POSTAL LAWS.

Assumpsit for money paid on fraudulent representations.—See the title ASSUMPSIT, vol. 2, pp. 636, 641, 645, 654. See, also, the titles PAYMENT; POSTAL LAWS.

Participation in fraud—Effect.—See ante, "Effect on Validity of Transaction," V, A; "Loss Therefrom as Between Innocent Parties," V, D.

coup the damages which he can show he has sustained through the fraud.[30]

Fraud in Esse Contractus.—The fraud or circumvention intended by the statute of Illinois, allowing "fraud or circumvention" used in obtaining the making of written instruments for the payment of money or property or the performance of covenants or conditions, to be pleaded in bar to any action thereon, which only embodies a rule of the common law, is not that which goes merely to the consideration of the instrument, but it must go to the execution or making; and there must be a trick or device by which one kind of instrument is signed in the belief that it is of another kind, or the amount or nature or terms of the instrument must be misrepresented to the signer.[31]

5. INJUNCTION.—See the title INJUNCTIONS.

6. LIMITATIONS OF RIGHT TO RELIEF.—See the titles LACHES; LIMITATION OF ACTIONS AND ADVERSE POSSESSION. See, also, ante, "Ratification, Waiver and Estoppel," V, H.

C. Parties—1. PARTIES PLAINTIFF.—In suits brought for relief against an instrument alleged to have been obtained by fraud or deceit, or any practice which would justify a court in granting relief, the plaintiff must show, that he has such an interest in the relief sought as entitled him to move in the matter. If it be a question of property, a case must be made in which the court can afford a remedy in regard to that property; if it be a question of fraud, which would render the instrument void, the fraud must operate to the prejudice of the plaintiff; and if it is apparent that the suit is brought for the benefit of some third party, and that the plaintiff has no pecuniary interest in the remedy sought, and is under no obligation to the party who will be benefited, to sustain an action for his use, such action cannot be sustained.[32]

30. **Fraud as a defense.**—Hume *v.* United States, 132 U. S. 406, 413, 33 L. Ed. 393; Insurance Co. *v.* Bailey, 13 Wall. 616, 20 L. Ed. 501.

In Sawyer *v.* Prickett, 19 Wall. 146, 163, 165, 22 L. Ed. 105, it is held that, to make an alleged misrepresentation of existing facts matter of defense to a contract based thereon, it must be false, have been made in fact, by the other party or his duly authorized agent, and have been relied upon by the party seeking relief on account thereof. And see ante, "Nemo Allegans Rule," V, A, 3.

Defense to note.—In order to entitle a party to succeed in a defense to a note setting up false and fraudulent representations of plaintiff respecting the property, for the purchase of which the notes were given, it must be shown that the representations were made; that the representations, if made, were fraudulent; were material; that the defendant relied upon the representation to his injury; and that he had a right to rely upon them. Those are four material elements of fact that must enter into the case. Marshall *v.* Hubbard, 117 U. S. 415, 416, 29 L. Ed. 919.

Fraudulent representations as defense to action on guaranty.—See the title GUARANTY.

Fraud as set-off to action.—See the title SET-OFF, RECOUPMENT AND COUNTERCLAIM.

Fraud in sale as defense to action by vendee against officer for levy thereon.—See the title SHERIFFS AND CONSTABLES.

31. **Fraud in esse contractus.**—Especially where, as here, the holder of the instrument is a bona fide holder of it, before maturity, for a valuable consideration, without notice. Circumvention seems to be nearly, if not quite, synonymous with fraud. Oregon *v.* Jennings, 119 U. S. 74, 89, 30 L. Ed. 323.

Quære, if the statute applies to town bonds and their coupons, no fraud or imposition being practised on the town clerk or supervisor to induce them to sign these bonds and coupons. They knew what they were signing and signed intentionally. Oregon *v.* Jennings, 119 U. S. 74, 89, 30 L. Ed. 323.

32. **Parties plaintiff.**—United States *v.* San Jacinto Tin Co., 125 U. S. 272, 308, 31 L. Ed. 747.

And the same rule applies to a suit brought by the government for such relief. In short, if there does not appear any obligation on the part of the United States to the public, or to any individual, or any interest of their own, they cannot more sustain such an action than any private person could under similar circumstances. United States *v.* San Jacinto Tin Co., 125 U. S. 272, 273, 308, 31 L. Ed. 747. See, also, the title UNITED STATES. See, generally, the title PARTIES.

Parties have the right to make their own contracts; and, in general, when they are satisfied, that is sufficient, and others have no right to complain. Cases, however, occasionally arise, where a contract, though bona fide between those who made it, may operate as a fraud upon

Inurement.—And the right to avoid does not inure to subsequent creditors and purchasers on failure of party entitled to avoid to do so.[33]

2. PARTIES DEFENDANT.—**Necessary Parties.**—The former owner of an equitable interest in land purchased jointly, who has parted with all his interest to his co-owners, is not a necessary party to a bill alleging fraud on the part of real estate agents negotiating the purchases, and seeking relief therefor,[34] as also are third parties in interest generally, at least in equity.[35] And so with the alleged instigators of a fraudulent conspiracy.[36]

third parties. Barreda *v.* Silsbee, 21 How. 146, 170, 16 L. Ed. 86.

Misrepresentation as to capital—Creditors of corporation.—A creditor, who has been defrauded by misrepresentation of the real capital of the company, has his remedy in an action of tort against all who participated in the fraud. But the wrong done to him cannot entitle the entire body of creditors, who have not suffered from the alleged fraud, to recover of the entire body of stockholders, who have taken no part in it. Scovill *v.* Thayer, 105 U. S. 143, 151, 26 L. Ed. 968.

An heir at law, who has never accepted the succession as unconditional heir, not being liable for the ancestor's debts, under the Louisiana law, is not estopped by her warranty from claiming lands which such ancestor had fraudulently conveyed and through whose conveyance the defendants held possession of the lands as purchasers thereof. New Orleans *v.* Gaines, 138 U. S. 595, 614, 34 L. Ed. 1102.

33. Inurement.—Semble, that where a corporation has waived, or omitted to exercise, the right to institute proceedings to recover lands of which it has been defrauded, such right does not inure to the benefit of subsequent creditors or purchasers. Graham *v.* Railroad Co., 102 U. S. 148, 26 L. Ed. 106.

It seems clear that subsequent creditors have no better right than subsequent purchasers, to question a previous transaction in which the debtor's property was obtained from him by fraud, which he has acquiesced in, and which he has manifested no desire to disturb. Yet, in such a case, subsequent purchasers have no such right. Dicta of judges to that effect may undoubtedly be produced, but they are not supported by the facts of the cases under consideration. Graham *v.* Railroad Co., 102 U. S. 148, 154, 26 L. Ed. 106.

"Even though the debtor should assign his supposed right to the creditor, * * * the transaction savored of champerty, and was opposed, at least, to the spirit of the law against champerty and maintenance. This was the substance of the decision by the Court of Exchequer in 1835, in Prosser *v.* Edmonds, 1 Y. & C. 481." Graham *v.* Railroad Co., 102 U. S. 148, 155, 26 L. Ed. 106.

"The principle established in Prosser *v.* Edmonds has been adopted by the supreme court of Wisconsin, in which state the lands in question are situated. In Crocker *v.* Belangee et al. (6 Wis 645), decided in 1858, it was held that a deed obtained from the grantor, through fraudulent representations made by the grantee, is not void, but voidable only at the election of the grantor; and that the conveyance of the same land by the grantor to another person is not the exercise of such election, and does not avoid the former deed; that, in order to avoid such former deed, some proceeding must be had by the grantor to which the grantee is a party; and that a subsequent purchaser from the grantor cannot set up the alleged fraud of the first grantee to defeat his title, the court holding that the right of a vendor to avoid a sale or deed on the ground of fraud practiced by the vendee is not a right or interest capable of sale and transfer, so as to enable a subsequent vendee of such right, for such cause, to attack the title of the first vendee; that it is a mere personal right, incapable of sale or transfer." Graham *v.* Railroad Co., 102 U. S. 148, 156, 26 L. Ed. 106.

34. Necessary parties defendant.—Kilbourn *v.* Sunderland, 130 U. S. 505, 513, 32 L. Ed. 1005.

35. Third parties in interest.—A court of equity, on an application to set aside the agreements on the ground of fraud, would have required that third parties in interest should have been made parties to the suit, and would have protected their rights, or secured them against loss, if it interfered at all, upon the commonest principles of equity jurisprudence. Hartshorn *v.* Day, 19 How. 211, 223, 15 L. Ed. 605.

36. Instigators of conspiracy charged.—It would seem, that to a suit in equity for damages for a fraudulent conspiracy, if maintainable, the parties for whose benefit the fraud was committed, and who were its principal instigators, and whose actions were essential to its success, should be made parties. The charge is that they had assumed to pay the mortgage to defendant and had paid it, and then conspired with him to have the property, which was in their possession, and to which they had title, sold to defraud complainant out of his $14,000. However it may be at law, in chancery they are necessary parties to such a suit. Nougue *v.* Clapp, 101 U. S. 551, 553, 29 L. Ed. 1026. See the title CONSPIRACY, vol. 3, p. 1109.

Joinder.—Where it appears that each of the defendants participated in a fraudulent transaction, it was proper to sue them as jointly and severally liable.[37]

D. Pleading—1. JOINDER OF COUNTS.—Counts for deceit may be joined with special counts in tort for fraudulent wrongs.[38] And with counts in assumpsit.[39]

2. PLEADING FRAUD—a. *Fraud Must Be Expressly Charged.*—**In Bill.**—Affirmative relief will not be afforded upon the ground of fraud, unless it be made a distinct allegation in the bill, so that it may be put in issue by the pleadings.[40] Although a formal charge of fraud may be added when it is necessary and has been omitted, and must be so added to be availed of.[41]

In Answer.—The allegation of fraud having been stricken from the answer, by the order of the court, the defendant, of course, could not introduce evidence to prove it.[42]

b. *Grounds Must Be Specifically Stated*—(1) *General Statement of Rule.*—To allow fraud to be set up, a case of fraud must be made by the pleadings.[43] And a charge of fraud, to be considered, must be adequately alleged.[44]

37. **Joinder of parties.**—United States *v.* Piatt, 157 U. S. 113, 120, 39 L. Ed. 639.

Person not a party to contract induced by the fraud.—See ante, "Fraud a General Ground of Relief," VI, A, 1, a.

38. **Joinder of counts.**—Schuchardt *v.* Allens, 1 Wall. 359, 369, 17 L. Ed. 642. If the declaration be in tort for a false warranty on a sale of personalty, counts for deceit may be added to the special counts, and a recovery may be had for the false warranty or for the deceit, according to the proof. Either will sustain the action.

39. **Same.**—See the title ACTIONS, vol. 1, p. 111.

40. **Fraud must be expressly charged.**—Noonan *v.* Lee, 2 Black 499, 17 L. Ed. 278; Moss *v.* Riddle, 5 Cranch 351, 357, 3 L. Ed. 123; Patton *v.* Taylor, 7 How. 132, 12 L. Ed. 637; Stockton *v.* Ford, 11 How. 232, 246, 13 L. Ed. 676; Very *v.* Levy, 13 How. 345, 362, 14 L. Ed. 173; Eyre *v.* Potter, 15 How. 42, 14 L. Ed. 592; Magniac *v.* Thomson, 15 How. 281, 14 L. Ed. 696; Moore *v.* Greene, 19 How. 69, 15 L. Ed. 533; Beaubien *v.* Beaubien, 23 How. 190, 16 L. Ed. 484; New Albany *v.* Burke, 11 Wall. 96, 106, 20 L. Ed. 155; Voorhees *v.* Bonesteel, 16 Wall. 16, 21 L. Ed. 268.

41. **Addition by amendment.**—Graffam *v.* Burgess, 117 U. S. 180, 195, 29 L. Ed. 839; Very *v.* Levy, 13 How. 345, 361, 14 L. Ed. 173. See the title AMENDMENTS, vol. 1, pp. 294, 295.

Where neither in the original bill, nor in the amendments (for there were two amendments), is there to be found a charge impeaching the good faith or validity of the assignment of a judgment, although its existence was well known to the plaintiff; and while it remained, it was fatal to his deduction of title under the sheriff's sale, the question of fraud is not in the case. Stockton *v.* Ford, 11 How. 232, 246, 13 L. Ed. 676.

Where all the evidence as to fraud is brought out in answer to interrogatories relating to wholly different matters, and is merely to the effect, without further explanation, that he subsequently found the representations to be false; that he had any personal knowledge of their falsehood he does not say; and his statement indicates only that, by subsequent inquiry, and the information elicited thereby, he became satisfied that he was deceived; it would not be in conformity with settled rules of pleading and evidence in courts of equity, to convict a party of a fraud, not charged on the record, and brought out for the first time by the voluntary statements of a witness in answer to no question, and resting at last upon mere hearsay. Very *v.* Levy, 13 How. 345, 362, 14 L. Ed. 173.

42. **Answer.**—Hozey *v.* Buchanan, 16 Pet. 215, 219, 10 L. Ed. 941. And see ante, "Fraud as Defense," VI, B, 4.

43. **Case must be made by pleadings.**—New Albany *v.* Burke, 11 Wall. 96, 106, 20 L. Ed. 155.

Averments of fraud, to be considered, must be in themselves sufficient to make out a case of fraud practised directly upon the party complaining. Kent *v.* Lake Superior Iron Co., 144 U. S. 75, 91, 36 L. Ed. 352.

44. **Adequate allegations essential.**—Chicago, etc., R. Co. *v.* Babcock, 204 U. S. 585, 592, 51 L. Ed. 636, citing Stearns *v.* Page, 7 How. 819, 12 L. Ed. 928; Farmers' Bank *v.* Groves, 12 How. 51, 13 L. Ed. 889; Moore *v.* Greene, 19 How. 69, 15 L. Ed. 533; Marquez *v.* Frisbie, 101 U. S. 473, 478, 25 L. Ed. 800; United States *v.* Atherton, 102 U. S. 372, 26 L. Ed. 213; Greene *v.* Taylor, 132 U. S. 415, 443, 33 L. Ed. 411; Chicago, etc., R. Co. *v.* Price, 138 U. S. 185, 34 L. Ed. 917; Evers *v.* Watson, 156 U. S. 527, 533, 39 L. Ed. 520; Missouri *v.* Dockery, 191 U. S. 165, 170, 48 L. Ed. 133.

Averring fraudulent concealment of insolvency by bank.—See the title BANKS AND BANKINGS, vol. 3, p. 177.

Vague and general allegations of fraud, without averring by what representations or other fraudulent means it was accomplished, are insufficient.[45]

(2) *Rule to Be Reasonably Interpreted.*—While the facts constituting the cause of action in equity must be distinctly alleged so that the defendant may know what he has to meet and so that he may, if he choose, put them in issue, the rule must receive a reasonable interpretation and must be so enforced as to further and not obstruct the administration of justice.[46]

45. Vague and general charges insufficient.—Evers *v.* Watson, 156 U. S. 527, 534, 39 L. Ed. 520; Marquez *v.* Frisbie, 101 U. S. 473, 478, 25 L. Ed. 800; United States *v.* Atherton, 102 U. S. 372, 26 L. Ed. 213; Quinby *v.* Conlan, 104 U. S. 420, 426, 26 L. Ed. 800; Hardt *v.* Heidweyer, 152 U. S. 547, 559, 38 L. Ed. 548; Simmons *v.* Saul, 138 U. S. 439, 458, 34 L. Ed. 1054.

"If fraud is relied on, it is not sufficient to make the charge in general terms. 'Mere words, in and of themselves, and even as qualifying adjectives of more specific charges, are not sufficient grounds of equity jurisdiction, unless the transactions to which they refer are such as in their essential nature constitute a fraud or a breach of trust, for which a court of chancery can give relief.' Van Weel *v.* Winston, 115 U. S. 228, 237, 29 L. Ed. 384; Ambler *v.* Choteau, 107 U. S. 586, 591, 27 L. Ed. 322. The defendant should not be subjected to being taken by surprise, and enough should be stated to justify the conclusion of law, though without undue minuteness." St. Louis, etc., R. Co. *v.* Johnston, 133 U. S. 566, 577, 33 L. Ed. 683.

Words "fraudulent and corrupt," "imposition," "fraud," "conspiracy," "deceit," and general charges of conspiracy and violation of trust obligations are insufficient. Van Weel *v.* Winston, 115 U. S. 228, 237, 29 L. Ed. 384; Ambler *v.* Choteau, 107 U. S. 586, 590, 27 L. Ed. 322; United States *v.* San Jacinto Tin Co., 125 U. S. 272, 273, 300, 31 L. Ed. 747.

The mere allegation of a fraudulent intent and purpose in a course of action, amounts to nothing. If the act was legal, it is not made illegal by a mere epithet. McLane *v.* King, 144 U. S. 260, 263, 36 L. Ed. 428.

Where complainant impugns the good faith of a transaction, it is incumbent upon him to state the essential, ultimate facts upon which his cause of action rested, and not content himself with charging, generally, that what was done was "colorable," a "fraud," "a breach of trust," and a "scheme" by which a fraud was consummated. These are allegations of legal conclusions merely, which a demurrer does not admit. Fogg *v.* Blair, 139 U. S. 118, 127, 35 L. Ed. 104; Dillon *v.* Barnard, 21 Wall. 430, 437, 22 L. Ed. 673; United States *v.* Ames, 99 U. S. 35, 45, 25 L. Ed. 295; Pullman's Palace Car Co. *v.* Missouri Pac. R. Co., 115 U. S. 587, 596, 29 L. Ed. 499.

In Dean *v.* Younell, 8 Wall. 14, 19 L. Ed. 365, a bill had been filed below to set aside a deed of land for fraud and inadequate consideration. The allegations of fraud were founded wholly upon the circumstance, that the land was sold for Confederate notes. There was no averment that the complainant was induced to take the Confederate notes by fraudulent misrepresentations of the decedent. A decree sustaining a demurrer and dismissing the bill was affirmed on the ground that upon the principles of Thorington *v.* Smith, just preceding, the fact that the land was sold for Confederate notes did not, in the absence of all averment that the complainant was induced to take them by fraudulent misrepresentations of the decedent, afford ground for the interposition of a court of equity.

Where a deed was objected to in the circuit court on the ground of fraud, but no specific grounds of objection were made, the federal supreme court cannot inquire into the correctness or incorrectness of the objection. Thomas *v.* Lawson, 21 How. 331, 16 L. Ed. 82.

46. Reasonable interpretation.—Where all the facts upon which the plaintiff seeks relief from a court of equity are clearly stated in the bill, the facts constituting the fraud are set forth, and it is alleged that the parties doing the acts mentioned concealed them from the plaintiff for the purpose of defrauding plaintiff out of his interest and ownership in a mine, and having set out all the facts upon which the right to relief is based, the plaintiff asks specially for the possession and also for the proceeds of the mine, because, by reason of the facts, the location made by the defendants was a void location, and the plaintiff now under his prayer for general relief contends that, although the location by the defendants may have been so far valid as to create a title in the defendants, yet that by reason of the fraud already distinctly set forth in the bill the plaintiff was entitled to avail himself of that title, and to hold them as trustees ex maleficio, for his benefit: held that there is nothing in the intricacy of equity pleading that prevents the plaintiff from obtaining the relief under the general prayer, to which he may be entitled upon the facts plainly stated in the bill. There is no reason for denying his right to relief, if the plaintiff is otherwise entitled to it, simply because it is asked under the prayer for general relief and upon a somewhat different theory from that which is advanced under

(3) *Evidence Need Not Be Set Out.*—But the evidence need not be set out.[47]

(4) *Averment of Legal Conclusion.*—Pleadings must state facts, and not conclusions of law merely, and the allegation in this case that the loss arose from the fraud is only a conclusion of law. If the facts from which the conclusions are drawn are not sufficient to show that in law the loss was attributable to the fraud, the declaration is bad. They must show that the loss was both the natural and immediate consequence of the wrongful and fraudulent acts referred to.[48]

(5) *Demurrer the Test of Sufficiency.*—The bill is sufficiently explicit, when there can be no question that, if the bill, as is the general rule on demurrers, is to be taken as true, there is enough in it to establish the fraud.[49]

one of the special prayers. The cases of English *v.* Foxall, 2 Pet. 595, 7 L. Ed. 531; Boone *v.* Chiles, 10 Pet. 177, 9 L. Ed. 383; Hobson *v.* McArthur, 16 Pet. 182, 10 L. Ed. 930; Hayward *v.* National Bank, 96 U. S. 611, 24 L. Ed. 855; Georgia *v.* Stanton, 6 Wall. 50, 18 L. Ed. 721, are not opposed to the views just stated. Lockhart *v.* Leeds, 195 U. S. 427, 436, 49 L. Ed. 263. See the title EQUITY, vol. 5, p. 852.

The court below erred in holding that there was no sufficient averment as to the time of the discovery by plaintiff of the alleged fraud set forth in the bill, assuming such averment to have been necessary, where the plain import of these averments is that the conspiracy and combination did not become known to the plaintiff until after the expiration of the ninety days from the discovery of the mine, in which to file a copy of the notice posted on the ground, in the recorder's office of the proper county. That is a sufficiently definite averment of time, and it is enough to show that the failure to file a copy of the notice within the necessary time was owing to the action of the defendants. Lockhart *v.* Leeds, 195 U. S. 427, 434, 49 L. Ed. 263.

47. **Evidence.**—"While it is entirely true that an allegation of fraud is insufficient, either in an indictment or in a bill in equity, without giving the particulars of the fraud, an intent to defraud is only to be gathered by the jury from all the facts and circumstances of the case. There is no greater need of setting out the evidence to prove such intent than there would be of averring in detail the evidence of a scienter, or of any other fact material to the offense." Evans *v.* United States, 153 U. S. 584, 594, 38 L. Ed. 830.

It is said in a dissenting opinion in this case, that fraud is a conclusion of law from facts respecting the transactions designated, and if they do not necessarily tend to such conclusion, the allegation falls to the ground, however often repeated or with whatever amount of earnest asseveration. It is of no avail unless accompanied by a statement of facts from which such fraud must necessarily be inferred. Field, J., dissenting, in Evans *v.* United States, 153 U. S. 584, 606, 38 L. Ed. 830. The difference seems merely a difference of opinion as what constituted the particulars of the fraud, which both agreed were necessary to be alleged, and what was mere evidence thereof.

"It is a mistake to suppose that in stating the facts which constitute a fraud, where relief is sought in a bill in equity, all the evidence which may be adduced to prove that fraud must be recited in the bill. It is sufficient if the main facts or incidents which constitute the fraud against which relief is desired shall be fairly stated, so as to put the defendant upon his guard and apprise him of what answer may be required of him. 1 Story's Equity Pleadings, § 252." United States *v.* American Bell Tel. Co., 128 U. S. 315, 356, 32 L. Ed. 450.

48. **Averment of legal conclusion insufficient.**—Alabama *v.* Burr, 115 U. S. 413, 426, 29 L. Ed 435; St. Louis, etc., R. Co. *v.* Johnston, 133 U. S. 566, 577, 33 L. Ed. 683; Fogg *v.* Blair, 139 U. S. 118, 127, 35 L. Ed 104; Evans *v.* United States, 153 U. S. 584, 606, 38 L. Ed. 830; United States *v.* Des Moines, etc., Co., 142 U. S. 510, 544, 35 L. Ed. 1099. See, also, Teall *v.* Schroder, 158 U. S. 172, 175, 39 L. Ed. 938. And see ante, "General Statement of Rule," VI, D, 2, b, (1).

Epithets do not make out fraud, and the averments substantially of legal conclusions not admitted by the demurrers are insufficient. Kent *v.* Lake Superior Iron Co., 144 U. S. 75, 91, 36 L. Ed. 352; Fogg *v.* Blair, 139 U. S. 118, 127, 35 L. Ed. 104.

49. **Demurrer rule.**—United States *v.* American Bell Tel. Co., 128 U. S. 315, 356, 32 L. Ed. 450; Harding *v.* Handy, 11 Wheat. 103, 6 L. Ed 429; St. Louis *v.* Knapp Co., 104 U. S. 658, 26 L. Ed. 883.

A general averment of fraud, though repeated once or twice, is to be taken as qualified and limited by the specific facts set out to show wherein the transaction was fraudulent. Where a bill sets out a series of facts constituting a transaction between the two parties, a demurrer admits the truth of those facts and all reasonable inferences to be drawn therefrom, but not the conclusion which the pleader has seen fit to aver. United States *v.* Des Moines, etc., Co., 142 U. S. 510, 544, 35 L. Ed. 1099.

Availed of by special demurrer.—Christmas *v.* Russell, 5 Wall. 290, 18 L. Ed. 475.

c. *Averment of Intent and Scienter.*—While fraud consists in intention, and that intention is a fact, which must be averred in a plea of fraud,[50] allegations that the representations were falsely and fraudulently made with the intent to further the pecuniary interest of the maker, and were known to be false when made, have frequently been held the equivalent of averments of specific intent. Indeed, it is difficult to perceive how a statement falsely and fraudulently made can be otherwise than intended to deceive. A statement fraudulently made with knowledge of its falsity must necessarily be intended to deceive.[51] And knowledge of falsity need not be alleged in terms in an action of deceit for obtaining money by false and fraudulent representations.[52]

3. Identification of Subject Matter or Proceeds.—In a suit in equity to reclaim the proceeds of property obtained from plaintiff by fraud, against the voluntary assignee or one holding in bad faith, they must be accurately and certainly identified by the allegations of the bill.[53]

4. Plea or Answer Denying Fraud.—**Necessity for Verification and Effect of Want Thereof.**—The proper mode of treating a plea is to set it down for hearing as to its sufficiency to meet the bill, or so much of the bill as it purports to cover. If found to be sufficient, the complainant has a right to reply to it by denying its allegations, or otherwise putting it in issue. See Equity Rules, 32, 33, and 34, prescribed by this court. So also by these rules the charge of a fraudulent combination to cheat the complainant required that the plea should have been accompanied by an answer denying the fraud under oath. The plea may, therefore, be considered as out of the case. The demurrer may be held to include the exception as one of its grounds, and thus the case stands on bill and demurrer, and the sole question is whether, though there may be things in the bill which, if specially demurred to, would be bad, it is a bill on which a court of equity could found relief.[54]

E. Instructions.—Based on Evidence.—Instructions must of course be based on evidence in the case, or they should not be given.[55]

See the title DEMURRERS, vol. 5, p. 298.

50. Intent.—Moss *v.* Riddle, 5 Cranch 351, 3 L. Ed. 123.

"There is no allegation of fraud, and the circumstances pleaded do not, in themselves, amount to fraud. Fraud consists in intention, and that intention is a fact which ought to have been averred, for it is the gist of the plea, and would have been traversable." Moss *v.* Riddle, 5 Cranch 351, 357, 3 L. Ed. 123.

51. Intent and scienter.—It was held in Bullis *v.* O'Beirne, 195 U. S. 606, 618, 49 L. Ed. 340, that an inspection of the record as well as the interpretation put upon the pleadings and judgment by the courts of New York in the various trials and proceedings had, showed that the relief was granted upon the ground of fraud.

52. Action of deceit—Knowledge.—Where the declaration alleges a false and fraudulent representation by means of which the plaintiff below was induced to advance money to the defendant to his damage in a named amount, and the defendant pleaded not guilty, although the declaration did not, it is true, contain the allegation that the representations of the defendant were false to his knowledge, but simply said that the representations of the defendant were false and fraudulent, it would seem that the action was in tort for false and fraudulent representations. Forsyth *v.* Vehmeyer, 177 U. S. 177, 179, 44 L. Ed. 723.

"Where the state court has decided that the action was for fraud and deceit, and has held that in order to have maintained such action the fraud must have been proved as laid in the declaration, it must be assumed that the verdict and judgment in that action were obtained only upon the proof and a finding by the jury of the fact of fraud." Forsyth *v.* Vehmeyer, 177 U. S. 177, 180, 44 L. Ed. 723.

53. Identification of subject matter or proceeds.—United States *v.* Bitter Root Development Co., 200 U. S. 451, 473, 50 L. Ed. 550.

54. Unverified plea denying fraud.—Nougue *v.* Clapp, 101 U. S. 551, 552, 29 L. Ed. 1026.

Answer.—See post, "To Overcome Answer under Oath," VI, G, 3, a, (2).

55. Based on evidence.—Elwood *v.* Flannigan, 104 U. S. 562, 570, 26 L. Ed. 842; Thorwegan *v.* King, 111 U. S. 549, 555, 28 L. Ed. 514.

There is no error in refusing a request which was made of the court to charge the jury as to the effect of fraud in the procurement of the deed, where there is not a particle of evidence in the record to sustain such a claim. If the jury had found for the plaintiff on any such theory, it would have been the duty of the court

Instruction Substantially as Defendants Claimed.—Where an instruction is given substantially as claimed by defendants, they cannot complain.[56]

Knowledge and Intent.—Where the issue upon the pleadings and evidence was whether the contract sued on was induced by knowingly false and fraudulent representations of the plaintiff, and certain passages from the charge are excepted to, if the charge as a whole and in substance instructs the jury that a statement recklessly made, without knowledge of its truth, was a false statement knowingly made, within the settled rule, it is sufficient and no error can be assigned therein.[57]

Liability for Recommendation to Credit.—Where taking an instruction together it means this: That if the jury believed due inquiry as to the credit of W. had not been made by L. and that L. had signed the letter ignorantly, and regardless of the fact, whether the persons recommended were or were not entitled to credit, then the jury should charge the defendant: the real test of conduct, according to the charge, obviously being, whether L. ought to have accorded confidence to the source of his information, and whether this information was of such a character as to justify him in writing the letter to plaintiff without further inquiry, it was held, that this instruction, taken in its proper sense, was evasive of the true rule, and calculated to mislead the jury.[58]

Notice and Waiver.—An instruction which said: "Before the plaintiff was required to affirm or rescind the contract, he must be shown to have had actual knowledge of the imposition practiced upon him. It is not enough to show that he might have known or suspected it from data within his reach," was held under the circumstances, exactly right.[59]

to set the verdict aside and grant a new trial. Consequently there was no error in refusing the charge requested.

An instruction suggesting to the jury the existence of false representation or deceit, when there is no testimony in the case to support such a suggestion, is erroneous. Mutual Life Ins. Co. *v.* Phinney, 178 U. S. 327, 341, 44 L. Ed. 1088.

Same — Nondisclosure. — Where the whole case as exhibited in the petition or complaint in an action of deceit to recover damages therefor, rested upon an alleged positive misrepresentation of an existing fact; and all the evidence intended to establish the fraud charged was directed to the proof of that actual misrepresentation, there being no suggestion of any such relation between the parties, or of anything in the circumstances of the transaction, that imposed upon the defendant the legal obligation of making any disclosures, in respect to which he failed to speak, and the whole charge was, that having undertaken to make a statement of a particular condition of facts, he had done so falsely and fraudulently; held, that the court therefore should have confined its instructions to the jury, on their request, to the point really involved in the issue, and, omitting what was said in respect to fraudulent suppressions, informed them, that there was no evidence in the case that authorized their request for further instructions, upon the point involved in their inquiry. Thorwegan *v.* King, 111 U. S. 549, 555, 28 L. Ed. 514.

56 **Substantial compliance with request.**—It was held in Cooper *v.* Schlesinger, 111 U. S. 148, 155, 28 L. Ed. 382: "As to the rule of damages, the court, after setting forth the general rule correctly, stated the rule applicable to the special circumstances of this case; and we understand that rule to have been substantially given as claimed by the defendants. It was, that where a person is induced by false representations to buy an article, at an agreed price, to be delivered on his future order, he can recover, as damages for the deceit, the diminution caused thereby in the market price at the time of delivery. The instruction as claimed by the defendants having been given, they cannot complain of it."

57. **Knowledge and intent.**—Cooper *v.* Schlesinger, 111 U. S. 148, 155, 28 L. Ed. 382. See, also, Marshall *v.* Hubbard, 117 U. S., 415, 29 L. Ed. 919, where an instruction that the misrepresentations relied on must have been fraudulently made, was upheld.

58. **Liability for recommendation to credit.**—Lord *v.* Goddard, 13 How. 198, 211, 14 L. Ed. 111.

59. **Notice and waiver.**—Pence *v.* Langdon, 99 U. S. 578, 581, 25 L. Ed. 420.

In Pence *v.* Langdon, 99 U. S. 578, 581, 25 L. Ed. 420, an instruction which said: "It was not enough to charge the plaintiff with knowledge of the mal-character of the transaction, that the language used was such as might have caused some persons to suspect it. He might, in view of previous friendly relations, have no suspicion of bad faith, and might naturally regard expressions as inaccurately used, rather than put upon them a construction which would show bad faith on the part

Additional Instructions.—Where additional instructions are given the jury at their request, they must be consistent with the first, and if tending to mislead the jury, they are erroneous.[60]

F. Verdict and Decree.—Harmless Error.—In equitable remedies given for fraud, accident or mistake, it is the facts as found that give the right to relief, and it is often difficult to say, upon admitted facts, whether the error which is complained of was occasioned by intentional fraud or by mere inadvertence or mistake. Indeed, upon the very same state of facts, an intelligent man, acting deliberately, might well be regarded as guilty of fraud, and an ignorant and inexperienced person might be entitled to a more charitable view. Yet the injury to the complainant would be the same in either case. A defendant in a suit therefor has no reason to complain of the language of the court below in attributing the appellant's misconduct to mistake and inadvertence, rather than to intentional fraud.[61]

Decree against Parties Not Charged by Evidence.—Where a bill charges a conspiracy to defraud against several defendants, and the evidence fails to connect two of the defendants with the alleged fraud, on appeal by these two from a decree against all the defendants, the decree must be reversed as to them and the cause remanded with instructions to dismiss the bill as to them.[62]

G. Evidence—1. PRESUMPTIONS AND BURDEN OF PROOF.—See, generally, the title PRESUMPTIONS AND BURDEN OF PROOF.

a. *Fraud Never Presumed but to Be Proved.*—**Fraud Never Presumed.**—Fraud cannot be presumed, but must be proved by him alleging it,[63] and ex-

of the defendant, which he had no reason to anticipate," was held to have been exactly right under the circumstances.

60. **Additional instructions.**—Rea *v.* Missouri, 17 Wall. 532, 21 L. Ed. 707.

The jury having been charged by the circuit judge in a way not excepted to, and coming in for additional instructions and being again charged by the district judge, who now happened to be on the bench, it was held, first, that where the manifest tendency of the additional instructions, contrary to that of the original charge, was to give the jury the impression that evidence was required of a character more direct and positive than that of facts and circumstances tending to the conclusion of fraud, and such as might reasonably induce the jury to believe that C. held the property but in trust for B., the additional instructions were erroneous. And further, that it would not be inferred by the federal supreme court that the jury had taken them in connection with the qualifications made in the original charge. Second, that any statements made by B. in the absence of C., which were afterwards assented to by the latter or were part of the res gestæ, were evidence in the suit. Rea *v.* Missouri, 17 Wall. 532, 21 L. Ed. 707.

An intimate personal and business relation between B. and C. having been shown, it was error to instruct the jury that it was immaterial as to the ownership of the goods how C. acquired his means, or whether his exhibit of them was correct or not. Rea *v.* Missouri, 17 Wall. 532, 21 L. Ed. 707.

61. **Harmless error.**—Wasatch Min. Co. *v.* Crescent Min. Co., 148 U. S. 293, 298, 37 L. Ed. 454.

62. **Decree against parties not charged by evidence.**—Hunt *v.* Oliver, 118 U. S. 211, 219, 30 L. Ed 128; Frow *v.* De La Viga, 15 Wall. 552, 21 L. Ed. 60. See the titles CONSPIRACY, vol. 3, p. 1109; DISMISSAL, DISCONTINUANCE AND NONSUIT, vol. 5, p. 385.

Directing verdict.—See the title VERDICT.

63. **Fraud never presumed.**—Hiscock *v.* Varick Bank, 206 U. S. 28, 51 L. Ed. 945; Conard *v.* Nicoll, 4 Pet. 291, 297, 7 L. Ed. 862; United States *v.* Arredondo, 6 Pet. 691, 716, 8 L. Ed. 547; Brashear *v.* West, 7 Pet. 608, 613, 8 L. Ed. 801; Clarke *v.* White, 12 Pet. 178, 196, 9 L. Ed. 1046; Atkins *v.* Dick, 14 Pet. 114, 10 L. Ed. 378; Gaines *v.* Nicholson, 9 How. 356, 364, 13 L. Ed. 172; Gratz *v.* Cohen, 11 How. 1, 13 L. Ed. 579; Adams *v.* Preston, 22 How. 473, 487, 16 L. Ed. 273; Thompson *v.* Bowie, 4 Wall. 463, 472, 18 L. Ed 423 (per Grier, J., dissenting); Kempner *v.* Churchill, 8 Wall. 362, 369, 19 L. Ed. 461; Jones *v.* Simpson, 116 U. S. 609, 615, 29 L. Ed. 742; Maxwell Land-Grant Case, 121 U. S. 325, 377, 30 L. Ed. 949; Farrar *v.* Churchill, 135 U. S. 609, 615, 34 L. Ed. 246; Chicago, etc., R. Co. *v.* Price, 138 U. S. 185, 34 L. Ed. 917; United States *v.* Detroit, etc., Lumber Co., 200 U. S. 321, 332, 50 L. Ed. 499; Kann *v.* King, 204 U. S. 43, 61, 51 L. Ed. 360.

The presumptions are against fraud and in favor of innocence. The Bothnea, 2 Wheat. 169, 4 L. Ed. 211; Prevost *v.* Gratz, 6 Wheat. 481, 498, 5 L. Ed. 311; United States *v.* American Bell Tel. Co., 167 U. S. 224, 242, 42 L. Ed. 144; Colorado, etc., Iron Co. *v.* United States, 123 U. S. 307, 317, 31 L. Ed. 182.

"Fraud cannot be presumed or inferred

pressly found,[64] or admitted.[65] Fraud should not be lightly imputed,[66] particularly after considerable lapse of time.[67] Mere averments of fraud, unsupported by proof, will not support the jurisdiction of equity over a suit based thereon.[68]

b. *Burden of Proof.*—The burden of proving fraud is on the party alleging it,[69]

without proof in a court of equity, any more than in a court of law; and in both the rule is, that he who makes the charge must prove it." Hager *v.* Thomson, 1 Black 80, 91, 17 L. Ed. 41.

"The law presumes, in the absence of evidence to the contrary, that the business transactions of every man are done in good faith and for an honest purpose; and any one who alleges that such acts are done in bad faith, or for a dishonest and fraudulent purpose, takes upon himself the business of showing the same." Jones *v.* Simpson, 116 U. S. 609, 615, 29 L. Ed. 742; Conard *v.* Nicoll, 4 Pet. 291, 297, 7 L. Ed. 862; United States *v.* Arredondo, 6 Pet. 691, 716, 8 L. Ed. 547.

Fraud, it is said, will never be presumed, though it may be proved by circumstances. Now, where an act does not necessarily import fraud, where it is more likely to have been done through a good than a bad motive, fraud should never be presumed. Gregg *v.* Sayre, 8 Pet. 244, 8 L. Ed. 932.

"Upon the subject of motives and intention, the improbability of their existence deserves consideration." Conrad *v.* Nicoll, 4 Pet. 291, 300, 7 L. Ed. 862.

Opportunity for explanation must be given.—"If circumstances of doubtful appearance occur, justice requires that an opportunity to explain those circumstances should be given; and that fraud should never be fixed on an individual, until he has been allowed to clear himself from the imputation, if in his power." The George, 1 Wheat. 408, 4 L. Ed. 128.

64. Express finding.—Clarke *v.* White, 12 Pet. 178, 196, 9 L. Ed. 1046.

65. Admission.—Atkins *v.* Dick, 14 Pet. 114, 10 L. Ed. 378.

66. Not lightly imputed.—Hammond *v.* Hopkins, 143 U. S. 224, 257, 36 L. Ed. 134; Prevost *v.* Gratz, 6 Wheat. 481, 498; 5 L. Ed. 311; Jones *v.* Simpson, 116 U. S. 609, 615, 29 L. Ed. 742.

67. Lapse of time.—"But length of time necessarily obscures all human evidence; and as it thus removes from the parties all the immediate means to verify the nature of the original transactions, it operates by way of presumption, in favor of innocence, and against imputation of fraud. It would be unreasonable, after a great length of time, to require exact proof of all the minute circumstances of any transaction, or to expect a satisfactory explanation of every difficulty, real or apparent, with which it may be incumbered." Prevost *v.* Gratz, 6 Wheat. 481, 498, 5 L. Ed. 311. See the titles LACHES; LIMITATION OF ACTIONS AND ADVERSE POSSESSION. See, also, ante, "Ratification, Waiver and Estoppel," V, H.

Deceased persons.—"If fraud or breach of trust ought not lightly to be imputed to the living, the evidence of fraud should be convincing before the sanctity of the grave is disturbed." Hammond *v.* Hopkins, 143 U. S. 224, 257, 36 L. Ed. 134; Prevost *v.* Gratz, 6 Wheat. 481, 498, 5 L. Ed. 311.

68. Mere averments will not support jurisdiction.—United States *v.* Bitter Root Development Co., 200 U. S. 451, 471, 50 L. Ed. 550.

A mere charge of fraud does not give equity jurisdiction. Buzard *v.* Houston, 119 U. S. 347, 30 L. Ed. 451; Ambler *v.* Choteau, 107 U. S. 586, 27 L. Ed. 322. Tyler *v.* Savage, 143 U. S. 79, 36 L. Ed. 82, bears no resemblance to the case at bar. As the court there said, there were in the case discovery, account, fraud, misrepresentation and concealment. There was no demurrer for multifariousness, and no objection in the court below for want of equity, and the case was not one of a plain defect in equity jurisdiction. United States *v.* Bitter Root Development Co., 200 U. S. 451, 472, 50 L. Ed. 550. See, also, United States *v.* San Jacinto Tin Co., 125 U. S. 272, 273, 300, 31 L. Ed. 747. See ante, "Pleading Fraud," VI, D, 2.

The bill to set aside a deed and agreement on the ground of fraud, and also for discovery and account, where no fraud is made out, must be dismissed, unless it be so amended as to include all the parties interested, and be confined to a claim for the surplus of the proceeds of the lands, after paying reasonable expenses and legal claims, and carrying out the alleged fraudulent agreement. Gratz *v.* Cohen, 11 How. 1, 13 L. Ed. 579.

Inference from circumstances.—See post, "Circumstantial Evidence," VI, G, 2, e.

69. Burden of proof.—Rankin *v.* Chase Nat. Bank, 188 U. S. 557, 565, 47 L. Ed. 594; Connor *v.* Featherstone, 12 Wheat. 199, 6 L. Ed. 601; Sawyer *v.* Prickett, 19 Wall. 146, 22 L. Ed. 105; Life Ins. Co. *v.* Bangs, 103 U. S. 780, 26 L. Ed. 608; Oil Co. *v.* Van Etten, 107 U. S. 325, 27 L. Ed. 319; Hunt *v.* Oliver, 118 U. S. 211, 30 L. Ed. 128; Cissel *v.* Dutch, 125 U. S. 171, 31 L. Ed. 642; Southern Development Co. *v.* Silva, 125 U. S. 247, 31 L. Ed. 678; Telephone Cases, 126 U. S. 1, 568, 31 L. Ed. 863; Goodwin *v.* Fox, 129 U. S. 601, 632, 32 L. Ed. 805; Synnott *v.* Shaughnessy, 130 U. S. 572, 32 L. Ed. 1038; Cleaveland *v.* Richardson, 132 U. S. 318, 33 L. Ed. 384; Greene *v.* Taylor, 132 U. S. 415, 443, 33 L. Ed. 411; Rio Grande R. Co. *v.* Vinet, 132 U. S. 565, 33 L. Ed. 438; Schreyer *v.* Scott, 134 U. S. 405, 33 L.

even though it involve the proof of a negative.[70] And so with notice of fraud,[71] and so with knowledge of the fraud and the time of its discovery.[72]

Allegations of Bill Denied by Answer Shifts Burden.—See post, "To Overcome Answer under Oath," VI, G, 3, a, (2).

2. COMPETENCY—a. *In General.*—Parties contemplating a fraud frequently pursue such devious courses to conceal their designs, and resort to such subtle practices to mislead their unsecured creditors, that the fraud becomes impossible to detect, unless the door be swung wide open for the admission of all testimony having any possible bearing upon the question. Facts which to the court might seem of no pertinence and be rejected as having no legal tendency to show knowledge of the fraud, might be considered by the jury as significant and indicative of a guilty participation. Even negative evidence may sometimes have a positive value.[73]

Irrelevant and Confusing Evidence.—Irrelevant and misleading testimony ought not to be admitted.[74]

Evidence Tending to Show Falsity of Recommendation to Credit.—Where an action was brought against a person for making false representations of the pecuniary condition of a certain party, whereby the plaintiff had been induced to sell goods upon credit, and had incurred loss, evidence conducing to

Ed. 955; Chandler *v.* Pomeroy, 143 U. S. 318, 36 L. Ed. 169; McLane *v.* King, 144 U. S. 260, 263, 36 L. Ed. 428; Bamberger *v.* Schoolfield, 160 U. S. 149, 162, 40 L. Ed. 374.

While certain circumstances will give rise to an inference of fraud, yet the law never presumes it. It devolves on him who alleges fraud to show the same by satisfactory proof. Jones *v.* Simpson, 116 U. S. 609, 615, 29 L. Ed. 742; Sanger *v.* Nightingale, 122 U. S. 176, 186, 30 L. Ed. 1105; Farrar *v.* Churchill, 135 U. S. 609, 615, 34 L. Ed. 246; Voorhees *v.* Bonesteel, 16 Wall. 16, 29, 21 L. Ed. 268.

The burden of proof is on the complainant alleging fraud; and unless he brings evidence sufficient to overcome the natural presumption of fair dealing and honesty, a court of equity will not be justified in setting aside a contract on the ground of fraudulent representations. Southern Development Co. *v.* Silva, 125 U. S. 247, 249, 31 L. Ed. 678.

The fact of fraud or mistake must be established by competent evidence, the same as any other fact in issue. United States *v.* Savings Bank, 104 U. S. 728, 734, 26 L. Ed. 908.

Charges of fraud made upon information and belief only, where there is no evidence to support them, except the similarity of names, must also be treated as not sustained. Monroe Cattle Co. *v.* Becker, 147 U. S. 47, 55, 37 L. Ed. 72. See post, "Sufficiency and Weight," VI, G, 3.

70. Proof of negative.—Colorado, etc., Iron Co. *v.* United States, 123 U. S. 307, 31 L. Ed. 182.

71. Notice of fraud.—Bamberger *v.* Schoolfield, 160 U. S. 149, 162, 40 L. Ed. 374. See, also, Jones *v.* Simpson, 116 U. S. 609, 615, 29 L. Ed. 742.

See 1 Greenleaf on Evidence, § 80, where it is said: "So, where the negative allegation involves a charge of criminal neglect of duty, whether official or otherwise; or fraud; or the wrongful violation of actual lawful possession of property; the party making the allegation must prove it; for in these cases the presumption of law, which is always in favor of innocence and quiet possession, is in favor of the party charged." United States *v.* American Bell Tel. Co., 167 U. S. 224, 242, 42 L. Ed. 144; Colorado, etc., Iron Co. *v.* United States, 123 U. S. 307, 317, 31 L. Ed. 182.

72. Knowledge of fraud and time of discovery.—Pence *v.* Langdon, 99 U. S. 578, 582, 25 L. Ed. 420.

73. Competency in general.—Sonnentheil *v.* Christian Moerlein Brewing Co., 172 U. S. 401, 410, 43 L. Ed. 492; Butler *v.* Watkins, 13 Wall. 456, 20 L. Ed. 629; New York Mut. Life Ins. Co. *v.* Armstrong, 117 U. S. 591, 599, 29 L. Ed. 997.

Declarations in evidence.—See the titles DECLARATIONS AND ADMISSIONS, vol. 5, p. 227; RES GESTÆ.

74. Irrelevant and confusing evidence.—In an action of deceit for fraud in the sale of a boat, evidence, taking up much space in the record, consisting of accounts showing receipts and disbursements on account of the boat for sixteen trips, most of them made after the sale, and of the examination of the clerk in reference thereto, ought not to have been admitted. It was irrelevant, and tended to confuse and mislead the jury to the prejudice of the defendant by suggesting questions of good faith as to the management of the boat, after the transaction in question, which were not part of the issue, and which threw no light upon it. Thorwegan *v.* King, 111 U. S. 549, 553, 28 L. Ed. 514.

show that the statements of the defendant were false, ought to have been allowed to go to the jury.[75]

Evidence of Fraud as Defense to Bond.—See the title BONDS, vol. 3, pp. 424, 435.

Order of Proof.—The court has a large discretion in the matter of the order of proof.[76]

b. *In Rebuttal.*—Evidence will be legal, as rebutting testimony (as to repel an imputation or charge of fraud), which would not be admissible as original evidence.[77]

c. *Evidence of Other Frauds.*—See the title EVIDENCE, vol. 5, p. 1019.

d. *Parol Evidence.*—Parol testimony is always admissible in matters of contract, to show fraud, notwithstanding its effect may be to contradict what is in writing. That principle is too well established and too generally acknowledged to require any confirmation.[78]

e. *Circumstantial Evidence.*—See post, "Circumstantial Evidence," VI, G, 3, b.

3. SUFFICIENCY AND WEIGHT—a. *Amount of Evidence Necessary to Establish Fraud*—(1) *In General.*—Fraud must be clearly proven to justify the interposition of a court of equity.[79] Evidence of fraud must be clear, unequivocal and convincing, and not merely preponderating,[80] and circumstances of suspicion

75. Evidence tending to show falsity of recommendation to credit.—Iasigi *v.* Brown, 17 How. 183, 15 L. Ed. 205.

Any evidence conducing to prove that the statements of the defendant, in the letter of the 7th of April, in regard to the condition of the Thompsonville Company and Orrin Thompson, and their ability to meet their engagements, and in regard to the value of Thompson's property, were false, was competent evidence as tending to prove the facts. And especially was the testimony of G. admissible, who heard the defendant say, if the plaintiffs had called on them personally, they would not have sold their wool to the company; also the statement that before the letter was written, defendant admitted that he had lost confidence in Thompson, and therefore the letter of the 7th of April was guarded. These, and all other facts which conduce to show that the defendant acted in bad faith in writing that letter, are proper to be considered by the jury. Iasigi *v.* Brown, 17 How. 183, 196, 15 L. Ed. 205.

76. Order of proof.—"The fraud being to be made out in evidence, the order in which the proof should be brought to establish it was rather a matter in the discretion of the court, than of strict right in the parties. It is impossible to lay down any universal rule upon such a subject. Much must depend upon the posture and circumstances of the particular case; and at all events, if the proof be pertinent and competent, the admission of it cannot be matter of error." Wood *v.* United States, 16 Pet. 342, 361, 10 L. Ed. 987.

77. In rebuttal.—Zacharie *v.* Franklin, 12 Pet. 151, 9 L. Ed. 1035.

78. Parol evidence.—Barreda *v.* Silsbee, 21 How. 146, 170, 16 L. Ed. 86.

Parol evidence is admissible to show fraud, and consequently a resulting trust, in a deed absolute on its face, notwithstanding any denial by the answer. Babcock *v.* Wyman, 19 How. 289, 300, 15 L. Ed. 644. See the title PAROL EVIDENCE.

79. Amount of evidence necessary.—Johansson *v.* Stephanson, 154 U. S. 625, 23 L. Ed. 1009; Day *v.* Union India Rubber Co., 20 How. 216, 218, 15 L. Ed. 883; Atlantic Delaine Co. *v.* James, 94 U. S. 207, 214, 24 L. Ed. 112; Baltzer *v.* Raleigh, etc., R. Co., 115 U. S. 634, 29 L. Ed. 505; Hunt *v.* Oliver, 118 U. S. 211, 30 L. Ed. 128; Maxwell Land-Grant Case, 121 U. S. 325, 381, 30 L. Ed. 949; Union R. Co. *v.* Dull, 124 U. S. 173, 183, 31 L. Ed. 417; Cissel *v.* Dutch, 125 U. S. 171, 31 L. Ed. 642; Southern Development Co. *v.* Silva, 125 U. S. 247, 253, 31 L. Ed. 678.

"Those who seek to set aside their solemn written contracts, by proving loose conversations, should be held to make out a very clear case; and when they charge others with fraud, founded on such evidence, their own conduct and acts (which speak louder than words) should be consistent with such a hypothesis." Ogilvie *v.* Know Ins. Co., 22 How. 380, 390, 16 L. Ed. 349. And see ante, "Burden of Proof," VI, G, 1, b.

80. Clear and convincing, not merely preponderating.—United States *v.* Budd, 144 U. S. 154, 161, 36 L. Ed. 384; Maxwell Land-Grant Case, 121 U. S. 325, 381, 30 L. Ed. 949.

Charges of fraud must be supported by evidence that is clear, unequivocal and convincing, and a bare preponderance of evidence, leaving the issue in doubt, is insufficient. United States *v.* San Jacinto Tin Co., 125 U. S. 272, 300, 31 L. Ed. 747, citing Maxwell Land-Grant Case, 121 U. S. 325, 30 L. Ed. 949; United States *v.* American Bell Tel. Co., 167 U. S. 224, 241, 42 L. Ed. 144.

"In all proceedings instituted to recover moneys or to set aside and annul deeds or contracts or other written instruments on the ground of alleged fraud practised by a defendant upon a plaintiff,

merely are not sufficient to establish it,[81] when not inconsistent with good faith.[82]

Illustration.—Illustrations of when the evidence establishes fraud or not will be found in the notes.[83]

the rule is of long standing and is of universal application that the evidence tending to prove the fraud and upon which to found a verdict or decree must be clear and satisfactory. It may be circumstantial but it must be persuasive. A mere preponderance of evidence which at the same time is vague or ambiguous is not sufficient to warrant a finding of fraud, and will not sustain a judgment based on such finding." Lalone *v.* United States, 164 U. S. 255, 257, 41 L. Ed. 425.

Fraudulent representations to government officer.—"The rule obtains in cases of alleged fraudulent representations made to an officer of the government upon the faith of which the officer has issued a patent or done any other official act upon which the rights of the party making the misrepresentations may be founded. This principle is exemplified in United States *v.* Iron Silver Min. Co., 128 U. S. 673, 32 L. Ed. 571, and cases cited, and is not confined to cases of patents for lands." Lalone *v.* United States, 164 U. S. 255, 257, 41 L. Ed. 425.

Examining the record in this case and the whole evidence contained therein, and having in mind the rule above stated, the evidence on the part of the plaintiff, when read in connection with that which was given on the part of the defendants, falls far short of the requirements of the rule. Lalone *v.* United States, 164 U. S. 255, 258, 41 L. Ed. 425.

81. Mere suspicion not enough.—Sanger *v.* Nightingale, 122 U. S. 176, 186, 30 L. Ed. 1105; Clarke *v.* White, 12 Pet. 178, 196, 9 L. Ed 1046; Colorado, etc., Iron Co. *v.* United States, 123 U. S. 307, 317, 31 L. Ed. 182; Rio Grande R. Co. *v.* Vinet, 132 U. S. 565, 33 L. Ed. 438; United States *v.* Hancock, 133 U. S. 193, 197, 33 L. Ed. 601.

Denunciation and allegation of "fraud," "deceit" and "imposition," is not enough. There must be ample proof, and not a mere suspicion raised. United States *v.* San Jacinto Tin Co., 125 U. S. 272, 273, 300, 31 L. Ed. 747.

Proofs which create nothing more than a suspicion may leave a doubt, but they do not bring the assurance of certain wrong. United States *v.* Hancock, 133 U. S. 193, 197, 33 L. Ed. 601.

Mere suspicion of fraud or want of good faith is not enough to call for relief in equity. Hoffman *v.* Overbey, 137 U. S. 465, 34 L. Ed. 754. See, generally, the title EVIDENCE, vol. 5, p. 1004.

Other frauds.—Even conceding that testimony of fraud in another and independent transaction be competent, as to which quære, it is merely circumstance of suspicion, not evidence of fraud in itself as to the case at bar. United States *v.* Budd, 144 U. S. 154, 164, 36 L. Ed. 384.

82. Not inconsistent with good faith.—Fraud should not be imputed upon doubtful and unsatisfactory evidence not inconsistent with perfect good faith. Darlington *v.* Turner, 202 U. S. 195, 50 L. Ed. 992.

Constructive and actual fraud contrasted.—"Although cases of constructive fraud are equally cognizable, by a court of equity, with cases of direct or positive fraud, yet the two classes of cases would be met by a defendant in a very different manner. It seems to be an established doctrine of a court of equity, that when the bill sets up a case of actual fraud, and makes that the ground of the prayer for relief, the plaintiff will not be entitled to a decree, by establishing some of the facts quite independent of fraud, but which might of themselves create a case under a totally distinct head of equity from that which would be applicable to the case of fraud originally stated In support of this position may be cited, as directly in point, the case of Price *v.* Berrington, decided by Lord Chancellor Truro, in 1851. Vide 7 Eng. Law & Eq., 254." Eyre *v.* Potter, 15 How. 42, 56, 14 L. Ed. 592.

Party complaining chief witness to fraud.—The fact that the party complaining of fraud is the chief witness to make out the charge, may be considered on the question of fraud or no fraud. Day *v.* Union India Rubber Co., 20 How. 216, 218, 15 L. Ed. 883.

Interest and death of opposite party.—The uncorroborated statements of an interested witness, largely discredited by his behavior, cannot be held sufficient to establish a charge of fraud in their mutual dealings together, made against a deceased person. Darlington *v.* Turner, 202 U. S. 195, 223, 50 L. Ed. 992.

Personal character.—"Judicial inquiries are into the rights of the parties; and, although high and honorable character has, and ought to have, great influence in weighing testimony in which that character is in any manner involved; yet, when the inferences from that testimony are drawn by others, and a court is required to pronounce the law arising upon them, character is excluded from the view of the judge, and legal principles alone can be acknowledged as his guide." Etting *v.* United States Bank, 11 Wheat. 59, 73, 6 L. Ed. 419.

Badges of fraud.—As to badges of fraud in Twyne's case, see the clausulæ inconsuetæ, Taylor *v.* Taylor, 8 How. 183, 205, 12 L. Ed. 1040. And see the title FRAUDULENT AND VOLUNTARY CONVEYANCES.

83. Illustrations.—Baker *v.* Cummings, 169 U. S. 189, 42 L. Ed. 711, was a case

(2) *To Overcome Answer under Oath.*—Where, on a bill alleging fraud, answer under oath is called for or not waived, and is made denying the fraud explicitly and positively, the usual rule applies and unless the effect thereof is over-

in which the court, while holding that, if there was fraud, laches and limitations prevented its being set up by the party alleging it, expressly disclaimed intimating a conclusion that there was even a preponderance of evidence showing fraud.

Held no fraud shown.—It was said in United States *v.* Arredondo, 6 Pet. 691, 747, 8 L. Ed. 547: "The question of fraud has been pressed in the argument, but we perceive nothing in the evidence which shows its existence, so as to bring it home to the claimants, or that it exists at all, according to the definition and rules heretofore settled."

In Hunt *v.* Oliver, 118 U. S. 211, 30 L. Ed. 128, it was held that the evidence, as detailed in the opinion, did not support the charges of fraud made in the bill. See, also, Warner *v.* Godfrey, 186 U. S. 365, 46 L. Ed. 1203.

In Hunt *v.* Blackburn, 128 U. S. 464, 471, 32 L. Ed. 488, it was held that the testimony of the witnesses, together with the documents in the case, failed to show that there was any deceit or misapprehension in the premises, or any advice given, in fraud or in mistake of fact or law, to the party alleging the same by an attorney in defendant's employ, so as to prevent her being estopped by her conduct.

Surrender of subscription to stock of railroad by city.—In New Albany *v.* Burke, 11 Wall. 96, 105, 20 L. Ed. 155, an arrangement between a city and the directors of a railroad company, by which a subscription by the former to the stock of the latter was surrendered and canceled, was held not to have been fraudulent either in law or fact.

Bill to set aside titles.—In Moore *v.* Greene, 19 How. 69, 15 L. Ed. 533, it was held, where a bill was filed to set aside titles for frauds alleged to have been committed in 1767, that the bill did not make out a sufficient case; and the evidence did not even sustain the facts alleged.

On a question of fact, upon a bill filed to set aside the sale and assignment of a land warrant, on the ground, that it was obtained by fraudulent misrepresentation, and taking undue advantage of the party's imbecility of body and mind, evidence deemed insufficient, and bill dismissed. The burden of proof is on the party alleging the fraud. Connor *v.* Featherstone, 12 Wheat. 199, 6 L. Ed. 601.

A letter written by a defendant to a third party, in which he says, "Mr. H. has found out that I made an advantageous trade with him, that the land was in the state of Tennessee, contrary to his expectation, and complains heavily that I took an advantage of him, that he was a little deranged at the time," was greatly relied on in argument, not only to prove H.'s insanity, but to prove that defendant misrepresented the situation of the entry of 5,000 acres, and thereby deceived and defrauded H. Held that, so far as the letter alludes to the state of H.'s mind at the time of the contract, and to "an advantage" having been taken of him, the writer evidently means to state only H.'s subsequent complaints, and not the facts or circumstances actually attending the transaction. The letter cannot then prove that H. was deranged, or that defendant took advantage of him, unless it is inferable from other parts of the letter. He says H. had found out that defendant had made an advantageous trade; but it would be a very strained construction of this language, to suppose defendant meant anything more by it than a good bargain. Connor *v.* Featherstone, 12 Wheat. 199, 203, 6 L. Ed. 601.

Alleged fraud on rights of widow.—Where a widow filed a bill in chancery, complaining that immediately upon the death of her husband, the son of that husband, together with another person, had imposed upon her by false representations, and induced her to part with all her right in her husband's estate for an inadequate price, the evidence in the case did not sustain the allegation. Eyre *v.* Potter, 15 How. 42, 14 L. Ed. 592.

It is not alleged to be a case of constructive fraud, arising out of the relative position of the parties towards each other, but of actual fraud. The answers deny the fraud and are made more emphatic by the complainant's having put interrogatories to be answered by the defendants, and the evidence sustains the answers. Eyre *v.* Potter, 15 How. 42, 14 L. Ed. 592.

Charge of fraud in procuring passage of ordinance.—A bill charging fraudulent misrepresentations in procuring the passage of an ordinance to pave a street, with the intent to cast on lessees of certain property on the street the burden (the lessees, by their leases, being bound to pay all taxes), and so to benefit the lessor's reversionary interest, dismissed on proofs held insufficient. Willard *v.* Presbury, 14 Wall. 676, 20 L. Ed. 719.

In execution of deed, power of attorney, etc.—Where the complainant set up in his bill that a deed, power of attorney, and other writings, all of which, as alleged, were executed in contemplation of a suit for the recovery of his patrimonial inheritance of which he had been unjustly deprived, were obtained by imposition and fraud, and also that a deed, executed by him in the adjustment of the estate among the parties participating in the litigation to recover it, was obtained by like fraud

come by the testimony of two credible witnesses or one with corroborating circumstances, no right to relief is made out.[84] When the allegations of a bill charging fraud are explicitly met and denied by the answers, this puts the burden of establishing them upon the complainant.[85] But the answer must be positive,

and imposition, held, that upon the pleadings and proofs, the allegations are not sustained; on the contrary, the transactions in both respects referred to were fair, open, and unexceptionable. Collins *v.* Thompson, 22 How. 246, 16 L. Ed. 280.

Where the whole arrangement, therefore, between the parties, in respect to the property, entered into with a view to the institution of the suit, which is complained of, was given up, and a new one substituted, which was not only unexceptionable, but highly equitable and just, as concerned the complainant, the charge of fraud and imposition depending upon it, even if originally it had any foundation, falls with it. Collins *v.* Thompson, 22 How. 246, 250, 16 L. Ed. 280.

In exchange of property.—See the title EXCHANGE OF PROPERTY, ante, p. 75.

In compromise with creditors.—See ante, "Of Person Making Representation," IV, B, 2, a, (1).

Fraud under guise of legal proceedings.—It was held in McIntire *v.* Pryor, 173 U. S. 38, 43 L. Ed. 606, that the evidence showed conclusively the conception and carrying out of a glaring scheme of fraud to deprive of their property, under the guise of legal proceedings and conveyances, the owners thereof, who were ignorant and uneducated people, and that the case was one which should prevent the doctrine of laches from being applicable. See the titles LACHES; LIMITATIONS OF ACTIONS AND ADVERSE POSSESSION.

In Monger *v.* Shirley, 131 U. S., appx. cxxxi, cxxxiv, 22 L. Ed. 449, it was held that the evidence amply showed a fraud by which the title to complainant's land had been acquired by defendant, under guise of a fraudulent execution sale, and confiscation proceedings.

Scheme to defraud co-owner of rights to land.—After land was purchased and conveyed to the plaintiff D. and defendant P. jointly, the latter conceived the purpose of acquiring the title to the whole of it. To that end he pretended to have made a sale of it to B., and induced the plaintiff not only to believe that it was a real sale at a named price, but to join in the deed to B. The day after the title was vested in B. the latter reconveyed the property to P. According to the preponderance of evidence, that transaction was a sham, but not more so than the pretended sale and conveyance to one M. The proof makes it clear that the pretended sales to B. and M. were in execution of a scheme devised by P. to deprive D. of his interest in these lands without his receiving the full value of such interest, and thus to become himself the sole owner. It was held that the evidence fully sustained the allegations of fraud made in the original and amended complaint. Dickson *v.* Patterson, 160 U. S. 584, 589, 40 L. Ed. 543.

Release induced by fraud.—In Michaels *v.* Post, 21 Wall. 398, 422, 22 L. Ed. 520, it was held that, examined in connection with the attending circumstances, it is manifest that the discharge of the debt procured from the father to his sons, insolvent debtors owing him a large sum, is null and void, because it was obtained by gross deception, misrepresentation, and shameless fraud. See the title BANKRUPTCY, vol. 2, p. 842.

84. To overcome answer under oath.—Monroe Cattle Co. *v.* Becker, 147 U. S. 47, 54, 37 L. Ed. 72; Russell *v.* Clarke, 7 Cranch 69, 94, 3 L. Ed. 271; Hughes *v.* Blake, 6 Wheat. 453, 5 L. Ed. 303; Connor *v.* Featherstone, 12 Wheat. 199, 6 L. Ed. 601; Garrow *v.* Davis, 15 How. 272, 277, 14 L. Ed. 692; Vigel *v.* Hopp, 104 U. S. 441, 26 L. Ed. 765; Beals *v.* Illinois, etc., R. Co., 133 U. S. 290, 33 L. Ed. 608.

85. Allegations of bill denied by answer.—Brown *v.* County of Buena Vista, 95 U. S. 157, 24 L. Ed. 422; Connor *v.* Featherstone, 12 Wheat. 199, 204, 6 L. Ed. 601; Stephen *v.* Beall, 22 Wall. 329, 22 L. Ed. 786; Lea *v.* Polk County Cooper Co., 21 How. 493, 505, 16 L. Ed. 203; Allen *v.* Smith, 129 U. S. 465, 32 L. Ed. 732.

Where the answer of the defendant is direct, positive, and unequivocal in its denials of the allegations of the bill, and, as an answer on oath is not waived, unless these denials are disproved by evidence of greater weight than the testimony of one witness, or by that of one witness with corroborating circumstances, the complainant will not be entitled to a decree; and this effect of the defendant's answer is not weakened by the fact that the equity of the complainant's bill is the allegation of fraud. Vigel *v.* Hopp, 104 U. S. 441, 26 L. Ed. 765; Story Eq. Jur., § 1528; Daniell Ch. Pr. 844. Southern Development Co. *v.* Silva, 125 U. S. 247, 249, 31 L. Ed. 678; Farrar *v.* Churchill, 135 U. S. 609, 620, 34 L. Ed. 246.

"The positive denial of fraud in every answer in the cause, and the absence of any proof to sustain it, should alone be taken as a complete refutation of the charge." Ladd *v.* Ladd, 8 How. 10, 28, 12 L. Ed. 967.

And a decree, dismissing the bill, was proper and will not be reversed on merely suspicious evidence. Morrison *v.* Durr, 122 U. S. 518, 30 L. Ed. 1225.

Where the answer of the defendant in

and not merely as to remembrance and belief.[86]

b. *Circumstantial Evidence.*—The circumstances of a transaction may create an inference of fraud.[87] And to establish fraud, it is not necessary to prove it

a bill alleging fraud denied specifically all the material allegations of the complaint, and set out in detail the circumstances attending the transaction which, if proved, would establish his good faith and the absence of any fraudulent acts on the part of himself or any of his agents connected with such transactions, and the cause having been heard upon the pleadings and proofs, the court found the facts in favor of the defendant, and entered a decree in his favor, it was held that such findings were in the main responsive to the allegations and would not be disturbed. Synnott *v.* Shaughnessy, 130 U. S. 572, 575, 32 L. Ed. 1038.

Answers to interrogatories.—Positive denials of fraud in the answers, being directly responsive to the charging part of the bill, the latter, by every rule of equity pleading, must be displaced by them, unless those denials can be overcome by evidence aliunde. But by the peculiar frame and structure of the bill, in this case, the complainant has imparted to the answers a function beyond a mere response to the recitals or charges contained in the bill. The complainant has thought proper specifically to interrogate the defendants, as to the origin, progress, and conditions of the transactions impugned by her; and as to the part borne in them, both by the defendants and the complainant herself. By the answers to these interrogatories, the complainant must, therefore, be concluded, unless they can be overthrown by proofs. Eyre *v.* Potter, 15 How. 42, 57, 14 L. Ed. 592.

Rule not affected by failure to testify.—Where, in a bill filed by the government charging fraud, answers under oath were called for, and were filed, denying specifically the existence of any fraud, an answer under oath in an equity case, when called for, is to be taken as evidence, and no adverse inference is to be drawn from the fact that neither one of the defendants appeared as a witness. If the government doubted their statements under oath, it could have called either one and cross-examined him to its satisfaction. United States *v.* Budd, 144 U. S. 154, 165, 36 L. Ed. 384.

Where evidence conflicting.—There is a failure of proof of fraud where neither a neglect nor wrong is shown by the positive testimony of any one witness; and whatever is sworn to by any one in behalf of the complainant is counteracted by opposing circumstances, rather than strengthened, as it should be, after a sworn denial in the bill, and in so grave a charge as fraud, by very satisfactory auxiliaries, though not perhaps by so strong evidence as is necessary in reforming contracts; that is, by evidence which is "irrefragable," and not open "to opposing presumptions." 1 Bro. Ch. 347; Graves *v.* Boston Marine Ins. Co., 2 Cranch 419, 2 L. Ed. 324; 1 Ves. Sr., 317; 6 Ves. 332; Hunt *v.* Rousmanier, 8 Wheat. 173, 5 L. Ed. 589; Hunt *v.* Rousmanier, 1 Pet. 1, 13, 7 L. Ed. 27; 2 Johns. (N. Y.) Ch. 595, 630. Carpenter *v.* Providence, etc., Ins. Co., 4 How. 185, 224, 11 L. Ed. 931.

86. Answer must be positive.—Where a bill is filed to recover property obtained by an alleged fraud, if the property was acquired by unfair means the fact was one within the defendant's own knowledge, and in such cases the general rule of equity pleading is that the defendant must answer positively and not merely to his remembrance or belief. The distinction which is generally made between recent and remote acts or declarations of the defendant would hardly seem applicable to a case like the present. Slater *v.* Maxwell, 6 Wall. 268, 274, 18 L. Ed. 796.

87. Inference from circumstances.—Gregg *v.* Sayre, 8 Pet. 244, 8 L. Ed. 932.

"And there may be contracts so extortionate and unconscionable on their face as to raise the presumption of fraud in their inception, or at least to require but slight additional evidence to justify such presumption. In such cases the natural and irresistible inference of fraud is as efficacious to maintain the defense at law as to sustain an application for affirmative relief in equity. When this is so, if performance has been accepted in ignorance and under circumstances excusing the non-return of articles furnished, and these have some value, the amount sued for may be reduced to that value." Hume *v.* United States, 132 U. S. 406, 414, 33 L. Ed. 393.

The court said: "If the claimant intended to induce the agents of the government to contract to pay for these shucks thirty-five times their highest market value, and the agents of the government knowingly entered into such a contract, it will not be denied that such conduct would be fraudulent and the agreement vitiated accordingly. If the claimant knew that a clerical error had been committed, of which the agents of the government were ignorant, and deliberately intended to take advantage of the error to obtain the execution of a contract for the payment of so grossly unconscionable a price, or if the facts were such that he must be held to have known that their action, if understandingly taken, would be in palpable dereliction of their duty to their principal, and, notwithstanding, sought to profit by it, the character of the fraud, so far as the claimant is concerned, is not changed by the fact that such action was the result of the negli-

by direct and positive evidence. Circumstantial evidence is not only sufficient, in most cases it is the only proof that can be adduced.[88]

c. *Inadequacy of Consideration.*—Inadequacy of consideration of a nature so gross as to shock the conscience, will amount to proof of fraud. But it must be extremely gross.[89] But mere inadequacy alone will not ordinarily be per se proof of fraud.[90]

gence or mistake of the government's agents, untainted by moral turpitude on their part." Hume *v.* United States, 132 U. S. 406, 414, 33 L. Ed. 393.

88. Competency and sufficiency.—Rea *v.* Missouri, 17 Wall. 532, 543, 21 L. Ed. 707; Thompson *v.* Bowie, 4 Wall. 463, 472, 18 L. Ed. 423 (per Grier, J., dissenting); Kempner *v.* Churchill, 8 Wall. 362, 369, 19 L. Ed. 461; Wager *v.* Hall, 16 Wall. 584, 601, 21 L. Ed. 504; Lalone *v.* United States, 164 U. S. 255, 257, 41 L. Ed. 425.

Fraud, being essentially a matter of motive and intention, is often deducible only from a great variety of circumstances, no one of which is absolutely decisive; but all combined together may become almost irresistible as to the true nature and character of the transaction in controversy. Wood *v.* United States, 16 Pet. 342, 360, 10 L. Ed. 987. See Gregg *v.* Sayre, 8 Pet. 244, 8 L. Ed. 932; Butler *v.* Watkins, 13 Wall. 456, 464, 20 L. Ed. 629; Thompson *v.* Bowie, 4 Wall. 463, 472, 18 L. Ed. 423, per Grier, J., dissenting. Especially when corroborated by moral coincidences. Wager *v.* Hall, 16 Wall. 584, 601, 21 L. Ed. 504. And see the title CIRCUMSTANTIAL EVIDENCE, vol. 3, p. 786.

Illustration—Collusion or secret trust.—Where A had levied on certain goods as owned by B, which C claimed, the allegation of A being that there had been collusion between B and C, and that C was a mere instrument of B, it was held, on a suit by C against A for damages, that it was not necessary in this case, for the defendants, in order to maintain the issue on their part, to prove by direct and positive evidence that B had a secret trust or property in the goods. It was sufficient if they proved such facts and circumstances tending to that conclusion as might reasonably induce the jury to believe that he had such trust or property. Rea *v.* Missouri, 17 Wall. 532, 543, 21 L. Ed. 707.

On question of fraudulent recommendations to credit.—See ante, "Financial Standing," IV, B, 2, a.

89. Inadequacy of consideration.—Byers *v.* Surget, 19 How. 303, 311, 15 L. Ed. 670; Kempner *v.* Churchill, 8 Wall. 362, 369, 19 L. Ed. 461; Veazie *v.* Williams, 8 How. 134, 150, 12 L. Ed. 1018; Hume *v.* United States, 132 U. S. 406, 414, 33 L. Ed. 393.

"Great inadequacy of price is a circumstance which a court of equity will always regard with suspicion, unless it appears by the circumstances of the case, or by evidence, that it is no fault of the buyer." Graffam *v.* Burgess, 117 U. S. 180, 194, 29 L. Ed. 839.

Where the purchase has been made for a full price and on fair conditions without special advantage to the vendee, the proofs to impeach it ought to be more full and direct, more unequivocal and certain, than would be required in the case of a hard or unequal bargain. Calais Steamboat Co. *v.* Scudder, 2 Black 372, 17 L. Ed. 282.

Illustrations.—In Barribeau *v.* Brant, 17 How. 43, 15 L. Ed. 34, it was held that the allegation that a deed which complainant executed ought to be set aside, upon the ground of fraud and misrepresentation and inadequacy of price, was not sustained by the evidence.

"Although the prices paid for the different interests were undoubtedly very moderate; yet they were not so inadequate as to authorize the court to declare the deeds void on that ground. The inadequacy must be tested by the value of the property at the time of the sales, and not by its present value." Barribeau *v.* Brant, 17 How. 43, 45, 15 L. Ed. 34.

In Warner *v.* Godfrey, 186 U. S. 365, 46 L. Ed. 1203, on a bill to establish plaintiff's title to land, of which she claimed to have been defrauded by one of the defendants, the main asserted badges of fraud were a gross inadequacy of consideration, and other fraudulent and criminal practices, haste and concealment, both the trial and the appellate courts concurred in holding that the proof absolutely vindicated the defendants, and it is held by this court that "the entire want of foundation for the charges of wrongdoing urged against the defendants, and upon which the long litigation proceeded, may be taken as conclusively established."

90. "Mere inadequacy of price, or any other inequality in a bargain, we are told, is not to be understood as constituting per se a ground to avoid a bargain in equity, for courts of equity, as well as courts of law, act upon the ground that every person who is not, from his peculiar condition or circumstances, under disability, is entitled to dispose of his property in such manner and upon such terms as he chooses; and whether his bargains are wise and discrete or otherwise, or profitable or unprofitable, are considerations not for courts of justice, but for the party himself to deliberate upon." Eyre *v.* Potter, 15 How. 42, 59, 14 L. Ed. 592.

d. *Question for Jury.*—Fraud or no fraud is generally a question of fact to be determined by all the circumstances of the case.[91]

4. VARIANCE.—Proof of false representations of the same general character

See, also, Kempner *v.* Churchill, 8 Wall. 362, 369, 19 L. Ed. 461.

"Still, there may be such an unconscionableness or inadequacy in a bargain, as to demonstrate some gross imposition or some undue influence; and in such cases courts of equity ought to interfere, upon satisfactory ground of fraud; but then, such unconscionableness or such inadequacy should be made out as would, to use an expressive phrase, shock the conscience, and amount in itself to conclusive and decisive evidence of fraud." Eyre *v.* Potter, 15 How. 42, 60, 14 L. Ed. 592.

"But the contract between the parties in this case should not be controlled by a comparison between the subject obtained and the consideration given in a mere pecuniary point of view; added to this, were the motives of affection for the wife of the grantee, the granddaughter of the grantor, a conviction in the latter of what justice dictated towards the children of the decedent in relation to his property; the prospect of ease and independence on the part of this elderly female; her exemption from the expense, the perplexities, and hazards of managing a species of property to the management of which expense and energy and skill were indispensable; property to the tenure of which she entertained and expressed insuperable objections. Here, then, in addition to the sums of money paid, or secured to be paid, we see considerations of great influence which, naturally, justly, and lawfully, might have entered into this contract, and which we think cannot be disregarded in its interpretation, upon any sound construction of the testimony in the cause." Eyre *v.* Potter, 15 How. 42, 60, 14 L. Ed. 592. See, also, the title CONTRACTS, vol. 4, pp. 565-567.

91. Question of fact for jury.—Humes *v.* Scruggs, 94 U. S. 22, 28, 24 L. Ed. 51; Remington *v.* Linthicum, 14 Pet. 84, 94, 10 L. Ed. 364; Swayze *v.* Burke, 12 Pet. 11, 24, 9 L. Ed. 980.

"It may be said in general that there is no class of cases which are more peculiarly within the province of the jury than such as involve the existence of fraud." Sonnentheil *v.* Christian Moerlein Brewing Co., 172 U. S. 401, 410, 43 L. Ed. 492.

"In a charge of fraud courts have said, what is evidence to affect the mind of a jury is often difficult to decide or distinguish. But any fact, though in itself of slight importance, will not be withheld. In such cases it is not for the court to treat the jury as persons without discernment, where the issue is one purely of fact." Thompson *v.* Bowie, 4 Wall. 463, 474, 18 L. Ed. 423 (per Grier, J., dissenting). See the title QUESTIONS OF LAW AND FACT.

If a written contract between the parties be offered in evidence, and the opposite party either denies the authenticity of the paper or alleges that it was obtained by fraud, the question at issue is still open to the jury upon the whole of the evidence. Jewell *v.* Jewell, 1 How. 219, 11 L. Ed. 108.

Conflicting evidence.—The jury must pass upon conflicting evidence upon the question of the existence of fraud. Stewart *v.* Wyoming Cattle Ranche Co., 128 U. S. 383, 387, 32 L. Ed. 439.

As to liability for false recommendations to credit.—By whatever motives the defendant may have been actuated he is not to be held responsible, unless his letters of recommendation to credit did mislead and were intended to mislead the plaintiffs. And it will be for the jury to say, on a thorough examination of the letters, and the facts and circumstances connected with them, whether they were calculated to inspire, and did inspire, a false confidence in the pecuniary responsibility of the parties recommended. If an impression, not only of their solvency but of their success in business, so that by selling largely to them no more than the ordinary risks of business were incurred, was made and authorized by the letters, while, at the same time, their true condition was known to the defendant, which did not authorize such a representation, and which was intended to deceive and mislead the plaintiffs, the defendant may be justly held responsible. But of this the jury are to judge, they being the triers of the facts outside of the letters, which should be submitted to them for their consideration and decision. Iasigi *v.* Brown, 17 How. 183, 196, 15 L. Ed. 205.

The defendant having written to his own agent, and headed the letter "confidential," it was for the jury to say whether or not it was intended for the exclusive perusal of the agent. Iasigi *v.* Brown, 17 How. 183, 15 L. Ed. 205.

It was also for the jury to say, on a thorough examination of the letters and the facts and circumstances connected with them, whether they were calculated to inspire, and did not inspire, a false confidence in the pecuniary responsibility of the party, to which the writer knew he was not entitled. Iasigi *v.* Brown, 17 How. 183, 15 L. Ed. 205.

Absolute instruction erroneous.—It was said in Laidlaw *v.* Organ, 2 Wheat. 178, 195, 4 L. Ed. 214: "The court thinks that the absolute instruction of the judge was erroneous, and that the question, whether

as those alleged in the bill as fraudulent, though not in the precise language alleged, is sufficient to support the bill and the relief decreed.[92]

VII. Criminal Fraud.

Fraudulent Purchase of Goods on Credit.—If a person buy goods on credit in good faith, knowing that he is unable to pay for them at the time, but believing that he will be able to pay for them at the maturity of the bill, he is guilty of no offense even if he be disappointed in making such payment. But if he purchases them, knowing that he will not be able to pay for them, and with an intent to cheat the vendor, this is a plain fraud, and made punishable as such by statutes in many of the states.[93]

Promissory Representations.—Although, to make a false representation the subject of an indictment, it is generally necessary that it should be the statement of an existing fact,[94] some schemes may be promoted through mere representations and promises as to the future, yet are none the less schemes and artifices to defraud. Punishment because of the fraudulent purpose is no new thing.[95]

any imposition was practised by the vendee upon the vendor, ought to have been submitted to the jury."

Certificate of division of opinion.—In a litigation in respect to an alleged fraud in obtaining a deed of large tracts of land by the principal defendant from the complainant, where the decree found the fraud alleged, and held the deed null as to the principal defendant, but stated that the judges were opposed in opinion on the question whether his four codefendants, who claimed by deeds under him, were chargeable as privies to the fraud, this question was one of fact, only to be determined by an examination of the evidence in the record, and to be taken up on certificate of division. Brobst *v.* Brobst, 4 Wall. 2, 18 L. Ed. 387. See the title APPEAL AND ERROR, vol. 2, p. 31, et seq.

Fraud as a mixed question of law or fact.—See ante, "Fraud as Question of Law and Fact," III, A.

Directing issue to jury.—See the title ISSUES TO JURY.

92. Variance.—Turner *v.* Ward, 154 U. S. 618, 23 L. Ed. 391. See the title VARIANCE.

93. Fraudulent purchase of goods on credit.—Evans *v.* United States, 153 U. S. 584, 592, 38 L. Ed. 830; Durland *v.* United States, 161 U. S. 306, 313, 40 L. Ed. 709. See ante, "Fraudulent Purchase of Goods on Credit," IV, C, 2.

94. Promissory representations generally.—Sawyer *v.* Prickett, 19 Wall. 146, 160, 22 L. Ed. 105. See ante, "Must Be of Existing or Past Fact, Not a Mere Opinion," IV, B, 1.

95. Scheme or artifice to defraud—Promissory representations.—As held in Durland *v.* United States, 161 U. S. 306, 40 L. Ed. 709, the misrepresentation of existing facts is not necessary to a conviction under a statute applying to "any scheme or artifice to defraud." As was observed by Mr. Justice Brewer (p. 313): "Some schemes may be promoted through mere representations and promises as to the future, yet are none the less schemes and artifices to defraud. * * * In the light of this the statute must be read, and so read it includes everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future. The significant fact is the intent and purpose." Public Clearing House *v.* Coyne, 194 U. S. 497, 516, 48 L. Ed. 1092.

Fraudulent claim against United States.—Where an act of congress declared, that, if any person "shall transmit to, or present at, or cause or procure to be transmitted to, or presented at, any office or officer of the government of the United States, any deed, power of attorney, order, certificate, receipt, or other writing, in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited, every such person shall be deemed and adjudged guilty of felony," etc., the transmission or presentation of any deed, or other writing, to any office or officer of the government, in support of, or in relation to, any account or claim, with the intent to defraud the United States, knowing the same to be false, are the only essential ingredients. The felonious intent is no part of the description, as the offense is complete without it. Felony is the conclusion of law from the acts done with intent described; and makes part of the punishment; as, in the eye of the common law, the prisoner thereby becomes infamous, and disfranchised. These consequences may not follow, legally speaking, in a government where the common law does not prevail; but the moral degradation attaches to the punishment actually inflicted. United States *v.* Staats, 8 How. 41, 45, 12 L. Ed. 979.

Where the act done was the transmission to the commissioner of pensions of

Indictment—Alleging Intent.—Where the statute defining an offense involving fraudulent conduct uses words which are not absolutely inconsistent with an honest purpose, the allegation of an intent to defraud becomes material in the highest degree. Where, in fact, the gravamen of the offense consists in the evil design with which the act is done, a count which should omit the words "willfully," etc., and with intent to defraud, would be clearly bad.[96]

Alleging Facts.—Fraud is an inference of law from certain facts. A fraud, therefore, is not sufficiently set forth in an indictment, unless all the facts are averred which in law constitute the fraud. Whether an act be done fraudulently or not is a question of law so far as the moral character of the act is involved. To aver that the act is fraudulently done is, therefore, so far as the guilt or the innocence of the act is concerned, to aver a matter of law, and not a matter of fact. An averment that the act was done with intent to commit a fraud is equivalent to an averment that the act was done fraudulently. No epithets, no averment of fraudulent intent, can supply the place of an averment of the fact or facts from which the legal inference of fraud is to be drawn.[97]

an affidavit which was false in the facts which it professed to narrate, although sworn to by a person who really existed, and the person who transmitted it knew that it was false, it was an offense within the meaning of the act of congress. United States *v.* Staats, 8 How. 41, 12 L. Ed. 979.

"A genuine instrument containing a false statement of facts, used in support of a claim, the party knowing it to be false, and using it with the intent to defraud, presents a case not distinguishable in principle, or in turpitude, or in its mischievous effects, from one in which every part of the instrument is fabricated; and when the one is as fully within the words of the statute as the other, we may well suppose that it was intended to embrace it." United States *v.* Staats, 8 How. 41, 47, 12 L. Ed. 979.

Construction of statutes.—See ante, "Construction of Statutes against Fraud," III. G.

96. **Indictment—Alleging intent.**—Evans *v.* United States, 153 U. S. 584, 604, 38 L. Ed. 830. See United States *v.* Britton, 107 U. S. 655, 27 L. Ed. 520. See the title BANKS AND BANKING, vol. 3, p. 107, et seq.

Criminal intent generally.—See the title CRIMINAL LAW, vol. 5, p. 60, et seq.

Crimen falsi.—See the title CRIMINAL LAW, vol. 5, p. 66.

Charging felonious intent.—See the title FORGERY AND COUNTERFEITING, ante, p. 380.

97. **Alleging facts.**—Evans *v.* United States, 153 U. S. 584, 606, 38 L. Ed. 830 (per Field, J., dissenting).

"Starkey, in his late treatise on Criminal Pleadings, says: 'Whether particular circumstances constitute an indictable fraud is a question of law; and, therefore, according to a fundamental rule of description in indictments, such circumstances must be set out in order to show that the facts amount to an indictable offense.'" (Per Field, J., dissenting.) Evans *v.* United States, 153 U. S. 584, 607, 38 L. Ed. 830. The indictment, however, was in this case held sufficient by the majority of the court. See ante, "Evidence Need Not Be Set Out," VI, D, 2, b, (3).

See also, generally, the title INDICTMENTS, etc.

FRAUDS, STATUTE OF.

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As to fraudulent and voluntary conveyances, see the title FRAUDULENT AND VOLUNTARY CONVEYANCES. As to the requirement that contracts made with certain executive departments of the United States shall be made in writing, see the title UNITED STATES.

I. Construction of Statute Considered as Incorporated into Act.

Where the statute of frauds has been adopted into our own legislation, the known and settled construction thereof by courts of law has been considered as silently incorporated into the act, or has been received with all the weight of authority.[1]

II. Conflict of Laws.

The Massachusetts statute, which provides that "No action shall be brought to charge any person, upon or by reason of any representation or assurance, made concerning the character, conduct, credit, trade, or dealings of any other person, unless such representation or assurance be made in writing, and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized,"[2] applies to the case of a letter written in New York but intended to

1. **Construction of statute considered as incorporated into act.**—McDonald *v.* Hovey, 110 U. S. 619, 628, 28 L. Ed. 269. See post, "What Agreements Are within the Rule," IV, E, 2. And see the title STATUTES.

2. **Conflict of laws.**—Revised Statutes of 1836, § 3.

operate in Massachusetts.[3]

III. Statute of a State a Rule of Decision in the Federal Courts.

See the title COURTS, vol. 4, p. 1120.

IV. What Contracts Are within the Statute.

A. In General.—The supreme court of the United States has expressed the opinion that the relaxing construction of the statute of frauds under which so many cases have been taken out of its operation, which seem to be within its letter, ought not to be extended further than it has already been carried.[4]

B. Promise to Answer for Debt, Default or Miscarriage of Another.—The statute of frauds forbids the maintenance of an action to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged.[5] It does not apply to promise in respect to debts created at the instance and for the benefit of the promisor.[6] But only to those by which the debt of one party is sought to be charged upon and collected from another.[7] The real character of a promise does not depend altogether upon the form of expression, but largely on the situation of the parties. The question always is, what the parties mutually understood by the language, whether they understood it to be a collateral or a direct promise.[8] Whenever the alleged promisor is an absolute stranger to the transaction, and without interest in it, courts strictly uphold the obligations of the statute,[9] but if there is an original consideration

3. Iasigi *v.* Brown, 17 How. 183, 194, 15 L. Ed. 205. See the title CONFLICT OF LAWS, vol. 3, p. 1020.

4. **Construction of statute.**—"Already have so many cases been taken out of the statute of frauds, which seem to be within its letter, that it may well be doubted, whether the exceptions do not let in many of the mischiefs against which the rule was intended to guard. The best judges in England have been of opinion, that this relaxing construction of the statute ought not to be extended further than it has already been carried, and this court entirely concurs in that opinion." Marshall, C. J., in Grant *v.* Naylor, 4 Cranch 224, 235, 2 L. Ed. 603. See, also, Salmon Falls Mfg. Co. *v.* Goddard, 14 How. 446, 463, 14 L. Ed. 493.

5. **Terms of statute.**—Davis *v.* Patrick, 141 U. S. 479, 487, 35 L. Ed. 826; Bell *v.* Bruen, 1 How. 169, 183, 11 L. Ed. 89.

The statute of frauds of New York is a transcript of the statute of 29 Car. II, c. 3; it declares, "that no action shall be brought to charge a defendant on a special promise for the debt, default or miscarriage of another, unless the agreement or some memorandum or note thereof be in writing, and signed by the party, or by any one by him authorized." De Wolf *v.* Rabaud, 1 Pet. 476, 499, 7 L. Ed. 227.

6. **To what promises the statute applies.**—Davis *v.* Patrick, 141 U. S. 479, 487, 35 L. Ed. 826.

"The statute contemplates the mere promise of one man to be responsible for another, and cannot be interposed as a cover and shield against the actual obligations of the defendant himself." Davis *v.* Patrick, 141 U. S. 479, 488, 35 L. Ed. 826, quoting Browne on the Statute of Frauds, § 165.

7. Davis *v.* Patrick, 141 U. S. 479, 487, 35 L. Ed. 826.

"**The reason of the statute** is obvious, for in the one case if there be any conflict between the parties as to the exact terms of the promise, the courts can see that justice is done by charging against the promisor the reasonable value of that in respect to which the promise was made, while in the other case, and when a third party is the real debtor, and the party alone receiving benefit, it is impossible to solve the conflict of memory or testimony in any manner certain to accomplish justice. There is also a temptation for a promisee, in a case where the real debtor has proved insolvent or unable to pay, to enlarge the scope of the promise, or to torture mere words of encouragement and confidence into an absolute promise; and it is so obviously just that a promisor receiving no benefits should be bound only by the exact terms of his promise, that this statute requiring a memorandum in writing was enacted." Davis *v.* Patrick, 141 U. S. 479, 487, 35 L. Ed. 826.

8. **Understanding of parties test as to character of promise.**—Davis *v.* Patrick, 141 U. S. 479, 489, 35 L. Ed. 826.

9. **Statute applies where promisor is an absolute stranger to transaction.**—Davis *v.* Patrick, 141 U. S. 479, 488, 35 L. Ed. 826.

moving between the promisor and the promisee, the statute does not apply.[10] Damages to the promise constitutes as good a consideration as benefit to the promisor.[11] Though a third party is the original obligor, the primary debtor, yet if the promisor has a personal, immediate and pecuniary interest in the transaction, and is therefore himself a party to be benefited by the performance of the promisee, the reason which underlies and which prompted the statutory provision fails, and the courts will give effect to the promise.[12] Cases in which the guaranty or promise is collateral to the principal contract, but is made at the same time, and becomes an essential ground of the credit given to the principal debtor, are, in general, within the statute.[13] Other cases arise which also fall within the statute, where the collateral agreement is subsequent to the execution of the debt, and was not the inducement to it, on the ground that the subsisting liability was the foundation of the promise on the part of the defendant, without any other direct and separate consideration moving between the parties.[14] An undertaking by a defendant to pay his own debt is not brought within the statute of frauds by the fact that the payment is to be made in a particular way and to a third person, where the promise is made to and the suit brought by, not the third person, but by the person to whom the debt is owed.[15]

An acceptance of a bill of exchange is not a collateral engagement to pay the debt of another; it is an absolute engagement to pay the money to the holder of the bill.[16]

10. **Statute not applicable where there is an original consideration moving between the parties.**—Townsley *v.* Sumrall, 2 Pet. 170, 7 L. Ed. 386.

In cases not absolutely closed by authority, the supreme court has expressed a strong inclination not to extend the operation of the statute of frauds, so as to embrace original and distinct promises, made by different persons, at the same time, upon the same general consideration. Townsley *v.* Sumrall, 2 Pet. 170, 182, 7 L. Ed. 386.

11. Townsley *v.* Sumrall, 2 Pet. 170, 7 L. Ed. 386. See the title CONTRACTS, vol. 4, p. 565.

If A says to B, pay so much money to C, and I will repay it to you, it is an original independent promise; and if the money be paid upon the faith of it, it is an obligatory contract. Townsley *v.* Sumrall, 2 Pet. 170, 7 L. Ed. 386.

Guaranty as to value of corporation stock.—A guaranty to one who has proposed to sell land in exchange for stock of a corporation, that the stock shall be worth par at a certain date, or if it is not it shall be made so by the corporation, is an original independent contract and not a collateral undertaking to pay the debt of another. Hill *v.* Smith, 21 How. 283, 286, 16 L. Ed. 113. Grier, J., who delivered the opinion of the court, said: "Although the term 'guaranty' is usually applied to a collateral undertaking to pay the debt of another yet, when taken in connection with the other terms of the instrument, this is clearly an original independent contract."

A promise contained in a written agreement held to be an original undertaking, on a good and valid consideration moving between the parties to the instrument, and not a special promise for the debt, default or misdoings, of another. Such agreement held therefore not to be within the operation of the statute of frauds. Emerson *v.* Slater, 22 How. 28, 16 L. Ed. 360.

12. **Third party primary debtor, but consideration moving to promisor.**—Davis *v.* Patrick, 141 U. S. 479, 488, 35 L. Ed. 826.

"Whenever the main purpose and object of the promissor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself, or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability." Emerson *v.* Slater, 22 How. 28, 43, 16 L. Ed. 360; Davis *v.* Patrick, 141 U. S. 479, 488, 35 L. Ed. 826.

Where the original promisor was a mining company, and the undertaking was for its benefit, but the performance of the contract enured equally to the benefit of the promisor and the mining company, it was held that it was not within the statute of frauds. Davis *v.* Patrick, 141 U. S. 479, 488, 35 L. Ed. 826.

13. **Collateral promise made at time of principal contract.**—Emerson *v.* Slater, 22 How. 28, 43, 16 L. Ed. 360.

14. **Collateral agreement subsequent to execution of debt.**—Emerson *v.* Slater, 22 How. 28, 43, 16 L. Ed. 360.

15. **Undertaking to pay one's own debt in a particular way and to a third person.**—Townsend *v.* Jennison, 7 How. 706, 723, 12 L. Ed. 880.

16. **Acceptance of bill of exchange not a collateral promise.**—Raborg *v.* Peyton, 2 Wheat. 385, 386, 4 L. Ed. 268. See the title BILLS, NOTES AND CHECKS, vol. 3, p. 285.

If a person undertake verbally to ac-

C. Promises Made in Consideration of Marriage.—In states where the provision of the English statute of frauds touching promises made in consideration of marriage is in force, a verbal promise to settle property upon an intended wife, is void.[17]

D. Grants of and Contracts Relating to Real Estate—1. IN GENERAL.—The statute of frauds requires a contract concerning real estate or some memorandum or note thereof, to be in writing,[18] and signed either by the party to be charged, or by some person lawfully authorized.[19] This provision of the English statute has been incorporated into the legislation of most of the United States, but sometimes in a somewhat changed or modified form.[20] No statute of frauds had been adopted in New Mexico in 1868, but under the laws of the territory, then in force, a transfer of real estate to be valid was required to be in writing.[21] It has never been held that the statute of frauds applies to cases of enurement by way of estoppel and it has been conceded that it does not affect cases of dedication.[22]

cept a bill, in consideration that another will purchase one already drawn, or to be thereafter drawn, and as an inducement to the purchaser to take it, and the bill is purchased upon the credit of such promise, for a sufficient consideration, such promise to accept is binding upon the party; it is an original promise to the purchaser, not merely a promise for the debt of another. Townsley *v.* Sumrall, 2 Pet. 170, 7 L. Ed. 386.

It can make no difference in law, whether the debt for which such a bill of exchange is taken, be a pre-existing debt, or money then paid for the bill. In each case, there is a substantial credit given by the party, to the drawer, upon the bill, and the party parts with his present rights, at the instance of the promisee, whose promise is substantially a new and independent one, and not a mere guarantee of the existing promise of the drawer. Under such circumstances, there is no substantial distinction, whether the bill be then in existence, or be drawn afterwards; in each case, the object of the promise is to induce the party to take the bill upon the credit of the promise. Townsley *v.* Sumrall, 2 Pet. 170, 7 L. Ed. 386.

17. **Promise to settle property upon an intended wife.**—So held as to such a promise made in Georgia where the provision of the English statute of frauds is in force. Lloyd *v.* Fulton, 91 U. S. 479, 23 L. Ed. 363.

18. **Contract concerning real estate must be evidenced by a writing.**—Williams *v.* Morris, 95 U. S. 444, 454, 24 L. Ed. 360; Neale *v.* Neales, 9 Wall. 1, 9, 19 L. Ed. 590.

Parol agreement void.—A parol agreement concerning an interest in lands is void under the statute. Randall *v.* Howard, 2 Black 585, 589, 17 L. Ed. 269; Caldwell *v.* Carrington, 9 Pet. 86, 103, 9 L. Ed. 60.

19. **Writing must be signed.**—Williams *v.* Morris, 95 U. S. 444, 454, 24 L. Ed. 360.

20. **"The existing statutes of Texas,** while they substantially follow the English statute of frauds, so far as to require a conveyance of any 'estate of inheritance or freehold, or for a term of more than one year, in lands and tenements,' as well as 'any contract for the sale of real estate, or the lease thereof for a longer term than one year,' to be in writing, omit to re-enact the additional words of the English statute, in the clause concerning conveyances, 'or any uncertain interest of, in, to or out of' lands or tenements, and, in the other clause, 'or any interest in or concerning them.' Stat. 29 Car. II. c. 3, §§ 1, 4; Texas Rev. Stat. of 1879, arts. 548, 2464; 1 Paschal's Digest, arts. 997, 3875." Warner *v.* Texas, etc., R. Co., 164 U. S. 418, 435, 41 L. Ed. 495.

Under the Oklahoma statute, Laws 1897, ch. 8, § 4, no contract relating to real estate, other than for a lease for not over one year, was valid until reduced to writing and subscribed by the parties thereto. This statute, if taken literally and naturally, goes further than its English prototype. It is not satisfied by a memorandum made with a different intent, but requires an instrument drawn for the purpose of embodying the contract, and, in the case of an agreement to buy and sell, the subscription of both the buyer and seller, not merely that of "the party to be charged therewith." Halsell *v.* Renfrow, 202 U. S. 287, 292, 50 L. Ed. 1032.

21. **Rule in New Mexico in 1868.**—Maxwell Land Grant Co. *v.* Dawson, 151 U. S. 586, 598, 38 L. Ed. 279. The court held that it was unnecessary to express an opinion whether under the civil law as enforced in the territory a transfer of land was valid without a written instrument, as, though no statute of frauds had been adopted in the territory as early as 1868, yet under the compiled laws of 1865, art. 18, ch. 44, §§ 4, 5, all conveyances of real estate were required to be subscribed by the person transferring his title or interest, and to be acknowledged and certified by a public officer.

22. **Enurement by way of estoppel and dedication not affected by statute.**—Dickerson *v.* Colgrove, 100 U. S. 578, 583, 25 L. Ed. 618.

2. Sales—a. *Nature of the Contract.*—Where one party agrees with another to acquire title to a tract of land in his own name upon the best terms possible, and then to convey to the other an interest in the premises, for which the latter promises to pay to the former one-third of the purchase money and one-half of the expenses incurred in obtaining title, the contract is one for the sale of lands within the meaning of the statute of frauds.[23] So a promise to pay a sum of money, as a compensation to the plaintiff, for the injury done by the misconduct of the defendant, in obtaining a patent in his own name, for land which he ought to have patented in the name of the plaintiff, and in preventing the plaintiff from obtaining a patent in his own name, and in consideration of the defendant's having procured the patent to be issued to himself, is a contract for the sale of land, within the statute.[24]

b. *Nature of the Property.*—A conveyance in writing is not necessary to the valid transfer of a mining claim.[25] In Texas land certificates are chattels, and may be sold by parol agreement and delivery, whereby the purchaser acquires a right to locate the certificate and procure a patent in the name of the grantee, but for his own use.[26]

c. *Sheriff's or Marshal's Sales.*—Under the laws of Maryland, a sale by a sheriff or marshal of land seized under a fieri facias, transfers the legal estate to the vendee by operation of law, and does not require a sheriff's or marshal's deed to give it validity; but as such sales are within the statute of frauds, some memorandum in writing of the sale is required to be made.[27]

3. Contracts of Exchange.—A valid exchange of lands cannot be made by parol.[28] Such a contract is as much within the statute of frauds as a contract for their sale.[29]

4. Leases.—Verbal contracts of lease, not exceeding the term of one year, are valid by the laws of Mississippi.[30]

5. Trusts—a. *Express Trusts.*—The declaration of an express trust of real property under the statute of frauds of 29 Charles II, is required to be in writing and cannot be proved by parol testimony.[31] But trusts are not embraced by the statute of frauds of Texas, and may there be proved, as at common law, by parol.[32]

b. *Implied or Resulting Trusts.*—A resulting trust may be established by parol evidence.[33] In some jurisdictions implied or resulting trusts are expressly ex-

23. **Contracts for the sale of land.**—Dunphy *v.* Ryan, 116 U. S. 491, 496, 29 L. Ed. 703.

24. Hughes *v.* Moore, 7 Cranch 176, 3 L. Ed. 307.

25. **Conveyance in writing not necessary to transfer of mining claim.**—Mining Co. *v.* Taylor, 100 U. S. 37, 25 L. Ed. 541. See the title MINES AND MINERALS.

26. **In Texas land certificates may be sold by parol agreement and delivery.**—Miller *v.* Texas, etc., R. Co., 132 U. S. 662, 684, 33 L. Ed. 487. See the title PUBLIC LANDS.

27. **Sheriff's or marshal's sales.**—Remington *v.* Linthicum, 14 Pet. 84, 10 L. Ed. 364. See the title SHERIFFS', CONSTABLES' AND MARSHALS' SALES.

28. **Contract for exchange of lands within the statute.** Clark *v.* Graham, 6 Wheat. 577, 580, 5 L. Ed. 334.

29. Purcell *v.* Miner, 4 Wall. 513, 18 L. Ed. 435.

Parol proof of an intention to convey land in exchange for other land, will not operate to convey any estate or interest in the land. Clark *v.* Graham, 6 Wheat. 577, 580, 5 L. Ed. 334.

30. Code, 1871, § 2892. Bank *v.* Banks, 101 U. S. 240, 246, 25 L. Ed. 850. See the title LANDLORD AND TENANT.

31. **Express trust within statute of frauds.**—Osterman *v.* Baldwin, 6 Wall. 116, 123, 18 L. Ed. 730; Howland *v.* Blake, 97 U. S. 624, 628, 24 L. Ed. 1027.

Real property conveyed in a deed of trust for the payment of debts cannot be retained as a security for the advances or debts subsequently made on the strength of a parol engagement. Williams *v.* Hill, 19 How. 246, 250, 15 L. Ed. 570. See the title MORTGAGES AND DEEDS OF TRUST.

32. **Trusts not embraced by Texas statutes of frauds.**—Osterman *v.* Baldwin, 6 Wall. 116, 18 L. Ed. 730. See the title TRUSTS AND TRUSTEES.

33. **Resulting trust may be established by parol evidence.**—Babcock *v.* Wyman, 19 How. 289, 300, 15 L. Ed. 644.

Parol evidence is admissible to show fraud, and consequently a resulting trust, in a deed absolute on its face. Babcock *v.* Wyman, 19 How. 289, 300, 15 L. Ed. 644.

Such evidence is admissible to show that

cepted from the statute of frauds.[34]

6. Agreements for the Settlement of Boundary Lines.—An agreement, by parol, between two proprietors of adjoining lands, to settle the dividing line, between them by a surveyor, mutually employed, is not within the statute of frauds, as being a contract for the sale of lands or any interest in or concerning them.[35]

E. Agreements Not to Be Performed within One Year—1. Rule Stated.—The English statute of frauds[36] provides that no action shall be brought "upon any agreement which is not to be performed within the space of one year from the making thereof," unless the "agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or by some person by him thereunto lawfully authorized." This provision is in force in the District of Columbia,[37] and has been embodied in the statutes of a number of the states.[38]

2. What Agreements Are within the Rule.—The several states of the Union, in re-enacting this provision in its original words, must be taken to have adopted the known and settled construction which it had received by judicial decisions in England.[39] And the rule established in England by those decisions has ever since been generally recognized in England and America, although it may in a few instances have been warped or misapplied.[40] The statute applies only to contracts which, by their terms, are not to be performed within the year,[41] and not to contracts which may not be performed within that time.[42] In other words, to make a parol contract void it must be apparent that it was the understanding of the parties that it was not to be performed within a year from

a conveyance of property, absolute upon the face of it, was really a mortgage or deed of trust. Babcock *v.* Wyman, 19 How. 289, 15 L. Ed. 644.

Parol evidence, taken in conjunction with corroborating circumstances, held to show that a deed was not intended to be absolute. Babcock *v.* Wyman, 19 How. 289, 15 L. Ed. 644. See the titles MORTGAGES AND DEEDS OF TRUST; TRUSTS AND TRUSTEES.

Where an estate was purchased in the name of one person, and the consideration came from another, a resulting trust may be established by parol. Babcock *v.* Wyman, 19 How. 289, 300, 15 L. Ed. 644. See the title TRUSTS AND TRUSTEES.

34. District of Columbia.—An implied or resulting trust is expressly excepted from the provisions of the statute of frauds of the District of Columbia, Comp. Stat. D. C. 231, §§ 8, 9, and, therefore, the nature of such a trust may be shown by parol evidence. Smithsonian Institution *v.* Meech, 169 U. S. 398, 407, 42 L. Ed. 793.

Montana.—The trust which results to one who pays the consideration for an estate, where the title is taken in the name of another, is not within the statute of frauds of Montana, Compiled Statutes, § 217, and parol evidence is admissible to show whose money is actually paid for the property. Ducie *v.* Ford, 138 U. S. 587, 592, 34 L. Ed. 1091.

But to take it out of the operation of the statute the trust must have arisen at the time the purchase was made, and the whole consideration must have been paid or secured at the time of or prior to such purchase. Ducie *v.* Ford, 138 U. S. 587, 592, 34 L. Ed. 1091. See, also, Olcott *v.* Bynum, 17 Wall. 44, 59, 21 L. Ed. 570.

35. Agreement for the settlement of a boundary line.—Boyd *v.* Graves, 4 Wheat. 513, 517, 4 L. Ed. 628.

36. 29 Car. II, c. 3, § 4.

37. Packet Co. *v.* Sickles, 5 Wall. 580, 18 L. Ed. 550.

38. It has been embodied in the Texas statute of frauds. Texas Stat., January 18, 1840; 1 Paschal's Digest (4th Ed.), art. 3875; Rev. Stat., 1879, art. 2464. Warner *v.* Texas, etc., R. Co., 164 U. S. 418, 420, 41 L. Ed. 495.

39. Construction of English decisions adopted in re-enactments.—Warner *v.* Texas, etc., R. Co., 164 U. S. 418, 423, 41 L. Ed. 495.

40. Warner *v.* Texas, etc., R. Co., 164 U. S. 418, 423, 41 L. Ed. 495. See ante, "Construction of Statute Considered as Incorporated into Act," I. And see the title STATUTES.

41. Contracts not to be performed within one year within statute.—Walker *v.* Johnson, 96 U. S. 424, 427, 24 L. Ed. 834; McPherson *v.* Cox, 96 U. S. 404, 416, 24 L. Ed. 746.

"The statute applies to contracts not wholly to be performed within the year." Packet Co. *v.* Sickles, 5 Wall. 580, 595, 18 L. Ed. 550.

42. Statute not applicable though contract may not be performed within one year.—Walker *v.* Johnson, 96 U. S. 424, 427, 24 L. Ed. 834; McPherson *v.* Cox, 96 U. S. 404, 416, 24 L. Ed. 746.

the time it was made.[43] This must appear affirmatively.[44] If performance by the promisor can be required by the promisee within a year, the contract is valid.[45]

F. Agreement for Sale and Assignment of Right to Obtain a Patent.—An oral agreement for the sale and assignment of the right to obtain a patent for an invention is not within the statute of frauds.[46]

V. Effect of Statute upon Courts of Equity.

Courts of equity are bound, as much as courts of law, by the provisions of the statute of frauds;[47] and therefore they are not at liberty to disregard them.[48] They do, however, interfere in some cases within the reach of the statute. But they do so, not upon any notion of any right to dispense with it, but for the purpose of administering equities subservient to its true objects, or collateral to it, and independent of it.[49] A case of such interference is when a court of equity enforces the specific performance of a contract within the statutes, where the

43. McPherson *v.* Cox, 96 U. S. 404, 416, 24 L. Ed. 746; Warner *v.* Texas, etc., R. Co., 164 U. S. 418, 431, 41 L. Ed. 495.

"The question is not what the probable, or expected, or actual performance of the contract was; but whether the contract, according to the reasonable interpretation of its terms, required that it should not be performed within the year." Warner *v.* Texas, etc., R. Co., 164 U. S. 418, 434, 41 L. Ed. 495.

An agreement which, according to the intention of the parties, as shown by the terms of the contract, may be fully performed within a year from the time it was made, is not within the statute, although the time of its performance is uncertain, and may probably extend, and be expected by the parties to extend, and does in fact extend, beyond the year. Warner *v.* Texas, etc., R. Co., 164 U. S. 418, 422, 41 L. Ed. 495.

Contract for erection and maintenance of railroad switch.—An agreement between a railroad company and a mill owner that if the latter will furnish the ties and grade the ground for a switch at the place where he proposes to erect a sawmill, the railroad company will put down the iron rails and maintain the switch for his benefit for shipping purposes as long as he needs it, is not within the statute. Warner *v.* Texas, etc., R. Co., 164 U. S. 418, 433, 41 L. Ed. 495.

Contract to pay attorney when land recovered shall be sold.—A contract to pay to an attorney at law for his services in suits concerning land, if it be recovered, a specific sum of money out of the proceeds, when it shall be sold by the client, is not void under the statute of frauds because not in writing, if it may be performed within a year. McPherson *v.* Cox, 96 U. S. 404, 24 L. Ed. 746.

Performance to run through a term of years.—In Packet Co. *v.* Sickles, 5 Wall. 580, 18 L. Ed. 550, it was held that a contract where performance is to run through a term of years, but which, by its tenor, may be defeated at any time before the expiration of the term is within the statute, and this only was applied to a contract to pay for a right to use an invention on a certain boat, so much a year during the term of a patent having twelve years yet to run, "if the said boat should so long last." But in the later case of Warner *v.* Texas, etc., R. Co., 164 U. S. 418, 430, 41 L. Ed. 495, doubt was cast upon the holding in Packet Co. *v.* Sickles.

44. That performance was not to be within a year must appear affirmatively.—Walker *v.* Johnson, 96 U. S. 424, 427, 24 L. Ed. 834.

So held in regard to parol contract for the delivery of materials. Walker *v.* Johnson, 96 U. S. 424, 427, 24 L. Ed. 834.

45. Contract valid if performance can be required within a year.—Walker *v.* Johnson, 96 U. S. 424, 24 L. Ed. 834.

46. Agreement for sale of right to obtain patent not within statute.—Dalzell *v.* Dueber, etc., Mfg. Co., 149 U. S. 315, 321, 37 L. Ed. 749.

47. Statute binding upon courts of equity.—Purcell *v.* Miner, 4 Wall. 513, 517, 18 L. Ed. 435; Whitney *v.* Hay, 181 U. S. 77, 89, 45 L. Ed. 758.

48. Whitney *v.* Hay, 181 U. S. 77, 89, 45 L. Ed. 758.

Under the statute of frauds of Maryland specific performance of a contract for the sale of lands will not be decreed, unless there is a note or memorandum in writing of the agreement sufficient to maintain an action at law. Barry *v.* Coombe, 1 Pet. 640, 650, 7 L. Ed. 295.

As to the sufficiency of the writing, see post, "Sufficiency of the Writing," VII, B, 2.

49. Ground of equity's interference in cases within statute.—Whitney *v.* Hay, 181 U. S. 77, 89, 45 L. Ed. 758.

The statute of frauds was designed to prevent frauds, and courts of equity will not permit it to be used to accomplish that which it was designed to prevent. Smithsonian Institution *v.* Meech, 169 U. S. 398, 408, 42 L. Ed. 793.

Therefore, to prevent the statute from becoming an instrument of fraud, they have in many instances relaxed its provisions. Dunphy *v.* Ryan, 116 U. S. 491, 498, 29 L. Ed. 703; Purcell *v.* Miner, 4 Wall. 513, 517, 18 L. Ed. 435.

parol agreement has been partly carried into execution.[50]

VI. When the Statute Does Not Apply.

A. Effect of Full Performance.—It is well settled by the authorities that the defense of the statute of frauds cannot be set up against an executed contract.[51] Where an agreement within the purview of the statute is actually executed by both parties it is taken out of the operation of the statute.[52] Whether or not there has been such an execution is a question for the jury.[53] The statute cannot be set up as a defense to the performance of one formal item of an agreement, where the contract has been fully performed by the party asking such performance, and, except as to such remaining formal item, by the other party also.[54]

B. Effect of Part Performance—1. In General.—Part performance of a parol contract is often admitted in equity as an answer to the statute of frauds,[55] and as a basis for the enforcement of the specific performance of the contract.[56] The general principle to be extracted from the authorities is that if the plaintiff, with the knowledge and consent of the promisor, does acts pursuant to and in obvious reliance upon a verbal agreement, which so change the relations of the parties as to render a restoration of their former condition impracticable, it is a virtual fraud upon the part of the promisor to set up the statute in defense, and thus to receive to himself the benefit of the acts done by the plaintiff, while the latter is left to the chance of a suit at law for the reimbursement of his outlays, or to an action upon a quantum meruit for the value of his services.[57] But acts

50. Specific performance of parol agreement partly performed.—Whitney *v.* Hay, 181 U. S. 77, 89, 45 L. Ed. 758. See post, "Effect of Part Performance," VI, B.

51. Defense of statute cannot be set up against an executed contract.—Bibb *v.* Allen, 149 U. S. 481, 497, 37 L. Ed. 817.

"This rule proceeds and rests upon the principle that there is 'no rule of law which prevents a party from performing a promise which could not be legally enforced, or which will permit a party, morally but not legally bound to do a certain act or thing, upon the act or thing being done, to recall it to the prejudice of the promisee, on the plea that the promise, while still executory, could not by reason of some technical rule of law have been enforced by action.'" Bibb *v.* Allen, 149 U. S. 481, 497, 37 L. Ed. 817, quoting Newman *v.* Nellis, 97 N. Y. 285, 291.

Where in pursuance of a parol promise to convey land the land by the procurement of the promisee is conveyed to his wife for the avowed purpose of defeating his deed of the land to a third person, and this is done with the knowledge of the wife, neither the promisee nor his wife can set up the statute of frauds as a defense to an action by such third person to compel a conveyance to him. Moore *v.* Crawford, 130 U. S. 122, 32 L. Ed. 878. See the titles ESTOPPEL, vol. 5, p. 913; FRAUDULENT AND VOLUNTARY CONVEYANCES; TRUSTS AND TRUSTEES.

52. Execution of both parties takes agreement out of operation of statute.—Weightman *v.* Caldwell, 4 Wheat. 85, 88, 4 L. Ed. 520.

53. Fact of execution a question for jury.—Weightman *v.* Caldwell, 4 Wheat. 85, 88, 4 L. Ed. 520.

E. B. C., having an interest in a cargo at sea, agreed with J. W. for the sale of it, and J. W. signed the following agreement in writing: "J. W. agrees to purchase the share of E. B. C. in the cargo of the ship Aristides, W. P. Z., supercargo, say at $2,522.85, at fifteen per cent. advance on said amount, payable at five months from this date, and to give a note or notes for the same, with an approved indorser." In compliance with this agreement, J. W. gave his notes for the sum mentioned, and in an action upon the notes, the want of a legal consideration, under the statute of frauds, being set up as a defense on the ground of the defect of mutuality in the written contract, the court below left it to the jury, to infer from the evidence, an actual performance of the agreement; the jury found a verdict for the plaintiff, and the court below rendered judgment thereon, and that judgment was affirmed by the supreme court. Weightman *v.* Caldwell, 4 Wheat. 85, 4 L. Ed. 520.

54. Statute no defense to performance of one formal item of agreement.—Swain *v.* Seamens, 9 Wall. 254, 19 L. Ed. 554.

55. Part performance admitted in equity as answer to statute.—Swain *v.* Seamens, 9 Wall. 254, 273, 19 L. Ed. 554.

56. Part performance basis for specific performance.—Whitney *v.* Hay, 181 U. S. 77, 89, 45 L. Ed. 758. See the title SPECIFIC PERFORMANCE.

57. Prevention of fraud bases of doctrine of part performance.—Townsend *v.* Vanderwerker, 160 U. S. 171, 184, 40 L. Ed. 383; Whitney *v.* Hay, 181 U. S. 77, 90, 45

of part performance which will take a case out of the statute must be referable solely to the contract,[58] and must be consistent with it,[59] and done for the purpose of carrying it into execution, and with the consent or knowledge of the other party.[60] Nothing is part performance for the purpose of taking a contract out of the statute which is only ancillary or preparatory; it must be a direct act which is intended to be a substantial part performance of an obligation created by the contract as proved; and it must be an act which would not have been done but for the contract; and it must be directly in prejudice of the party doing the act, who must himself be the party calling for the completion of the contract.[61]

2. Part Performance of Contract Relating to Lands—a. *In General.*—Courts of equity have relaxed the rigidity of the rule which requires a contract concerning real estate to be in writing and hold that a part performance removes the bar of the statute,[62] on the ground that it is a fraud for the promisor to insist on the absence of a written instrument, when he had permitted the contract to be partly executed.[63] While acts done prior to the contract or preparatory thereto, such as delivering abstracts of titles, measuring the land, drawing up deeds, etc., are not regarded as sufficient part performance, it is otherwise with such acts as taking open possession of the land sold, or making permanent or valuable improvements thereon, or doing other acts in relation to the land manifestly inconsistent with any other theory than that of carrying out the parol undertaking.[64]

b. *Particular Contracts*—(1) *Sales*—(a) *In General.*—Specific performance of a parol contract for the sale of lands will not be decreed, unless a sufficient part performance is made out to show that fraud and injustice would be done if the contract was held to be inoperative.[65]

L. Ed. 758; Riggles *v.* Erney, 154 U. S. 244, 254, 38 L. Ed. 976; Williams *v.* Morris, 95 U. S. 444, 457, 24 L. Ed. 360.

"The distinct ground upon which courts of equity interfere in cases of this sort is, that otherwise one party would be enabled to practice a fraud upon the other; and it could never be the intention of the statute to enable any party to commit such a fraud with impunity. Indeed, fraud in all cases constitutes an answer to the most solemn acts and conveyances, and the objects of the statute are promoted, instead of being obstructed, by such a jurisdiction for discovery and relief. And where one party has executed his part of the agreement, in the confidence that the other party would do the same, it is obvious, if the latter should refuse, it would be a fraud upon the former to suffer this refusal to work to his prejudice." 1 Story's Eq. Juris., §§ 754, 759, quoted in Whitney *v.* Hay, 181 U. S. 77, 89, 45 L. Ed. 758.

58. Character of acts that will take a case out of statute.—Winslow *v.* Baltimore, etc., R. Co., 188 U. S. 646, 658, 47 L. Ed. 635; Williams *v.* Morris, 95 U. S. 444, 457, 24 L. Ed. 360; Riggles *v.* Erney, 154 U. S. 244, 254, 38 L. Ed. 976.

59. Williams *v.* Morris, 95 U. S. 444, 451, 24 L. Ed. 360.

60. Riggles *v.* Erney, 154 U. S. 244, 254, 38 L. Ed. 976.

61. Williams *v.* Morris, 95 U. S. 444, 457, 24 L. Ed. 360.

62. Part performance of contracts concerning real estate.—Neale *v.* Neales, 9 Wall. 1, 9, 19 L. Ed. 590; Brown *v.* Sutton, 129 U. S. 238, 248, 32 L. Ed. 664.

63. Neale *v.* Neales, 9 Wall. 1, 9, 19 L. Ed. 590.

"Although in a suit to enforce the specific performance of a parol agreement in reference to land the defendant cannot be directly charged upon the alleged contract itself, he may be held—the evidence clearly showing part performance, in substantial particulars, of such agreement—to do what justice requires to be done under the equities arising from acts done after the making of the agreement and in execution of its provisions. To refuse under some circumstances to compel the full execution of an agreement of that kind which has been partly performed would make the statute an instrument of fraud, and that a court of equity will not permit." Whitney *v.* Hay, 181 U. S. 77, 91, 45 L. Ed. 758.

"When the statute says that no action is to be brought to charge any person upon a contract concerning land, it has in view the simple case in which he is charged upon the contract only, and not that in which there are equities resulting from res gestæ subsequent to and arising out of the contract." Whitney *v.* Hay, 181 U. S. 77, 91, 45 L. Ed. 758.

64. Riggles *v.* Erney, 154 U. S. 244, 254, 38 L. Ed. 976. See post, "Payment of Consideration and Entry into Possession," VI, B, 2, b, (1), (c); "Possession and Improvements," VI, B, 2, b, (1), (d).

65. Sufficiency of part performance to warrant specific performance.—Williams *v.* Morris, 95 U. S. 444, 457, 24 L. Ed. 360.

A party seeking to enforce a specific

(b) *Payment of Consideration in Money.*—A mere payment of the consideration in money is insufficient to remove the bar of the statute.[66]

(c) *Payment of Consideration and Entry into Possession.*—But payment of the consideration in money, accompanied by an entry into possession under the contract, is such a part performance as will remove the bar of the statute.[67]

(d) *Possession and Improvements.*—So the entry into possession of the land, and the making of valuable improvements thereon, constitutes such part performance as will take the case out of the operation of the statute.[68]

(2) *Contracts of Exchange.*—A party seeking to enforce a specific execution of a parol contract for the exchange of lands must bring himself within the same conditions as he would if the contract was for their sale, before he can invoke the aid of a court of equity.[69] Complete performance by one of the parties will prevent the operation of the statute.[70] So possession taken by the parties to the contract in pursuance of the contract, and improvements made upon the respective parcels, constitute a part performance sufficient to take the contract

execution of a parol contract for the sale of lands must make full, satisfactory, and indubitable proof: First, of the contract, and of its terms; a proof which must show a contract leaving no jus deliberandi, or locus pœnitentiæ; and which cannot be made out by mere hearsay, or by evidence of the declarations of a party to mere strangers to the transactions, in chance conversation. Second, that the consideration has been paid or tendered. And even the payment of the price in part or in whole, will not, of itself, be sufficient for the interference of a court of equity, if the party have a sufficient remedy at law to recover back the money. Third, that there has been such a part performance of the contract that its rescission would be a fraud on the other party; and could not be fully compensated by recovery of damages in a court of law. Fourth, that delivery of possession has been made in pursuance of the contract, and acquiesced in by the other party; a requisition which is not satisfied by proof of a scrambling and litigious possession. Purcell *v.* Miner, 4 Wall. 513, 18 L. Ed. 435. See post, "Payment of Consideration in Money," VI, B, 2, b, (1), (b); "Payment of Consideration and Entry into Possession," VI, B, 2, b, (1), (c); "Possession and Improvements," VI, B, 2, b, (1), (d).

Facts held to constitute such part performance of an oral agreement to convey certain real estate to the promisee, in consideration of her taking care of the promisor during the remainder of his life, as to take the case out of the statute of frauds. Brown *v.* Sutton, 129 U. S. 238, 32 L. Ed. 664. See, also, Whitney *v.* Hay, 181 U. S. 77, 45 L. Ed. 758.

66. Bar of statute not removed by payment of consideration in money.—Townsend *v.* Vanderwerker, 160 U. S. 171, 183, 40 L. Ed. 383.

Under the Oklahoma statute, act of 1897, ch. 8, § 7, a part payment of the purchase price of real estate to one who has no authority to convey or to receive the purchase money, will not estop the vendor from setting up the statute of frauds as a defense to an action for the specific performance of the agreement to convey. Halsell *v.* Renfrow, 202 U. S. 287, 295, 50 L. Ed. 1032.

67. Payment of consideration and entry into possession.—Townsend *v.* Vanderwerker, 160 U. S. 171, 183, 40 L. Ed. 383.

68. Possession and improvements.—Townsend *v.* Vanderwerker, 160 U. S. 171, 184, 40 L. Ed. 383.

Improvements made with knowledge that title is in another.—"A court of equity will not relieve an individual from the operation of the statute * * * and impose an equitable lien upon land in favor of one who makes improvements thereon, knowing that the title is in another, especially where the money is expended under an express understanding with reference thereto had with the owner, but will leave the party to the remedies if any, which a court of law provides." Washington Market Co. *v.* District of Columbia, 172 U. S. 361, 371, 43 L. Ed. 478.

69. Sufficiency of part performance to warrant specific performance.—Purcell *v.* Miner, 4 Wall. 513, 18 L. Ed. 435. See ante, "Sales," VI, B, 2, b, (1).

70. Complete execution by one party.—C. agreed with W. for an exchange of lands which C. owned in Virginia for certain military lands in Kentucky. W. took possession of the lands in Virginia and sold a part of them. It was held that the complete execution of the contract by C. by conveying to W. the lands he had agreed to give him in exchange prevented the operation of the statute of frauds. Caldwell *v.* Carrington, 9 Pet. 86, 9 L. Ed. 60.

Full performance by one party and substantial part performance by other.—Where a verbal contract for the exchange of lands has been fully performed by one of the parties, and there has been substantial part performance by the other, it is taken out of the operation of the statute of frauds. Bigelow *v.* Armes, 108 U. S. 10, 12, 27 L. Ed. 631.

out of the operation of the statute and authorize a decree for its full performance.[71]

(3) *Gift Accompanied by Possession and Improvements Made by Donee.*—See the title GIFTS.

(4) *Agreement of Heirs to Sell Estate and Divide Proceeds.*—Where the heirs of an estate agree to sell it and divide the proceeds, a sale and division of the proceeds of part of the estate, will take the agreement out of the statute.[72]

(5) *Agreement to Purchase Lands on Joint Account.*—Surrender of possession of mining lands to one who agrees to purchase the lands on joint account, does not constitute a sufficient part of the performance of the contract to take it out of the statute of frauds, unless the surrender of possession be made in pursuance of the contract, and be referable to it, and not merely the continuance of a former possession claimed under a different right or title.[73]

c. *Effect of Fraud.*—The breach of a parol promise or trust as to an interest in land does not constitute such fraud as will take a case out of the statute of frauds.[74] But when the promise has been performed and a conveyance made, the grantee cannot set up the statute as a defense to an action by one in whose favor the land is charged with a trust.[75]

VII. Requirements of the Statute.

A. In General.—To render valid a contract within the operation of the statute of frauds, the acts or conditions which the statute makes essential to its validity must be performed.[76]

B. The Writing—1. WHAT THE TERM WRITING INCLUDES.—The great increase in the use of printing for all forms of instruments, such as deeds, bonds, tickets, tokens for the payment of goods, etc., have seemed to demand that where, either by the common law or by statute, such instruments are required to be in writing, the term "writing" should be held to include printing as well as script.[77]

2. SUFFICIENCY OF THE WRITING—a. *In General.*—Unless the essential terms of an agreement which is within the statute, can be ascertained from the writing itself, or by reference in it to something else, the writing is not a compliance with the statute;[78] and, if the agreement be thus defective, it cannot

71. **Possession and improvements.**—Union Pacific R. Co. *v.* McAlpine, 129 U. S. 305, 312, 32 L. Ed. 673.

72. **Sale and division of proceeds of part of the estate.**—Riggles *v.* Erney, 154 U. S. 244, 253, 38 L. Ed. 976.

73. **Surrender of possession to one who agrees to purchase on joint account.**—Ducie *v.* Ford, 138 U. S. 587, 594, 34 L. Ed. 1091.

Plaintiffs and defendant located and claimed a load, and plaintiffs were preparing to contest defendant's application for a patent when a bargain was made between them orally, by which it was agreed that plaintiffs should relinquish such possession as they had to defendant in consideration of the latter agreeing to purchase the land upon their joint account. It was held that plaintiff's withdrawal in favor of the defendant and their refraining to prosecute an adverse claim which was never filed, was insufficient to take the case of the statute of frauds. Ducie *v.* Ford, 138 U. S. 587, 594, 34 L. Ed. 1091.

74. **Breach of parol promise or trust.**—Moore *v.* Crawford, 130 U. S. 122, 130, 32 L. Ed. 878.

The mere breach of a verbal promise for the purchase of lands does not constitute fraud, and will not justify the interference of a court of equity. "The party who so refuses stands upon the law and has a right to refuse." Dunphy *v.* Ryan, 116 U. S. 491, 498, 29 L. Ed. 703.

75. **After conveyance, grantee cannot set up statute against one in whose favor land is charged with a trust.**—Moore *v.* Crawford, 130 U. S. 122, 130, 32 L. Ed 878. See ante, "Effect of Full Performance," VI, A. And see the titles FRAUDULENT AND VOLUNTARY CONVEYANCES; TRUSTS AND TRUSTEES.

76. **Essential conditions of statute must be performed.**—Mahan *v.* United States 16 Wall. 143, 21 L. Ed. 307.

77. Benson *v.* McMahon, 127 U. S. 457 468, 32 L. Ed. 234.

78. **Writing must contain essential terms of agreement.**—Williams *v.* Morris 95 U. S. 444, 456, 24 L. Ed. 360. See post "Contracts Evidenced by Two or More Writings," VII, B, 2, b.

So held in regard to a sale of real estate. Williams *v.* Morris, 95 U. S. 444 456, 24 L. Ed. 360.

An undertaking to answer for the debt or default of another must, to save it from the operation of the statute of frauds, be

be supplied by parol proof.[79] Nor, according to the better opinion, can a written contract falling within the statute be varied by any subsequent agreement of the parties, unless such new agreement is also in writing,[80] and this rule prevails in equity as well as at law.[81] But the form of the writing is not regarded,[82] nor the place of signature, provided it be in the handwriting of the party, or his agent,[83] and furnish evidence of a complete and practicable agreement.[84] And parol evidence is admissible to explain latent ambiguities,[85] and to apply the instrument to the subject matter.[86]

b. *Contracts Evidenced by Two or More Writings.*—The principle is well established that a complete contract binding under the statute of frauds may be gathered from letters, writings and telegrams between the parties relating to the subject matter of the contract, and so connected with each other that they may be fairly said to constitute one paper relating to the contract.[87] If the return to a fieri facias, written on the writ, is so incomplete as not to constitute a sufficient memorandum of a marshal's sale within the statute of frauds, it cannot be made complete and sufficient by a reference to the private memorandum book

in writing, and wholly so. Clarke *v.* Russell, 3 Dall. 415, 424, 1 L. Ed. 660.

79. Defective agreement cannot be supplied by parol proof.—Williams *v.* Morris, 95 U. S. 444, 456, 24 L. Ed. 360.

To permit a defective agreement to be supplied by parol proof would at once introduce all the mischiefs which the statute was intended to prevent. Williams *v.* Morris, 95 U. S. 444, 456, 24 L. Ed. 360.

80. Written contract cannot be varied by subsequent parol agreement.—Swain *v.* Seamens, 9 Wall. 254, 272, 19 L. Ed. 554; Emerson *v.* Slater, 22 How. 28, 42, 16 L. Ed. 360. See post, "Contracts Evidenced by Two or More Writings," VII, B, 2, b.

An undertaking to answer for the debt or default of another, cannot be added to or varied by parol testimony. Clarke *v.* Russell, 3 Dall. 415, 424, 1 L. Ed. 660; Bell *v.* Bruen, 1 How. 169, 183, 11 L. Ed. 89.

Nor can it be so far explained by parol testimony as to affect its import, with regard to the supposed undertaking. Clarke *v.* Russell, 3 Dall. 415, 424, 1 L. Ed. 660.

Although a written agreement between persons not parties to the suit may, as a general rule, be contradicted or explained by oral testimony, this does not apply to an attempt to make good by parol evidence a contract which the statute requires to be made in writing. Stitt *v.* Huidekopers, 17 Wall. 384, 21 L. Ed. 644.

81. Rule prevails in equity.—Swain *v.* Seamens, 9 Wall. 254, 272, 19 L. Ed. 554. See ante, "Effect of Statute upon Courts of Equity," V.

82. Form of writing immaterial.—Barry *v.* Coombe, 1 Pet. 640, 650, 7 L. Ed. 295.

As the statute of frauds does not prescribe the form of a binding agreement, it is sufficient that the natural parts of it appear either expressed, or clearly to be implied. Bell *v.* Bruen, 1 How. 169, 183, 11 L. Ed. 89.

But no trust in relation to real property could be established under the statute of frauds of Iowa in force in 1875, except by an instrument in writing executed in the same manner as a deed of conveyance. Allen *v.* Withrow, 110 U. S. 119, 129, 28 L. Ed. 90.

83. Place of signature immaterial.—Barry *v.* Coombe, 1 Pet. 640, 650, 7 L. Ed. 295. See post, "The Signature," VII, B, 2, h.

84. Writing must furnish evidence of a complete and practicable agreement.—Barry *v.* Coombe, 1 Pet. 640, 650, 7 L. Ed. 295; Williams *v.* Morris, 95 U. S. 444, 456, 24 L. Ed. 360.

85. Parol evidence admissible to explain latent ambiguities.—Williams *v.* Morris, 95 U. S. 444, 456, 24 L. Ed. 360.

86. Parol evidence admissible to apply instrument to subject matter.—Williams *v.* Morris, 95 U. S. 444, 456, 24 L. Ed. 360.

"Correspondence and other evidence may be used to ascertain the true import and application of the agreement; by the aid of which extrinsic evidence, the proper construction may be made." Bell *v.* Bruen, 1 How. 169, 183, 11 L. Ed. 89; Lee *v.* Dick, 10 Pet. 482, 493, 9 L. Ed. 503; Douglass *v.* Reynolds, 7 Pet. 113, 8 L. Ed. 626. See post, "Contracts Evidenced by Two or More Writings," VII, B, 2, b.

87. Contracts evidenced by two or more writings.—Bibb *v.* Allen, 149 U. S. 481, 496, 37 L. Ed. 817; Ryan *v.* United States, 136 U. S. 68, 83, 34 L. Ed. 447; Salmon Falls Mfg. Co. *v.* Goddard, 14 How. 446, 456, 14 L. Ed. 493.

Thus bought and sold notes, when they correspond and state all the terms of the bargain, are complete and sufficient evidence to satisfy the statute; even though there be no entry in the broker's book, or, what is equivalent, only an unsigned entry. Bibb *v.* Allen, 149 U. S. 481, 496, 37 L. Ed. 817, quoting Benjamin on Sales (Am. Ed., § 296).

Such is the rule in New York. Bibb *v.* Allen, 149 U. S. 481, 496, 37 L. Ed. 817.

Ship contracts for the sale of cotton in the form prescribed by the rules and regulations of the New York Cotton Exchange, constitute bought and sold notes, and when taken together, as they should be, constitute a sufficient memorandum in

kept by the marshal of his sales, as that is not the kind of written evidence that the statute requires.[88]

c. *Designation of Parties.*—The writing to be sufficient under the statute must designate the parties to the contract,[89] and it will not support an action by parties not mentioned in it.[90] But where the contract is made by an agent it is not necessary that the writing should disclose the principal.[91]

d. *Subject Matter.*—**To take a contract for the sale of lands** out of the statute the memorandum must contain something of an unambiguous character to enable the court to determine what real estate is the subject of the purchase.[92] It must describe or give some means of identifying the land.[93] The terms may be abstract and of a general nature, but they must be sufficient to fit and comprehend the property which is the subject of the transaction; so that with the assistance of external evidence,[94] the description, without being contradicted or

writing of the contract between the brokers or their principal and the purchasers of the cotton, to meet the requirements of the statute of frauds. Bibb *v.* Allen, 149 U. S. 481, 495, 37 L. Ed. 817.

Writings constituting sufficient memorandum of agreement for sale of lands.—Subsequent to a parol agreement for the sale of lands the vendor executed to the vendee a deed which was not acknowledged so as to take effect as a conveyance, nor accepted as such by the vendee, but which contained a full description of the land by metes and bounds. The deed was sent to the vendee's agent by the vendor's agent in a letter demanding payment of part of the price in money, and of the rest in notes, in the terms of the original memorandum. The vendee's agent replied that he had received that letter; and subsequently wrote another letter, inclosing a form of deed substantially like the first one, but with a sufficient certificate of acknowledgment, requesting that this deed might be executed instead of the other, and promising, on receipt of it, to "forward money, notes and old deed." It was held that the letter of the vendee's agent, read in connection with the other writings which had passed between the parties, constituted a sufficient memorandum to take the case out of the statute of frauds. Bayne *v.* Wiggins, 139 U. S. 210, 214, 35 L. Ed. 144.

Printed bill of parcels subsequently recognized by letter.—"A printed bill or parcels, delivered by the seller, may be a sufficient memorandum within the statute to bind him, especially, if subsequently recognized by a letter to the buyer." Salmon Falls Mfg. Co. *v.* Goddard, 14 How. 446, 456, 14 L. Ed 493.

Ambiguity or abbreviations in memorandum of sale may be explained by printed bill of parcels.—A printed bill of parcels made out and delivered by a seller of goods in the course of the fulfillment of his contract, which is evidenced by a memorandum in writing, if acquiesced in by the buyer, and the goods ordered to be delivered after its receipt, may be referred to for the purpose of explaining any ambiguity or abbreviations in the memorandum. Salmon Falls Mfg. Co. *v.* Goddard, 14 How. 446, 456, 14 L. Ed. 493.

As to collateral papers adduced to supply the defect of signature, see post, "The Signature," VII, B, 2, h.

88. Insufficient memorandum of marshal's sale.—Remington *v.* Linthicum, 14 Pet. 84, 93, 10 L. Ed. 364.

89. The return to a fieri facias, written on the writ, to constitute a sufficient memorandum of a marshal's sale within the statute, must contain the name of the purchaser. Remington *v.* Linthicum, 14 Pet. 84, 93, 10 L. Ed. 364.

In order to satisfy the requirements of the statute of frauds of New Hampshire, the memorandum in writing of an agreement for the sale of lands which is signed by the party to be charged, must not only contain a sufficient description of them, together with a statement of the price to be paid therefor, but in that memorandum, or in some paper signed by that party, the other contracting party must be so designated that he can be identified without parol proof. Grafton *v.* Cummings, 99 U. S. 100, 25 L. Ed. 366.

90. A letter of credit addressed, by mistake, to John and Joseph, and delivered to John and Jeremiah, will not support an action by John and Jeremiah for goods furnished by them to the bearer, upon the faith of the letter of credit. It is not a written contract between the plaintiffs and the defendant, and parol proof cannot be admitted to make it such. It is not a case of ambiguity, or of fraud, or of mistake on the part of the plaintiffs. Grant *v.* Naylor, 4 Cranch 224, 2 L. Ed. 603.

91. Writing need not disclose principal.—Ford *v.* Williams, 21 How. 287, 289, 16 L. Ed. 36.

92. Designation of land in contract for sale of real estate.—Williams *v.* Morris, 95 U. S. 444, 455, 24 L. Ed. 360.

93. Bayne *v.* Wiggins, 139 U. S. 210, 214, 35 L. Ed. 144.

94. In a contract or memorandum of the sale of real estate it is not essential that the description of the property have such particulars and tokens of identification as to render a resort to extrinsic aid entirely needless when the writing comes to be applied to the subject matter. Ryan

added to, can be connected with and applied to the very property intended and to the exclusion of all other property.[95] The circumstance that in any case a conflict arises in the outside evidence cannot be allowed the force of proof that the written description is in itself insufficient to satisfy the statute.[96]

e. *Consideration.*—In an early English case[97] it was held that it is necessary, to escape from the statute of frauds, that the agreement shall contain the consideration for the promise, as well as the promise itself;[98] and it has since been determined that if it contains it, it is wholly immaterial, whether it be stated in express terms, or by necessary implication.[99] This English case has, from its origin, encountered many difficulties, and been matter of serious observation, both at the bar, and on the bench, in England and America. After many doubts, it seems, at last, in England, to have settled down into an approved authority.[1] It has not, however, received a uniform recognition in America; although in several of the states, and particularly in New York,[2] it has, to a limited extent, been adopted into its jurisprudence, as a sound construction of the statute.[3] On the other hand, in Massachusetts, its authority has been directly overruled.[4] The reasoning of the judges in construing the statute of frauds in the cases in which they have decided that the consideration ought to be in writing, turns upon the word "agreement," of which the consideration forms an integral part. This reasoning does not apply to the Virginia statute in which the word "promise" is introduced.[5] The Alabama statute expressly requires that the writing evidencing a special promise to answer for the debt, default or miscarriage of another, shall express the consideration for such promise.[6] It is competent to show by parol proof that certain figures, in a memorandum of a

v. United States, 136 U. S. 68, 82, 34 L. Ed. 447, quoting Eggleston *v.* Wagner, 46 Mich. 610, 618.

95. Ryan *v.* United States, 136 U. S. 68, 83, 34 L. Ed. 447, quoting Eggleston *v.* Wagner, 46 Mich. 610, 618.

In an account stated by the parties, in the handwriting of the defendant, his name being written by him at the head of the account, a balance was acknowledged to be due by him to the complainant in a bill for a specific performance, and there was the following credit, "by my purchase of your 1-2 E. B. wharf and premises, this day as agreed upon between us, $7.578.63." It was held to be a sufficient memorandum in writing, under the statute of frauds of Maryland, upon which the court could decree a specific performance of the sale of the estate referred to; other matters appearing in evidence, and by the admission of the defendant in his answer, to show the particular property designated by "your 1-2 E. B. wharf and premises." Barry *v.* Coombe, 1 Pet. 640, 7 L. Ed. 295.

96. Ryan *v.* United States, 136 U. S. 68, 83, 34 L. Ed. 447, quoting Eggleston *v.* Wagner, 46 Mich. 610, 618.

97. Wain *v.* Warlters, 5 East. 10.

98. English doctrine as to expression of consideration.—De Wolf *v.* Rabaud, 1 Pet. 476, 501, 7 L. Ed. 227.

99. De Wolf *v.* Rabaud, 1 Pet. 476, 501, 7 L. Ed. 227.

1. De Wolf *v.* Rabaud, 1 Pet. 476, 501, 7 L. Ed. 227.

2. Adoption of English doctrine into American jurisprudence.—De Wolf *v.* Rabaud, 1 Pet. 476, 501, 7 L. Ed. 227.

But it is the rule in New York that in the case of a guarantee, or promise collateral to the principal contract, but made at the same time, and becoming an essential ground of the credit given to the principal or direct debtor if there is no consideration other than the original transaction, the plaintiff will be permitted to show that fact, if necessary, by parol proof. De Wolf *v.* Rabaud, 1 Pet. 476, 501, 7 L. Ed. 227.

3. De Wolf *v.* Rabaud, 1 Pet. 476, 501, 7 L. Ed. 227.

To take a contract for the sale of lands out of the statute of frauds, the memorandum must mention the price. Williams *v.* Morris, 95 U. S. 444, 455, 24 L. Ed. 360.

The return to a fieri facias, written on the writ, to constitute a sufficient memorandum of a marshal's sale within the statute of frauds, must specify the price paid for the property. Remington *v.* Linthicum, 14 Pet. 84, 93, 10 L. Ed. 364.

4. Rule in Massachusetts.—De Wolf *v.* Rabaud, 1 Pet. 476, 501, 7 L. Ed. 227.

5. Rule under the Virginia statute.—Violett *v.* Patton, 5 Cranch 142, 151, 3 L. Ed. 61.

6. Under Alabama statute writing must express consideration.—Code, 1887, § 1732.

The words "value received," or acknowledging the receipt of one dollar, sufficiently express a consideration under this statute. Moses *v.* Lawrence County Bank, 149 U. S. 298, 303, 37 L. Ed. 743.

A guaranty of the payment of a negotiable promissory note, written by a third person upon the note before its delivery, requires no other consideration to sup-

contract for the sale of goods set opposite certain specified numbers of bales and cases of goods, mean cents per yard.[7]

f. *Representations or Assurances Concerning Another.*—**The Massachusetts statute** which provides that no action shall be brought to charge any person, upon or by reason of any representation or assurance, made concerning another, unless such representation or assurance be made in writing,[8] has no other effect than to require the representation, on which the defendant is charged, to be in writing.[9]

g. *Contracts for the Sale of Goods*[10]—(1) *What the Memorandum Imports.*—A memorandum of a contract for the sale of goods, expressing that the goods have been sold, necessarily imports that they have been bought.[11]

(2) *Terms of the Bargain.*—The word "bargain," in the statute, means the terms upon which the respective parties contract; and in the sale of goods, the terms of the bargain must be specified in the note or memorandum, and stated with reasonable certainty, so that they can be understood from the writing itself, without having recourse to parol proof; for, unless the essential terms of the sale can be ascertained from the writing itself, or by a reference contained in it to something else, the memorandum is not a compliance with the statute.[12]

(3) *Law Supplies Omission of Time or Place of Delivery.*—When a memorandum of a contract for the sale of goods contains the names of the sellers, and of the buyer, the commodity and the price, the time of credit, and

port it than that which the note upon its face implies to have passed between the original parties, and, therefore, under Alabama statute such a guaranty need not express a consideration. But a guaranty written upon a promissory note, after the note has been delivered and taken effect as a contract, requires a distinct consideration to support it; and if such a guaranty does not express any consideration it is void under the statute. Moses *v.* Lawrence County Bank, 149 U. S. 298, 302, 37 L. Ed. 743.

7. **Parol proof admissible to show meaning of figures.**—Salmon Falls Mfg. Co. *v.* Goddard, 14 How. 446, 456, 14 L. Ed. 493.

8. Rev. Stat., 1836, § 3.

9. **Requirements of Massachusetts statute as to representations or assurance concerning another.**—Iasigi *v.* Brown, 17 How. 183, 194, 15 L. Ed. 205.

When there is a misstatement of facts in regard to the pecuniary ability of an individual or company, and, especially if this be done through interested motives or a fraudulent intent, by reason of which a credit is given and the debt is lost, the facts which conduce to establish the liability must be outside of the writing, and may be established by parol evidence. Iasigi *v.* Brown, 17 How. 183, 194, 15 L. Ed. 205.

Thus, where an action was brought against a person for making false representations of the pecuniary condition of a certain party, whereby the plaintiff had been induced to sell goods upon credit, and had incurred loss, evidence conducing to show that the statements of the defendant were false, ought to have been allowed to go to the jury. Iasigi *v.* Brown, 17 How. 183, 15 L. Ed. 205.

10. As to contracts for the sale of goods evidenced by two or more writings, see ante, "Contracts Evidenced by Two or More Writings," VII, B, 2, b. As to the admission of parol evidence to explain the consideration expressed in a memorandum of a contract for the sale of goods, see ante, "Consideration," VII, B, 2, e.

11. **Memorandum imports that goods have been bought.**—Butler *v.* Thomson 92 U. S. 412, 417, 23 L. Ed. 684.

Thus the following memorandum of a contract of sale signed by the agents of the purchaser and the seller, to wit:

"New York, July 10, 1867.

"Sold for Messrs' Butler & Co., Boston, to Messrs. A. A. Thomson & Co., New York, seven hundred and five (705) packs first quality Russia sheet-iron, to arrive at New York, at twelve and three quarters (12 3-4) cents per pound, gold, cash, actual tare.

"Iron due about Sept. 1, '67.

"White & Hazard, Brokers."

is a sufficient memorandum under the statute of frauds to bind both parties. Butler *v.* Thomson, 92 U. S. 412, 23 L. Ed. 684.

12. **Terms of the bargain.**—Salmon Falls Mfg. Co. *v.* Goddard, 14 How. 446, 454, 14 L. Ed. 493.

"This brief note of the contract, however, like all other mercantile contracts, is subject to explanation by reference to the usage and custom of the trade, with a view to get at the true meaning of the parties, as each is presumed to have contracted in reference to them. And although specific and express provisions will control the usage, and exclude any such explanation, yet, if the terms are technical, or equivocal on the face of the instrument, or made so by reference to extraneous circumstances, parol evidence of the usage and practice in the trade is admissible to explain the meaning." Sal-

conditions of the delivery, the law will supply the omission of any specified time or place of delivery.[13]

h. *The Signature.*—Provided the signature to a contract within the statute be in the handwriting of the party or his agent,[14] its place in the writing is immaterial.[15] The signature of one of two partners is a sufficient signing to charge the firm.[16] It is a general rule that collateral papers, adduced to supply the defect of signature of a written agreement under the statute, should on their face sufficiently demonstrate their reference to such agreement without the aid of parol proof.[17] But the rule is not absolute. If there is ground for any doubt in the matter, the general rule should be enforced. But not otherwise.[18] A letter embodying an agreement to pay the debt of another on his making default cannot be added to by written evidence, unless such evidence is signed by the guarantor, or is, by a reference in the letter, adopted as part of it.[19] Under the Louisiana statute which provides that "all sales of immovable property or slaves, shall be made by authentic act, or private signature," the ordinary mark of a person, incapable of writing his name, is a sufficient signature to a bill of sale, to make it admissible in evidence.[20]

3. Purpose for Which Writing Was Created Immaterial in Equity.—Courts of equity are not particular with regard to the direct and immediate purpose for which the written evidence of the contract was created.[21]

4. Verbal Promise Subsequently Reduced to Writing.—Where a promise, though originally verbal, is subsequently, with full knowledge of the facts, reduced to writing, it is not within the statute.[22]

C. Receipt and Acceptance of Goods Sold[23]—1. What Constitutes Receipt and Acceptance.—A purchaser's receipt and acceptance of goods sufficient to satisfy the statute of frauds may be constructive.[24] In order to take

mon Falls Mfg. Co. *v.* Goddard, 14 How. 446, 454, 14 L. Ed. 493.

13. Law supplies omission of time or place of delivery.—Salmon Falls Mfg. Co. *v.* Goddard, 14 How. 446, 455, 14 L. Ed. 493.

14. Under the New York statute of frauds a contract for the sale of goods signed by the agent of both parties, the buyer and the seller, is a valid contract, obligatory upon both the parties thereto. Butler *v.* Thomson, 92 U. S. 412, 417, 23 L. Ed. 684.

Extraneous evidence admissible to show that signer acted only as an agent.—Extraneous evidence is admissible to show that a person whose name is affixed to a contract with the statute, acted only as an agent, thereby enabling the principal either to sue or be sued in his own name; and this, though it purports on its face to have been made by the agent himself, and the principal is not named. Salmon Falls Mfg. Co. *v.* Goddard, 14 How. 446, 454, 14 L. Ed. 493. But see Grafton *v.* Cummings, 99 U. S. 100, 111, 25 L. Ed. 366.

15. Place of signature immaterial.—Barry *v.* Coombe, 1 Pet. 640, 650, 7 L. Ed. 295.

16. Signature of one of two partners binds firm.—Salmon Falls Mfg. Co. *v.* Goddard, 14 How. 446, 454, 14 L. Ed. 493. See the title PARTNERSHIP.

It was and it is competent to show, by parol proof, that the partner so signing signed for the firm. Salmon Falls Mfg. Co. *v.* Goddard, 14 How. 446, 455, 14 L. Ed. 493.

17. Collateral papers adduced to supply defect of signature.—Beckwith *v.* Talbot, 95 U. S. 289, 292, 24 L. Ed. 496.

18. Beckwith *v.* Talbot, 95 U. S. 289, 292, 24 L. Ed. 496.

Where there is no ground for doubt, the enforcement of the rule would aid, instead of discouraging, fraud. Beckwith *v.* Talbot, 95 U. S. 289, 292, 24 L. Ed. 496.

19. Written evidence adding to letter embodying agreement.—Bell *v.* Bruen, 1 How. 169, 183, 11 L. Ed. 89.

20. Ordinary mark of person incapable of writing sufficient signature under Louisiana statute.—Zacharie *v.* Franklin, 12 Pet. 151, 162, 9 L. Ed. 1035.

21. Purpose for which writing was created immaterial in equity.—Barry *v.* Coombe, 1 Pet. 640, 651, 7 L. Ed. 295.

"It is written evidence which the statute requires, and a note or letter, and even in one case, a letter, the subject of which was to annul the contract, on a ground really not unreasonable (1 Atk. 12; 1 Sch. & Lef. 22), has been held to bring a case within the provisions of the statute." Barry *v.* Coombe, 1 Pet. 640, 651, 7 L. Ed. 295.

22. Verbal promise subsequently reduced to writing.—Fitzpatrick *v.* Flannagan, 106 U. S. 648, 659, 27 L. Ed. 211.

23. As to fraudulent and voluntary conveyances of personal property, see the title FRAUDULENT AND VOLUNTARY CONVEYANCES.

24. Receipt and acceptance may be constructive.—Garfield *v.* Paris, 96 U. S. [illegible], 24 L. Ed. 821.

a contract out of the operation of the statute, there must be acts of such a character as to unequivocally place the property within the power and under the exclusive dominion of the buyer as absolute owner, discharged of all lien for the price.[25] Thus there must be a delivery by the vendor with an intention of vesting the right of possession in the vendee, and there must be an actual acceptance by the latter with the intent of taking possession as owner. This rule can only be satisfied by something done subsequent to the sale unequivocally indicating the mutual intentions of the parties. Mere words are not sufficient.[26] Where, by the terms of the contract, the sale is to be for cash or any other condition precedent to the buyer's acquiring title in the goods be imposed, or the goods be at the time of the alleged receipt not fitted for delivery according to the contract, or anything remain to be done by the seller to perfect the delivery, such fact will be generally conclusive that there was no receipt by the buyer.[27] The receipt and acceptance may be complete although the terms of the contract are in dispute.[28] But the act or acts relied on as constituting a receipt and acceptance, to satisfy the statute, must be such as definitely establish that the relation of vendor and vendee exists.[29] Receipt and acceptance of a substantial part of the goods will be as operative as a receipt and acceptance of the whole.[30] The foregoing

25. **What acts constitute receipt and acceptance.**—Hinchman *v.* Lincoln, 124 U. S. 38, 49, 31 L. Ed. 337.

26. Hinchman *v.* Lincoln, 124 U. S. 38, 49, 31 L. Ed. 337.

"In many of the cases the test for determining whether there has been an actual receipt by the purchaser has been to inquire whether the vendor has lost his lien. Receipt implies delivery, and it is plain that so long as vendor has not delivered there can be no actual receipt by vendee." Hinchman *v.* Lincoln, 124 U. S. 38, 50, 31 L. Ed. 337, quoting with approval Benjamin on Sales, § 187.

"The subject was placed in a very clear light by Holroyd, J., in the decision in Baldey *v.* Parker, 2 B. & C. 37: 'Upon a sale of specific goods for a specific price, by parting with the possession, the seller parts with his lien. The statute contemplates such a parting with the possession, and therefore, as long as the seller preserves his control over the goods so as to retain his lien, he prevents the vendee from accepting and receiving them as his own within the meaning of the statute. No exception is known in the whole series of decisions to the proposition here enounced, and it is safe to assume as a general rule that whenever no fact has been proven showing an abandonment by the vendor of his lien, no actual receipt by the purchaser has taken place. This has been as strongly insisted upon in the latest as in the earliest cases." Hinchman *v.* Lincoln, 124 U. S. 38, 51, 31 L. Ed. 337, quoting with approval Benjamin on Sales, § 187.

"Where the acts of the buyer are equivocal, and do not lead irresistibly to the conclusion that there has been a transfer and acceptance of the possession, the cases qualify the inferences to be drawn from them, and hold the contract to be within the statute." Hinchman *v.* Lincoln, 124 U. S. 38, 49, 31 L. Ed. 337, quoting Wright, J., in Shindler *v.* Houston, 1 N. Y. (1 Comstock) 261, 4 Am. Dec. 316.

27. **Facts generally conclusive that there was no receipt by buyer.**—Hinchman *v.* Lincoln, 124 U. S. 38, 51, 31 L. Ed. 337, quoting with approval Browne on the Statute of Frauds, § 317a.

28. **Receipt and acceptance may be complete though terms of contract in dispute.**—Hinchman *v.* Lincoln, 124 U. S. 38, 54, 31 L. Ed. 337.

"Receipt and acceptance by some unequivocal act, sufficiently proven to have taken place under some contract of sale, is sufficient to take the case out of the prohibition of the statute, leaving the jury to ascertain and find from the testimony what terms of sale were actually agreed on." Hinchman *v.* Lincoln, 124 U. S. 38, 54, 31 L. Ed. 337.

29. **That relation of vendor and vendee exists must be definitely established.**—Hinchman *v.* Lincoln, 124 U. S. 38, 55, 31 L. Ed. 337.

"The statute does not mean that the thing which is to dispense with the writing is to take the place of all the terms of the contract, but that the acceptance is to establish the broad fact of the relation of vendor and vendee." Hinchman *v.* Lincoln, 124 U. S. 38, 54, 31 L. Ed. 337, quoting Williams, J., in Tompkinson *v.* Straight, 17 C. B. 697.

30. **Receipt and acceptance of part of the goods.**—Garfield *v.* Paris, 96 U. S. 557, 566, 24 L. Ed. 821.

"Where goods are purchased in several parcels, to be paid for at a future day, the whole, within the meaning of the statute of frauds, constitutes but one contract, and the delivery of part to the purchaser is sufficient to take the case out of the operation of the statute." Garfield *v.* Paris, 96 U. S. 557, 565, 24 L. Ed. 821.

But the delivery in such a case, in order that it may have that effect, must be made in pursuance of the contract. Garfield *v.* Paris, 96 U. S. 557, 566, 24 L. Ed. 821.

principles have been applied by the supreme court to the facts of particular cases.[31]

2. Time of Acceptance.—Acceptance may either precede the reception of the articles or may accompany their reception.[32]

3. Evidence—a. *Burden of Proof.*—That there has been an acceptance, or that the buyer has conducted himself in regard to the goods as owner, is to be proved by the party setting up the contract.[33]

b. *Admissibility.*—Parol evidence is admissible to show what the circumstances were attending the contract, and to show the receipt and acceptance, in whole or in part, of the goods purchased.[34] To show such receipt and acceptance any acts of the parties indicative of ownership by the vendee may be given in evidence.[35]

4. Province of Court and Jury.—As a general rule it is a question for the jury whether, under all the circumstances, the acts which the buyer does or forbears to do amount to a receipt and acceptance within the terms of the statute.[36] So it is proper to leave to the jury the question whether the purchaser acquired possession under the sale.[37] But where the facts in relation to a contract of sale alleged to be within the statute are not in dispute, it belongs to the

31. Purchaser of interest in stage company put into possession.—C. bought an undivided one-third interest in a stage company, intending that S. should have one-half of the one-third, and, before the purchase, informed S. of such intention. At the time there was an unsettled account between C. and S., in respect of services rendered by S. to C., and of certain business in which they were both interested. After the purchase, C agreed verbally with S. that S. should have the one-sixth at the price C. had paid for it, any amount due by C. to S. to be applied towards payment for the one-sixth, the ownership of it by S. to commence at once. Afterwards, the four owners of the property, of whom S. and C. were two, executed a paper, under seal, in which the interests of the four were defined, S. and C. being stated to be the owners of one-third; and all, including C., thereafter recognized S. as owning one-sixth, subject, as between S. and C., to the liability of S. to reinburse C. what he had paid for such one-sixth. It was held that the contract was executed, and S. was put in possession, and therefore the statute of frauds, 29 Car. 2, ch. 3, § 17, did not apply. Huntley *v.* Huntley, 114 U. S. 394, 29 L. Ed. 130.

Facts not constituting receipt and acceptance of securities.—In an action to recover the price of certain securities alleged to have been sold and delivered by the plaintiff to the defendant, facts held not to constitute such a receipt and acceptance of the securities by the defendant as to take the alleged contract out of the statute of frauds. Hinchman *v.* Lincoln, 124 U. S. 38, 56, 31 L. Ed. 337.

Parol agreement for sale of cotton not removed from operation of statute.—Under article 4 of chapter xliv of the Revised Code of Mississippi, which enacts, "That no contract for the sale of any personal property, etc., shall be allowed to be good and valid except the buyer shall receive part of the personal property or shall actually pay or secure the purchase money, or part thereof, or unless some note or memorandum in writing of the bargain be made and signed by the party to be charged by such contract or his agent thereunto lawfully authorized," a parol agreement for the sale of cotton in payment of a mortgage debt, cannot be sustained, where, though the price of the cotton per pound was fixed, the number of pounds was not definitely ascertained, nor any payment indorsed on the mortgage, nor any receipt given, nor any memorandum in writing made, nor any present consideration paid, nor any change of possession affected, nor any delivery, either actual or symbolic, made. Mahan *v.* United States, 16 Wall. 143, 21 L. Ed. 307.

32. Time of acceptance.—Garfield *v.* Paris, 96 U. S. 557, 566, 24 L. Ed. 821.

33. Burden of proof is on party setting up contract.—Hinchman *v.* Lincoln, 124 U. S. 38, 50, 31 L. Ed. 337.

34. Parol evidence admissible to show receipt and acceptance.—Garfield *v.* Paris, 96 U. S. 557, 566, 24 L. Ed. 821.

35. Acts of parties indicative of ownership by vendee admissible.—Garfield *v.* Paris, 96 U. S. 557, 563, 24 L. Ed. 821.

Conduct, acts and declarations of the purchaser may be given in evidence to show receipt and acceptance. Garfield *v.* Paris, 96 U. S. 557, 563, 24 L. Ed. 821.

36. Whether buyer's acts amount to receipt and acceptance generally a question for jury.—Hinchman *v.* Lincoln, 124 U. S. 38, 48, 31 L. Ed. 337; Garfield *v.* Paris, 96 U. S. 557, 563, 24 L. Ed. 821.

37. Question whether purchaser acquired possession under sale is for jury.—Porter *v.* Graves, 104 U. S. 171, 175, 26 L. Ed. 691.

Where goods were purchased in several parcels to be paid for at a future day the

court to determine their legal effect.[38] And so it is for the court to withhold the facts from the jury when they are not such as can in law warrant finding an acceptance, and this includes cases where, though the court might admit that there was a scintilla of evidence tending to show an acceptance, they would still feel bound to set aside a verdict finding an acceptance on that evidence.[39]

VIII. Effect of Statute upon the Contract.

Contracts not in conformity with the statute of frauds are only voidable and not illegal.[40] But such a contract cannot be enforced directly or collaterally. It confers no right and creates no obligation as between the parties to it.[41]

IX. Pleading.

Proof Must Conform to Pleading.—Where the attempt is to take the case out of the statute upon the ground of part performance, the party making the attempt must show by clear and satisfactory proof the existence of the contract as laid in his pleading, and the act of part performance must be of the identical contract which he has in that manner set up and alleged.[42]

question whether the delivery of part of the goods to the purchaser was made in pursuance of the contract is one for the jury; but if they find that question in the affirmative, then it follows that the case is taken out of the statute. Garfield *v.* Paris, 96 U. S. 557, 566, 24 L. Ed. 821.

38. Court determines legal effect of facts not in dispute.—Hinchman *v.* Lincoln, 124 U. S. 38, 48, 31 L. Ed. 337.

39. When court will withhold facts from jury.—Hinchman *v.* Lincoln, 124 U. S. 38, 48, 31 L. Ed. 337.

In general, as to questions of law and fact, see the title QUESTIONS OF LAW AND FACT.

40. Contracts not conforming to statute only voidable.—Bibb *v.* Allen, 149 U. S. 481, 497, 37 L. Ed. 817.

41. Contract not conforming to statute is unenforcible.—Dunphy *v.* Ryan, 116 U. S. 491, 496, 29 L. Ed. 703.

The Pennsylvania statute does not make a parol agreement for the sale of lands, void; though it restricts the operation of the agreement, as to the acquisition of an interest in the land, and no title in fee simple can be derived under it. But, an action will lie to recover damages for the nonperformance of such an agreement. Bell *v.* Andrews, 4 Dall. 152, 1 L. Ed. 779. See the title VENDOR AND PURCHASER.

Under the statute of frauds in Indiana, which enacts in "Section 10. That no assignment of goods by way of mortgage shall be valid against any other person than the parties thereto, when such goods are not delivered to the mortgagee, or assignee, and retained by him, unless such assignment or mortgage shall be duly recorded;" and in "Section 21. That the question of fraudulent intent in all cases shall be deemed a question of fact;" a mortgagor of chattels personal may, if the transaction be fair and the mortgage made by him be duly recorded, retain possession of personal chattels. But the effect of the statute is not to make every recorded mortgage, which prior to the statute would have been held fraudulent in law, prima facie valid. The recording of the mortgage contemplated by the statute was meant as a substitute for possession, but was not meant to protect a mortgage from all illegal stipulations contained in it. Robinson *v.* Elliott, 22 Wall. 513, 22 L. Ed. 758.

Hence, where a trading firm in a city in Illinois owing money evidenced by a series of notes, coming due from time to time for some months in advance, made a mortgage of their stock of goods, the mortgage containing this clause: "And it is hereby expressly agreed that until default shall be made in the payment of some one of said notes, or some paper in renewal thereof, the parties of the first part may remain in possession of said goods, wares and merchandise, and may sell the same as heretofore, and supply their places with other goods, and the goods substituted by purchase for those sold shall, upon being put into said store, or any other store in said city where the same may be put for sale by said parties of the first part, be subjected to the lien of this mortgage;" the instrument then concluding with powers to the mortgagee, upon any default, to have the right to enter into said store of the firm and take possession of a sufficient amount of goods to satisfy, pay, and discharge all the paper due, and have full power and authority, upon ten days' public notice, to sell at public auction such amounts of said goods as should be necessary to pay said paper, it was held that the mortgage was void. Robinson *v.* Elliott, 22 Wall. 513, 22 L. Ed. 758. See the title CHATTEL MORTGAGES, vol. 3, p. 699.

42. Proof must conform to pleading.—Williams *v.* Morris, 95 U. S. 444, 456, 24 L. Ed. 360.

"It is not enough that the act of part performance is evidence of some agreement; but it must be unequivocal and satisfactory evidence of the particular

When Defense of Statute Is Available on Demurrer.—Where it appears on the face of a bill, that an agreement concerning an interest in lands set up by complainant is in parol, the defense of the statute of frauds may be taken advantage of on demurrer.[43]

Defense of Statute Available under Denial of Contract.—A denial in the answer,[44] or in the replication,[45] of the making of a contract within the statute, is as effective for letting in the defense of the statute as if the statute had been specifically pleaded.

When one person pays money or performs services for another upon a contract void under the statute of frauds, he may recover the money upon a count for money paid to the use of defendant at his request, or recover for the services upon the quantum meruit count. But in such cases the suit should be brought upon the implied promise.[46]

agreement charged in the bill or answer." Williams *v.* Morris, 95 U. S. 444, 457, 24 L. Ed. 360.

43. **When defense of statute available on demurrer.**—Randall *v.* Howard, 2 Black 585, 17 L. Ed. 269.

44. **Denial of agreement in answer will let in defense of statute.**—Where an agreement for the sale of lands, alleged in a bill in equity praying for specific performance, is denied by the answer, the defendant, where there is no written evidence of such agreement, may, at the hearing, insist on the statute of frauds as effectually as if it had been pleaded. May *v.* Sloan, 101 U. S. 231, 25 L. Ed. 797.

45. **The denial in the replication of the plaintiff of the making of a contract** which is within the statute of frauds, and on which the defendant bases his cross action, is as effective for letting in the defense of the statute as if the statute had been specifically pleaded. Dunphy *v.* Ryan, 116 U. S. 491, 495, 29 L. Ed. 703.

46. **Pleading in actions to recover money paid or for services performed under contract within statute.**—Dunphy *v.* Ryan, 116 U. S. 491, 497, 29 L. Ed. 703.

FRAUDULENT AND VOLUNTARY CONVEYANCES.

BY JAMES F. MINOR.

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CROSS REFERENCES.

See the titles APPEAL AND ERROR, vol. 1, p. 333; ASSIGNMENTS FOR BENEFIT OF CREDITORS, vol. 2, p. 599; BANKRUPTCY, vol. 2, p. 792; BANKS AND BANKING, vol. 3, p. 1; CHATTEL MORTGAGES, vol. 3, p. 699; COMPROMISE AND SETTLEMENT, vol. 3, p. 980; CONSPIRACY, vol. 3, p. 1099; CONSTITUTIONAL LAW, vol. 4, p. 1; CORPORATIONS, vol. 4, p. 621; COURTS, vol. 4, p. 861; CREDITORS' SUITS, vol. 5, p. 22; CURTESY, vol. 5, p. 155; DEEDS, vol. 5, p. 245; DESCENT AND DISTRIBUTION, vol. 5, p. 335; DOWER, vol. 5, p. 487; EQUITY, vol. 5, 803; EVIDENCE, vol. 5, p. 1004; EXECUTORS AND ADMINISTRATORS, ante, p. 119; FRAUD AND DECEIT, ante, p. 394; FRAUDS, STATUTE OF, ante, p. 451; INSOLVENCY; LIENS; MORTGAGES AND DEEDS OF TRUST; MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES; NOTICE; PARTNERSHIP; PLEADING; PLEDGE AND COLLATERAL SECURITY; RAILROADS; SALES; TRUSTS AND TRUSTEES; VENDOR AND PURCHASER.

By corporation, see the titles CORPORATIONS, vol. 5, pp. 639, et seq.; 729, 741; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS; RAILROADS; STOCK AND STOCKHOLDERS. As act of bankruptcy, see the title BANKRUPTCY, vol. 2, p. 809. As preference in bankruptcy, see the title BANKRUPTCY, vol. 2, pp. 933, 950. As color of title, see the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION. To defeat decree for alimony, see the title DIVORCE AND ALIMONY, vol. 5, p. 426. To defeat confiscation acts, see the title WAR. As to conveyances, etc., in violation of bankruptcy and insolvent laws, see the titles BANKRUPTCY, vol. 2, p. 933, et seq.; INSOLVENCY. As to effect of bankruptcy on proceedings to set aside conveyance, see the title BANKRUPTCY, vol. 2, p. 954. As to estoppel of fraudulent grantee to claim title to land conveyed, see the title ESTOPPEL, vol. 5, p. 913. As to fraudulent devise or bequest, see the title WILLS. As to fraudulent loans, see the title LOANS. As to marriage contracts and settlements, see the title MARRIAGE CONTRACTS AND SETTLEMENTS. As to rules of decision in federal courts, see the title COURTS, vol. 4, p. 1087. Frequent reference should be made to the title FRAUD AND DECEIT, ante, p. 394, as many cases supporting general principles treated there have not been repeated here.

I. Conflict of Laws.

The subject of conflict of laws is treated elsewhere.[1]

II. Powers Exercisable by Debtor over His Property.

It would seem to be a consequence of that absolute power which a man possesses over his own property, that he may make any disposition of it which does not interfere with the existing rights of others, and such disposition, if it be fair and real, will be valid. The limitations on this power are those only which are prescribed by law.[2]

1. **Conflict of laws.**—See the title CONFLICT OF LAWS, vol. 3, p. 1061, et seq.

As to transfer of insurance policy, see post, "Payment of Life Insurance Premiums or Transfer of Policy," III, B, 4. As to preference, see post, "Prohibition by Statute," III, C, 8, b.

2. **Powers exercisable by debtor over his property.**—Sexton *v.* Wheaton, 8 Wheat. 229, 242, 5 L. Ed. 603; Bean *v.* Patterson, 122 U. S. 496, 499, 30 L. Ed. 1126; Hinde *v.* Longworth, 11 Wheat. 199, 213, 6 L. Ed. 454.

A debtor, even when financially embarrassed, may in good faith compromise his liabilities, sell or transfer property in payment of debts, or mortgage or pledge it as security for debts, or create a lien upon it by means even of a judgment confessed in favor of his creditor. Such transactions often take place in the ordinary course of business, when the debtor has no purpose, in the near future, of discontinuing business or of going into bankruptcy and surrendering control of all his property. A debtor is not bound to succumb under temporary reverses in his affairs, and has the right, acting in good faith, to use his property in any mode he chooses, in order to avoid a general assignment for the benefit of his creditors, until he recognizes the fact that

III. Transfers or Alienations Made or Obtained with Intent to Hinder, Delay or Defraud Creditors.

A. Statutory Provisions—1. STATUTE OF 13TH ELIZABETH.—The statute of 13th Elizabeth, c. 5, against fraudulent conveyances has been universally adopted in American law as the basis of our jurisprudence on that subject (Story Eq. Jur., § 353), and re-enacted in terms, or nearly so, or with some change of language, by the legislatures of the several states.[3] And this statute was merely declaratory of the common law.[4]

he can no longer go on in business, and determines to yield the dominion of his ntire estate. White *v.* Cotzhausen, 129 U. S. 329, 342, 32 L. Ed. 677. See post, "Preference to Creditors," III, C, 8; "Voluntary Conveyances," IV.

"Unquestionably, the claims of morality and justice, as well as the legitimate interests of creditors, require there should be protection against those acts of an insolvent or dishonest debtor that are contrary to the prescriptions of law, and are unfaithful and injurious. But the legislature must determine upon the remedies appropriate for this end; and the difficulty of the subject is evinced by the diversity in the systems of different states for adjusting the relations of creditor and debtor, consistently with equity and humanity. Bankrupt and insolvent laws, laws allowing of attachment and sequestration of the debtor's estate, and for the revocation of fraudulent conveyances, creditors' bills, and criminal prosecutions for fraud or conspiracy, are some of the modes that have been adopted for the purpose." Adler *v.* Fenton, 24 How. 407, 412, 16 L. Ed. 696. See post, "Construction," III, A, 2. See, generally, the titles BANKRUPTCY, vol. 2, p. 933, et seq.; INSOLVENCY.

Application of payments.—See the title PAYMENT.

The right of a debtor in the first instance to apply his payments wherever his funds are not specifically bound, is universally admitted, and the power of the debtor to apply his payments is coextensive with that of the creditor. This principle has, it is believed, never been denied. Leggett *v.* Humphreys, 21 How. 66, 77, 16 L. Ed. 50; Marbury *v.* Brooks, 7 Wheat. 556, 5 L. Ed. 522; Tompkins *v.* Wheeler, 16 Pet. 106, 10 L. Ed. 903. See post, "Preference to Creditors," III, C, 8.

Exchanges.—See the title BANKRUPTCY, vol. 2, p. 947.

Property subject to power of appointment.—See the title POWERS.

Equitable estates.—See the title TRUSTS AND TRUSTEES.

3. Statute of 13th Elizabeth.—Peters *v.* Bain, 133 U. S. 670, 685, 33 L. Ed. 696; Parish *v.* Murphree, 13 How. 92, 14 L. Ed. 65; Means *v.* Dowd, 128 U. S. 273, 280, 32 L. Ed. 429; Crawford *v.* Neal, 144 U. S. 585, 595, 36 L. Ed. 552; United States Rubber Co. *v.* American Oak Leather Co., 181 U. S. 434, 448, 45 L. Ed. 938. See Davis *v.* Schwartz, 155 U. S. 631, 39 L. Ed. 289. For the terms of this statute, see Sexton *v.* Wheaton, 8 Wheat. 229, 242, 5 L. Ed. 603.

Alabama.—See Parish *v.* Murphree, 13 How. 92, 14 L. Ed. 65.

District of Columbia.—The statute of 13 Eliz., ch. 5, is in force in the District of Columbia. Mattingly *v.* Nye, 8 Wall. 370, 19 L. Ed. 380; Cathcart *v.* Robinson, 5 Pet. 264, 280, 8 L. Ed. 120. See, also, Sexton *v.* Wheaton, 8 Wheat. 229, 242, 5 L. Ed. 603, quoting the statute.

Indiana.—In Indiana the statute of 13th Elizabeth has been adopted, with two provisions engrafted on it: one as to recordation of chattel mortgages (see the title CHATTEL MORTGAGES, vol. 3, p. 729, et seq.), and the other "that the question of fraudulent intent in all cases shall be deemed a question of fact." Robinson *v.* Elliott, 22 Wall. 513, 520, 22 L. Ed. 758.

Missouri.—See Wallace *v.* Penfield, 106 U. S. 260, 263, 27 L. Ed. 147.

North Carolina.—See Means *v.* Dowd, 128 U. S. 273, 280, 32 L. Ed. 429.

Oregon and Virginia.—Crawford *v.* Neal, 144 U. S. 585, 594, 36 L. Ed. 552; Peters *v.* Bain, 133 U. S. 670, 685, 33 L. Ed. 696.

In Oregon it is further provided that the question of fraudulent intent in all cases arising under that section shall be "deemed a question of fact, and not of law," and that the section "shall not be construed in any manner to affect or impair the title of a purchaser for a valuable consideration, unless it shall appear that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor." 2 Hill's Ann. Laws Oregon, 1887, pp. 1373, 1374, §§ 3059, 3062, 3063. Crawford *v.* Neal, 144 U. S. 585, 595, 36 L. Ed. 552.

And similarly in Virginia.—Peters *v.* Bain, 133 U. S. 670, 685, 33 L. Ed. 696, quoting Va. Code 1873, p. 896, c. 114, § 1. See, also, United States Bank *v.* Lee, 13 Pet. 107, 10 L. Ed. 81.

Texas.—See Clements *v.* Moore, 6 Wall. 299, 312, 18 L. Ed. 786; Chandler *v.* Von Roeder, 24 How. 224, 227, 16 L. Ed. 633.

Wisconsin.—See Summer *v.* Hicks, 2 Black 532, 533, 17 L. Ed. 355.

4. Declaratory of the common law.—"The statute of Elizabeth was declaratory of the common law. In the absence of such legislation the common law

2. Construction.—A liberal construction should be given to the clause of the Virginia statute, for the suppression of fraud; this is the well-established rule in the construction of the statute of Elizabeth, which the first section of the Virginia statute substantially adopts.[5]

Rule of Decision in Federal Court as to Construction.—See the title Courts, vol. 4, pp. 1087, 1120. As to construction as affecting assignments for benefit of creditors, see the title Courts, vol. 4, p. 1062.

3. Object of Statute.—The object of the statute of Elizabeth was to prevent debtors from dealing with their property in any way to the prejudice of their creditors; but dealing with that which creditors, irrespective of such dealing, could not have touched, is within neither the letter nor the spirit of the statute.[6]

B. Character and Form of Transfer—1. Connected but Distinct Conveyances.—Where two conveyances to different grantees are assailed as fraudulent, undoubtedly the rule is that a transaction void in part for fraud in fact is entirely void, but here the transactions were so distinct that while the circumstances surrounding the one should be given due weight so far as they may bear upon the other, a result adverse to the validity of the one does not necessarily compel a like result as to the other.[7]

would have accomplished the same results. Twyne's case (3 Coke, 80. S. C. 1); Smith's L. C. 1; Codagan *v.* Kennet (Cowp., 434); Wheaton *v.* Sexton, 1 Amer. L. C. 68." Summer *v.* Hicks, 2 Black 532, 534, 17 L. Ed. 355; Hamilton *v.* Russell, 1 Cranch 309, 316, 2 L. Ed. 118; United States Bank *v.* Lee, 13 Pet. 107, 10 L. Ed. 81; Clements *v.* Moore, 6 Wall. 299, 312, 18 L. Ed. 786; Clarke *v.* White, 12 Pet. 178, 198, 9 L. Ed. 1046; Baker *v.* Humphrey, 101 U. S. 494, 499, 25 L. Ed. 1065.

5. Construction.—United States Bank *v.* Lee, 13 Pet. 107, 10 L. Ed. 81.

"The various constructions which have been given to the statutes of frauds by the courts of England and of this country, would seem to have been influenced, to some extent, from an attempt to give a literal application of the words of the statute instead of its intent. No provision can be drawn so as to define minutely the circumstances under which fraud may be committed. If an individual, being in debt, shall make a voluntary conveyance of his entire property, it would be a clear case of fraud; but this rule would not apply if such a conveyance be made by a person free from all embarrassments and without reference to future responsibilities. But between these extremes numberless cases arise, under facts and circumstances which must be minutely examined, to ascertain their true character. To hold that a settlement of a small amount, by an individual in independent circumstances, and which, if known to the public, would not affect his credit, is fraudulent, would be a perversion of the statute. It did not intend thus to disturb the ordinary and safe transactions in society, made in good faith, and which, at the time, subjected creditors to no hazard. The statute designed to prohibit frauds, by protecting the rights of creditors. If the facts and circumstances show clearly a fraudulent intent, the conveyance is void against all creditors, past or future. Where a voluntary conveyance is made by an individual free from debt, with a purpose of committing a fraud on future creditors, it is void under the statute. And if a settlement be made, without any fraudulent intent, yet if the amount thus conveyed impaired the means of the grantor so as to hinder or delay his creditors, it is as to them void." Parish *v.* Murphree, 13 How. 92, 98, 14 L. Ed. 65. See ante, "Powers Exercisable by Debtor over His Property," II.

6. Object of statute.—Washington Cent. Bank *v.* Hume, 128 U. S. 195, 203, 32 L. Ed. 370.

"In the view of the law, credit is extended in reliance upon the evidence of the ability of the debtor to pay, and in confidence that his possessions will not be diminished to the prejudice of those who trust him. This reliance is disappointed, and this confidence abused, if he divests himself of his property by giving it away after he has obtained credit." Washington Cent. Bank *v.* Hume, 128 U. S. 195, 204, 32 L. Ed. 370. See post, "Property Not Belonging to Debtor, or Exempt," III, B. 7.

7. Connected but distinct conveyances.—The instruments were several; the grantees, the property conveyed, the alleged consideration, were all different and disconnected; and although the grantee in one, which was otherwise valid, acted for his brother the grantee in the other in obtaining the deed, yet it is not held that error was committed in declining to treat the conveyances as constituting parts of a single transaction and rendering the former a cograntee with the latter. Crawford *v.* Neal, 144 U. S. 585, 598, 36 L. Ed. 552.

Previous illegal deed of trust.—The fact that a debtor in Mississippi had previously

2. Absolute Sale and Assignment Distinguished.—An absolute sale in full satisfaction of an existing debt is to be distinguished from an assignment to secure payment of same.[8]

3. Fraudulent Entry of Public Lands.—Where a bill in chancery alleges that certain lands were entered in the name of a third person, with a view to cover them from the creditors of the person who had entered them, and this allegation is denied in the answer and not sustained by proof, the bill pro tanto must be dismissed.[9]

4. Payment of Life Insurance Premiums or Transfer of Policy.—Policies of insurance effected without fraud, directly and on their face for the benefit of the wife, and payable to her, are not fraudulent as to creditors. The fraud which would invalidate is actual fraud participated in by all parties, and not fraud inferred from the mere fact of insolvency of insured at the time.[10] This is true whether the policy was originally taken out by the wife, and pre-

executed a trust deed, with a provision probably making it constructively fraudulent, assuming that the conveyance in trust was of that character, according to the law of Mississippi, it does not follow that a subsequent sale and transfer, followed by delivery of possession, is tainted by the vice of the original transaction. Such objection assumes that the whole transaction, from the beginning, was free from actual and intended fraud, and was meant to be a mode of securing and paying an actual debt, in good faith, without any design injurious to other creditors, beyond that implied in obtaining a preference, which is not forbidden by law. In this view, the admission that the conveyance in trust was illegal does not affect the subsequent sale, which, on the contrary, being free from objection, on account of its own nature and form, served to remedy the defects in the original security. It was quite competent for the parties to rescind and cancel the first conveyance, and unite in the execution of another, free from objection. Stewart *v.* Dunham, 115 U. S. 61, 66, 29 L. Ed. 329.

Marriage settlement.—See the title MARRIAGE CONTRACTS AND SETTLEMENTS.

8. Sale and assignment distinguished.—It was held in Klein *v.* Hoffheimer, 132 U. S. 367, 372, 33 L. Ed. 373, that the transfer in question was not an assignment to secure payment of the debt of the debtor to the creditor, but it purports upon its face to be, and was treated by the parties throughout as, an absolute sale of those notes and accounts in full satisfaction of the debts due by the insolvent firm, and was to be treated as such, in its subsequent consideration. See, generally, the title ASSIGNMENTS FOR BENEFIT OF CREDITORS, vol. 2, p. 599.

9. Fraudulent entry of public lands.—McCoy *v.* Rhodes, 11 How. 131, 13 L. Ed. 634.

But where the party entered the lands in his own name, and afterwards conveyed them to this third person, but the deed to the third person was not recorded until after a judgment had been obtained by a creditor, and recorded in the parish where the land lies, against the party who made the entry, it will not be sufficient merely to set up in the answer that this third person furnished the money with which to purchase the lands. The equity must be proved. McCoy *v.* Rhodes, 11 How. 131, 13 L. Ed. 634. See, also, the title PUBLIC LANDS.

10. Payment of life insurance premiums.—Washington Cent. Bank *v.* Hume, 128 U. S. 195, 208, 32 L. Ed. 370.

Where a married man paid insurance premiums out of his own money, when insolvent, and the contracts covered his wife and children's insurable interest, the creditors, or the administrators as representing them, cannot take away from these dependent ones that which was expressly secured to them in the event of the death of their natural supporter. The interest insured was neither the debtor's nor his creditors'. The contracts were not payable to the debtor, or his representatives, or his creditors. No fraud on the part of the wife, or the children, or the insurance company is pretended. In no sense was there any gift or transfer of the debtor's property, unless the amounts paid as premiums are to be held to constitute such gift or transfer, which is not the case. Washington Cent. Bank *v.* Hume, 128 U. S. 195, 208, 32 L. Ed. 370.

But, even though he paid this money out of his own funds when insolvent, and if such payment were within the statute of Elizabeth, this would not give the creditors any interest in the proceeds of the policies, which belonged to the beneficiaries for the reasons already stated. Washington Cent. Bank *v.* Hume, 128 U. S. 195, 209, 32 L. Ed. 370.

By the laws of Connecticut an insurance policy for the benefit of a married woman enures to her separate use or her children,' unless the annual premium exceed $300, in which case any excess based on a larger premium enures to the benefit of the creditors of the person paying the premiums. Washington Cent. Bank *v.* Hume, 128 U. S. 195, 207, 32 L. Ed. 370.

"The rights and benefits given by the laws of Connecticut in this regard are as

miums paid by husband to keep it alive, or by him for her benefit.[11] And not even the premiums so paid can be recovered by the creditors, save in exceptional cases, where it is alleged and proved that the company participated in the fraud.[12]

Assignment of Policy for Benefit of Estate While Insolvent.—But where a policy has been taken out for the benefit of the estate of insured, it cannot be assigned by him, while insolvent, to any one, to the prejudice of creditors.[13]

5. Fraudulent Confession of Judgment.—See the title Judgments and Decrees.

6. Fraudulent Execution or Judicial Sale.—See the titles Judicial Sales; Sheriffs', Constables' and Marshals' Sales.

7. Property Not Belonging to Debtor, or Exempt.—It is only property be-

much part of these contracts as if incorporated therein, not only because they are to be taken as if entered into there, but because there was the place of performance, and the stipulation of the parties was made with reference to the laws of that place." Washington Cent. Bank *v.* Hume, 128 U. S. 195, 207, 32 L. Ed. 370.

11. By whom policy taken out immaterial.—The vested right of the beneficiary in the policy exists where the contract is directly with the beneficiary; in respect to policies running to the person insured, but payable to another having a direct pecuniary interest in the life insured; and where the proceeds are made to enure by positive statutory provisions. Washington Cent. Bank *v.* Hume, 128 U. S. 195, 206, 32 L. Ed. 370.

"There is no anomaly in this, nor any conflict with the letter or spirit of the statute of Elizabeth, because in such cases the policy would be at no time the property of the assured, and hence no question of fraud in its transfer could arise as to his creditors. It is only in case of the asssignment of a policy that once belonged to the assured that the question of fraud can arise under this act." Washington Cent. Bank *v.* Hume, 128 U. S. 195; 208, 32 L. Ed. 370.

12. Recovery of premiums.—Washington Cent. Bank *v.* Hume, 128 U. S. 195, 32 L. Ed. 370.

Where the premiums were paid by the husband to the insurance companies, to recover from them would require proof that the latter participated in the alleged fraudulent intent, which is not claimed. Cases might be imagined of the payment of large premiums, out of all reasonable proportion to the known or reputed financial condition of the person paying, and under circumstances of grave suspicion, which might justify the inference of fraud on creditors in the withdrawal of such an amount from the debtor's resources; but no element of that sort exists here. The premiums form no part of the proceeds of the policies, and cannot be deducted therefrom on that ground. Washington Cent. Bank *v.* Hume, 128 U. S. 195, 209, 32 L. Ed. 370.

13. Assignment of policy while insolvent.—"And where a person has taken out policies of insurance upon his life for the benefit of his estate, it has been frequently held that, as against creditors, his assignment, when insolvent, of such policies, to or for the benefit of wife and children, or either, constitutes a fraudulent transfer of assets within the statute, and this, even though the debtor may have had no deliberate intention of depriving his creditors of a fund to which they were entitled, because his act has in point of fact withdrawn such a fund from them, and dealt with it by way of bounty. Freeman *v.* Pope, L. R. 9 Eq. 206, S. C. L. R. 5 Ch. 538. The rule stands upon precisely the same ground as any other disposition of his property by the debtor. The defect of the disposition is that it removes the property of the debtor out of the reach of his creditors." Washington Cent. Bank *v.* Hume, 128 U. S. 195, 204, 32 L. Ed. 370.

"But the rule applies only to that which the debtor could have made available for payment of his debts. For instance, the exercise of a general power of appointment might be fraudulent and void under the statute, but not the exercise of a limited or exclusive power, because, in the latter case, the debtor never had any interest in the property himself which could have been available to a creditor, or by which he could have obtained credit." Washington Cent. Bank *v.* Hume, 128 U. S. 15, 204, 32 L. Ed. 370.

"It is true that creditors can obtain relief in respect to a fraudulent conveyance where the grantor cannot, but that relief only restores the subjection of the debtor's property to the payment of his indebtedness as it existed prior to the conveyance." Washington Cent. Bank *v.* Hume, 128 U. S. 195, 204, 32 L. Ed. 370.

Conflict of laws.—"It may very well be that a transfer by an insolvent of a Connecticut policy, payable to himself or his personal representatives, would be held invalid in that district, even though valid under the laws of Connecticut, if the laws of the district were opposed to the latter, because the positive laws of the domicile and the forum must prevail; but there is no such conflict of laws in this case in

longing to the debtor, and liable for his debts, that can be the subject of a fraudulent conveyance, or cannot be given away by him.[14]

Conveyance of Exempt Property.—That a member of a firm covered his homestead with a mortgage, which was used to raise money by the firm to pay its debts, is not a transaction that should be branded as a fraud by other creditors.[15]

C. Elements and Badges of Fraud.—See, generally, the title FRAUD AND DECEIT, ante, p. 394.

1. INTENT IN GENERAL—a. *Of Grantor.*—While good faith is essential to support a conveyance against the claims of attacking creditors,[16] where there is clearly a bona fide grantor, the grant is not within the statutes against fraudulent conveyances.[17] Where good faith exists, and there is no proof of any intent on the part of the grantor to hinder, delay or defraud his existing creditors, a conveyance by him for a valuable consideration, whether an existing debt or other thing, is valid pro tanto, and cannot be set aside by other creditors.[18]

respect to the power of disposition by a person procuring insurance payable to another." Washington Cent. Bank *v.* Hume, 128 U. S. 195, 207, 32 L. Ed. 370.

14. Property not belonging to debtor.—Rio Grande R. Co. *v.* Vinet, 132 U. S. 565, 33 L. Ed. 438; Stewart *v.* Platt, 101 U. S. 731, 25 L. Ed. 816; Carite *v.* Trotot, 105 U. S. 751, 26 L. Ed. 1223; Van Riswick *v.* Spalding, 117 U. S. 370, 29 L. Ed. 913; Sexton *v.* Wheaton, 8 Wheat. 229, 5 L. Ed. 603; Davis *v.* Fredericks, 104 U. S. 618, 26 L. Ed. 849; Washington Cent. Bank *v.* Hume, 128 U. S. 195, 203, 32 L. Ed. 370.

15. Conveyance of exempt property.—Rio Grande R. Co. *v.* Vinet, 132 U. S. 565, 571, 33 L. Ed. 438.

Wife's settlement property.—And where property which had been settled upon a married woman, was afterwards appropriated by their joint act to the payment of one creditor, other creditors could not complain, for it was not their debtor's property. Stewart *v.* Platt, 101 U. S. 731, 25 L. Ed. 816.

By joint act of husband and wife.—Where property was a gift from the husband to the wife at a time when his right to make it cannot be disputed, being distinctly separated from the mass of his property, and the title made to her for her benefit, and there being no proof that the conveyance was with any intention to defraud his then existing or future creditors, and she chose, in order to aid her husband, or for other reasons satisfactory to herself, to unite with him in the conveyance to a creditor, thereby surrendering her estate for the benefit of the husband's creditor, this appropriation of the wife's property, by the joint act of herself and husband, to the payment of the debt of a particular creditor of the latter, is not a matter of which the assignee in bankruptcy, or any subsequent creditor of the husband, can rightfully complain. Stewart *v.* Platt, 101 U. S. 731, 741, 25 L. Ed. 816; Davis *v.* Fredericks, 104 U. S. 618, 26 L. Ed. 849. See, generally, the titles HUSBAND AND WIFE; SEPARATE ESTATE OF MARRIED WOMEN.

As to expenditure of labor and business ability of husband on wife's separate estate, see the title SEPARATE ESTATE OF MARRIED WOMEN.

16. Good faith.—It is not enough, in order to support a conveyance or settlement against creditors, that it be made for a valuable consideration. It must be also bona fide. If it be made with intent to hinder, delay, or defraud them, it is void as against them, although there may be in the strictest sense a valuable or even an adequate consideration. Blennerhassett *v.* Sherman, 105 U. S. 100, 117, 26 L. Ed. 1080; United States *v.* Hooe, 3 Cranch 73, 2 L. Ed. 370; Blanchard *v.* Brown, 3 Wall. 245, 250, 18 L. Ed. 69; Lukins *v.* Aird, 6 Wall. 78, 79, 18 L. Ed. 750; Kempner *v.* Churchill, 8 Wall. 362, 19 L. Ed. 451; Lloyd *v.* Fulton, 91 U. S. 479, 485, 23 L. Ed. 363; Peters *v.* Bain, 133 U. S. 670, 692, 33 L. Ed. 696; Davis *v.* Schwartz, 155 U. S. 631, 638, 39 L. Ed. 289; Shauer *v.* Alterton, 151 U. S. 607, 38 L. Ed. 286.

"A sale may be void for bad faith though the buyer pays the full value of the property bought. This is the consequence, where his purpose is to aid the seller in perpetrating a fraud upon his creditors, and where he buys recklessly, with guilty knowledge. When the fact of fraud is established in a suit at law, the buyer losses the property without reference to the amount or application of what he has paid, and he can have no relief either at law or in equity." Clements *v.* Moore, 6 Wall. 299, 312, 18 L. Ed. 786. See, also, United States *v.* Hooe, 3 Cranch 73, 2 L. Ed. 370; Klein *v.* Hoffheimer, 132 U. S. 367, 377, 33 L. Ed. 373.

Collusion between debtor and purchaser at judicial or sheriff's sale.—See the titles JUDICIAL SALES; SHERIFFS', CONSTABLES' AND MARSHALS' SALES.

17. Bona fide grantor.—Clarke *v.* White, 12 Pet. 178, 9 L. Ed. 1046.

18. Intent of grantor.—Robinson *v.* Elliott, 22 Wall. 513, 523, 22 L. Ed. 758;

And the fraudulent intent must have existed in that particular transaction.[19]

Intent to Hinder and Delay.—An intent to hinder and delay is as fatal to the validity of such a conveyance as an intent to defraud creditors.[20]

b. *Mutuality of Fraudulent Intent, or Notice, Essential.*—And where the price paid is not shown to be inadequate, whatever may be suggested or surmised as to possible fraudulent intentions of a grantor, in the conveyance, its validity cannot be questioned in the absence of any evidence of participation in them by the grantee. The fraud which will vitiate a sale must be mutual, that is, must be intended by both parties, or by one with knowledge of the other's purpose, and thus acquiesced in and furthered.[21] Actual notice or knowledge, of

Drury *v.* Cross, 7 Wall 299, 302, 19 L. Ed 40.

"But the creditor must take care in making his contract that it does not contain provisions of no advantage to him, but which benefit the debtor, and were designed to do so, and are injurious to other creditors. The law will not sanction a proceeding of this kind. It will not allow the creditor to make use of his debt for any other purpose than his own indemnity. If he goes beyond this, and puts into the contract stipulations which have the effect to shield the property of his debtor, so that creditors are delayed in the collection of their debts, a court of equity will not lend its aid to enforce the contract." Robinson *v.* Elliott, 22 Wall. 513, 523, 22 L. Ed. 758. See, also, Means *v.* Dowd, 128 U. S. 273, 284, 32 L. Ed. 429. See post, "Preference to Creditors," III, C, 8.

19. **In transaction in question.**—The inquiry is not whether the grantors had been previously guilty of fraud or embezzlement, but whether this particular conveyance was made with a fraudulent intent known to the trustees or beneficiaries. This is not shown here. Peters *v.* Bain, 133 U. S. 670, 690, 33 L. Ed. 696. See the title BANKS AND BANKING, vol. 3, p. 1.

Previous conduct of the grantors in a deed assailed as fraudulent, however censurable, does not render the deed in itself fraudulent, although all the circumstances should be taken into consideration in passing on that question. Peters *v.* Bain, 133 U. S. 670, 692, 33 L. Ed. 696.

20. **Intent to hinder and delay sufficient.**—Means *v.* Dowd, 128 U. S. 273, 288, 32 L. Ed. 429; Robinson *v.* Elliott, 22 Wall. 513, 523, 22 L. Ed. 758.

21. **Mutuality of fraudulent intent, or notice, essential.**—Horbach *v.* Hill, 112 U. S. 144, 148, 28 L. Ed. 670; Astor *v.* Wells, 4 Wheat. 466, 4 L. Ed. 616; Brooks *v.* Marbury, 11 Wheat. 78, 90, 6 L. Ed. 423; Magniac *v.* Thompson, 7 Pet. 348, 393, 8 L. Ed. 709; Jones *v.* Simpson, 116 U. S. 609, 614, 29 L. Ed. 742; Emerson *v.* Senter, 118 U. S. 1, 10, 30 L. Ed. 49; Means *v.* Dowd, 128 U. S. 273, 280, 32 L. Ed. 429; Crawford *v.* Neal, 144 U. S. 585, 595, 36 L. Ed. 552. See, also, Mattingly *v.* Nye, 8 Wall. 370, 372, 19 L. Ed. 380; Sexton *v.* Wheat, 8 Wheat. 229, 5 L. Ed. 603.

"The consideration being valuable, if the contract, whether executed or executory, is made in good faith, with one having no notice or knowledge of any fraud, covin or collusion to defraud creditors, performance may be enforced, or voluntarily made, and the contract carried into execution, at any time, either in the whole or in part, as is in the power of the party." Magniac *v.* Thompson, 7 Pet. 348, 393, 8 L. Ed. 709.

"The words of the law (the statute of 13 Eliz., c. 5) require, that both parties must concur in the fraud, in order to bring the same within the provisions." Magniac *v.* Thompson, 7 Pet. 348, 393, 8 L. Ed. 709.

Thus, when a deed is executed for a valuable and adequate consideration, without knowledge by the grantee of any fraudulent intent of the grantor, it will be upheld, however fraudulent his purpose. To vitiate the transfer in such case, the grantee also must be chargeable with knowledge of the intention of the grantor. Prewit *v.* Wilson, 103 U. S. 22, 24, 26 L. Ed. 360; Watson *v.* Sutherland, 5 Wall. 74, 80, 18 L. Ed. 580.

And the purchaser of a stock of goods and business good will for an adequate consideration and without participation in or knowledge of any fraudulent purpose of the vendor in so disposing thereof, gets a good title to same in absence of statute invalidating such sales. North *v.* Peters, 138 U. S. 271, 280, 34 L. Ed. 936.

Burden of proof as to payment of consideration.—"Upon its appearing that the vendor—possession having been delivered—made the sale with the fraudulent intent to hinder or delay his creditors, the utmost which the creditors could claim is that the burden of proof is upon the vendee, as between him and existing creditors, to show, by competent proof, that he paid a sufficient consideration for the property. But such payment being shown, the vendee is entitled to a verdict and judgment—however fraudulent may have been the intent of the vendor—unless it appears affirmatively, from all the circumstances, that he purchased in bad faith." Jones *v.* Simpson, 116 U. S. 609, 614, 29 L. Ed. 742.

such intent of grantor,[22] or reasonable cause to suspect the existence of such intent, is sufficient.[23] In some of the states notice to the trustee in a deed of

"That deeds which are absolutely void cannot be the foundation of title, or that a cestui que trust can claim nothing under a deed which is fraudulently obtained by his trustee or agent, acting by his authority, need not be controverted; but that a principal and his agent, meditating, as the probable consequence of their act, an object forbidden by the policy of the law, cannot, because the one has conveyed to the other in furtherance of this design, sell to a fair creditor, or for the benefit of a fair creditor, not participating in their views, or cognizant thereof, is more than this court is prepared to say." Brooks *v.* Marbury, 11 Wheat. 78, 90, 6 L. Ed. 423.

Preferential mortgage.—In order to invalidate a preferential mortgage it must have been made with the intent, on the part of debtor, to hinder and delay his other creditors, and the mortgagees must have accepted it with the intent of assisting him to hinder and delay his other creditors. Huiskamp *v.* Moline Wagon Co., 121 U. S. 310, 319, 30 L. Ed. 971. See, also, the title MORTGAGES AND DEEDS OF TRUST.

Fraudulent intent to prefer creditor.—See post, "Lawful in Absence of Statute," III, C, 8, a.

22. Actual notice.—Actual notice of intent to delay or defraud creditors, makes any sale voidable against creditors. Shauer *v.* Alterton, 151 U. S. 607, 621, 38 L. Ed. 286; Jones *v.* Simpson, 116 U. S. 609, 614, 29 L. Ed. 742; Clements *v.* Moore, 6 Wall. 299, 312, 18 L. Ed. 786.

It must not be taken that it requires active co-operation, preconcert and participation in the original design of fraud; and that notice of it is not sufficient to avoid the settlement, although all the parties, after such notice, proceed to execute it. Magniac *v.* Thompson, 7 Pet. 348, 395, 8 L. Ed. 709.

23. Reasonable cause of suspicion.—Tiffany *v.* Lucas, 15 Wall. 410, 21 L. Ed. 198; Harrell *v.* Beall, 17 Wall. 590, 21 L. Ed. 692.

If the evidence showed either that the purchase was not in good faith, or was made with knowledge at the time of such facts and circumstances as reasonably put them upon inquiry as to the purpose of the vendors to hinder and delay their creditors, the conveyance will not stand, and if there was evidence tending to prove this, then the jury are to be allowed to pass upon it, in spite of the consideration paid. Jones *v.* Simpson, 116 U. S. 609, 612, 614, 29 L. Ed. 742.

"A statute that declares every transfer of property, made with intent to delay or defraud any creditor of his demands, void against all creditors of the debtor, would be wholly defeated in its operation if the rights of the transferee were not subject to the rule that 'whatever is notice enough to excite attention and put the party on his guard, and call for inquiry, is notice of everything to which such inquiry might have led.'" Shauer *v.* Alterton, 151 U. S. 607, 622, 38 L. Ed. 286; Wood *v.* Carpenter, 101 U. S. 135, 141, 25 L. Ed. 807.

The statute of Dakota, strictly interpreted, would seem to invalidate any transfer of property made with the intent, upon the part of the owner, to delay or defraud creditors, even when the transferee purchased in good faith. But even when liberally construed so as to protect bona fide purchasers for value, assuming, for the purpose of this case, that this interpretation was correct, while the plaintiff was not bound to act upon mere suspicion as to the intent with which his brother made the sale in question, if he had knowledge or actual notice of circumstances sufficient to put him, as a prudent man, upon inquiry as to whether his brother intended to delay or defraud his creditors, and he omitted to make such inquiry with reasonable diligence, he should have been deemed to have notice of such fact, and, therefore, such notice as would invalidate the sale to him, if such sale was in fact made with the intent upon the part of the vendor to delay or defraud other creditors. Shauer *v.* Alterton, 151 U. S. 607, 621, 38 L. Ed. 286.

"Referring to the statute of Dakota, declaring a conveyance of real property, other than a lease for a term not exceeding one year, void as against any subsequent purchaser or encumbrancer (including an assignee of a mortgage, lease, or other conditional estate, of the same property or any part thereof), in good faith and for a valuable consideration, whose conveyance is first duly recorded, the supreme court of Dakota, in Gress *v.* Evans, 1 Dakota 387, 399, said: 'Actual notice of a prior unrecorded conveyance, or of any title, legal or equitable, to the premises, or knowledge and notice of any facts which should put a prudent man upon inquiry, impeaches the good faith of the subsequent purchaser. There should be proof of actual notice of prior title or prior equities, or circumstances tending to prove such prior rights, which affect the conscience of the subsequent purchaser. Actual notice, of itself, impeaches the subsequent conveyance. Proof of circumstances, short of actual notice, which should put a prudent man upon inquiry, authorizes the court or jury to infer and find actual notice. Or, to express it exactly, good faith consists in an honest intention to abstain from taking any unconscientious advantage of another, even through the forms or technicalities of law, together with an absence of all informa-

trust is notice to the beneficiary.[24] The question of good faith is one of fact.[25]

c. *Intent to Defraud Future Creditors.*—An intent to defraud future creditors by disposing of property, may be a fraud against them.[26]

2. Conveyances Fraudulent on Their Face.—A conveyance sometimes contains provisions which in themselves justify the inference of a fraudulent intent.[27]

tion or belief of facts which would render the transaction unconscientious. And notice is either actual or constructive." Shauer *v.* Alterton, 151 U. S. 607, 621, 38 L. Ed. 286.

"A less stringent rule cannot be applied to the Dakota statute relating to transfers of property with intent to delay or defraud creditors. The plaintiff had the right, by a purchase of his brother's stock of merchandise, to obtain payment of his claims in preference to the claims of other creditors. But the statute of Dakota, however liberally construed in favor of purchasers from a fraudulent debtor, will not permit him to enjoy, to the exclusion of other creditors, the fruits of his purchase, when the sale was made with the intent to delay or defraud other creditors, if he had, at the time, actual notice of such intent or knowledge of such circumstances or facts as were sufficient to put a prudent person upon an inquiry that would have disclosed the existence of such intent upon the part of the vendor." Shauer *v.* Alterton, 151 U. S. 607, 622, 38 L. Ed. 286.

Under the statute of fraudulent conveyances of Ohio, which provides, that "every gift, grant or conveyance of lands, tenements, hereditaments, etc., made or obtained, with intent to defraud creditors of their just and lawful debts or damages, or to defraud or deceive the person or persons who shall purchase such lands, etc., shall be deemed utterly void, and of no effect;" held, that a bona fide purchaser, without notice, could not be affected by the intent of the grantor to defraud creditors. Astor *v.* Wells, 4 Wheat. 466, 4 L. Ed. 616.

24. Notice to trustee in deed of trust.—It is well settled in the states of West Virginia and Virginia that notice to the trustees is notice to the beneficiaries. Peters *v.* Bain, 133 U. S. 670, 696, 33 L. Ed. 696.

While it is well settled in Virginia that the trustees and beneficiaries in a deed of trust to secure bona fide debts occupy the position of purchasers for a valuable consideration, yet they cannot hold with notice of the fraudulent intent of their grantor, or of the fraud rendering his title void. Peters *v.* Bain, 133 U. S. 670, 696, 33 L. Ed. 696.

25. While the fact that a mortgage is given for a larger amount than was due, is a suspicious circumstance, raising a presumption of fraud, and may, under certain circumstances, avoid the whole mortgage, in all such cases the question of good faith is one of fact, and a mere error of judgment will not be imputed as a fraud. The fact that the debt so included was a bona fide debt, and that the act of the mortgagee in so including it was subsequently affirmed by the creditors interested, will be strong evidence that no actual fraud was intended. There must be a willful design to impose upon and defraud the general creditors, to avoid it. Davis *v.* Schwartz, 155 U. S. 631, 645, 39 L. Ed. 289; Shirras *v.* Caig, 7 Cranch 34, 3 L. Ed. 260. See, also, Robinson *v.* Elliott, 22 Wall. 513, 520, 22 L. Ed. 758.

Weight of evidence.—See post, "Weight and Sufficiency," VI, F, 3.

26. Intent to defraud future creditors.—"It is true that if a debtor dispose of his property, with intent to defraud those to whom he expects to become immediately or soon indebted, this may be a fraud against them, which they may have a right to unravel. But that is a special case, to which the present bears no resemblance." Graham *v.* Railroad Co., 102 U. S. 148, 153, 26 L. Ed. 106. See, also, post, "Validity as to Creditors," IV, B; "As to Creditors and Purchasers," V, C.

27. Conveyances fraudulent on their face.—"The doctrine in Virginia, settled by a long and uninterrupted line of decisions, is that, while there may be provisions in a deed of trust of such a character as of themselves to furnish evidence sufficient to justify the inference of a fraudulent intent, yet this cannot be so except where the inference is so absolutely irresistible as to preclude indulgence in any other." Peters *v.* Bain, 133 U. S. 670, 686, 33 L. Ed. 696.

"Hence provisions postponing the time of the sale and reserving the use of the property to the grantor meanwhile, though perishable and consumable in the use; permitting sales on credit; for the payment of surplus after satisfaction of creditors secured; the omission of a schedule or inventory; and the like, have been regarded as insufficient to justify the court in invalidating the deed for fraud in point of law. The fraudulent intent is held not to be presumed even under such circumstances, and in its absence the fact that creditors may be delayed or hindered is not of itself sufficient to vacate the instrument, while the right to prefer one creditor over another is thoroughly established." Peters *v.* Bain, 133 U. S. 670, 686, 33 L. Ed. 696.

"The tendency of courts in modern times has been, not to hold instruments of this character to be fraudulent and void upon

3. Concealment.—A conveyance not fraudulent in its inception, may become so by concealment.[28] But it is only a circumstance connected with other facts from which fraud may be inferred.[29]

4. Confidential Relations—a. *In General.*—The fact that the assignee or the preferred creditor of an insolvent debtor is a relative or intimate friend is doubtless calculated to excite suspicion; yet in reality there is nothing unnatural in a dealer or trader who is in need of credit, or a loan of money to carry on his business, first applying to his relatives for such loans, and if the evidence be undisputed that the money was advanced, the fact that the persons making the loan are relatives ought not to debar them from receiving security. Their rights are neither increased nor diminished by the fact of relationship.[30]

their face, unless they contain provisions plainly inconsistent with an honest purpose, or the instrument indicates with reasonable certainty that it was executed, not to secure bona fide creditors, but to enable the debtor to continue to carry on his business under cover of another's name. So early as 1805, it was held by this court in United States *v.* Hooe, 3 Cranch 73, 2 L. Ed. 370, that the mortgage of a part of his property, made by a collector of revenue to the surety upon his official bond, to indemnify him for his responsibility, and to secure him for endorsements at the bank, was valid against the United States, though it turned out that the mortgagor was unable to pay all his debts at the time the mortgage was given, and the mortgagee also knew at that time that he was largely indebted to the United States. It was contended that the mortgage was fraudulent upon its face, but the case was distinguished from Twyne's case, 3 Rep. 81, in the fact that in Twyne's case the deed was of all the property; was secret; was of chattels, and purported to be absolute, yet the vendor remained in possession and exercised ownership over them; while in the case then under consideration the deed was of a part of the property; was of record; was of lands, and purported to be a conveyance which left the property conveyed in the possession of the grantor. The case was also distinguished from Hamilton *v.* Russell, 1 Cranch 309, 2 L. Ed. 118, in which this court declared an absolute bill of sale of a personal chattel, of which the vendor retained possession, to be a fraud." Huntley *v.* Kingman, 152 U. S. 527, 532, 38 L. Ed. 540. See the title MORTGAGES AND DEEDS OF TRUST.

28. **Concealment.** — Blennershaett *v.* Sherman, 105 U. S. 100, 118, 26 L. Ed. 1080.

"As long ago as the case of Hungerford *v.* Earle (2 Vern. 261), it was held that 'a deed not at first fraudulent may afterwards become so by being concealed or not pursued, by which means creditors are drawn in to lend their money.' This doctrine has been repeatedly reaffirmed." Blennerhassett *v.* Sherman, 105 U. S. 100, 118, 26 L. Ed. 1080.

"But where a mortgagee, knowing that his mortgagor is insolvent, for the purpose of giving him a fictitious credit actively conceals the mortgage which covers his entire estate and withholds it from the record, and while so concealing it represents the mortgagor as having a large estate and unlimited credit, and by these means others are induced to give him credit, and he fails and is unable to pay the debts thus contracted, the mortgage will be declared fraudulent and void at common law, whether the motive of the mortgagee be gain to himself or advantage to his mortgagor." Blennerhassett *v.* Sherman, 105 U. S. 100, 117, 26 L. Ed. 1080. See, also, Davis *v.* Schwartz, 155 U. S. 631, 639, 39 L. Ed. 289.

29. **A circumstance of suspicion merely.** —"Whilst in the old cases it was held that the possession of the vendor of goods sold was fraudulent against creditors, no case, it is believed, has been so held by the court on the sole ground of secrecy in making the contract. It is a circumstance connected with other facts from which fraud may be inferred. But if the secrecy supposed amounted to absolute fraud, yet the court could not have so pronounced in this case, as there was evidence controverting the supposition of secrecy, which the court could not properly take from the consideration of the jury." Warner *v.* Norton, 20 How. 448, 460, 15 L. Ed. 950. See post, "Retention of Possession," III, C, 9, a.

30. **Confidential relations in general.**— Davis *v.* Schwartz, 155 U. S. 631, 638, 39 L. Ed. 289; Magniac *v.* Thompson, 7 Pet. 348, 8 L. Ed. 709; Prewit *v.* Wilson, 103 U. S. 22, 26 L. Ed. 360; Estes *v.* Gunter, 122 U. S. 450, 30 L. Ed. 1228; Bean *v.* Patterson, 122 U. S. 496, 30 L. Ed. 1126; Garner *v.* Second Nat. Bank, 151 U. S. 420, 432, 38 L. Ed. 218.

The law presumes a sale, even between near relations (brothers), to have been made in good faith, if accompanied by immediate delivery and followed by actual, continued change of possession. Shaver *v.* Alterton, 151 U. S. 607, 626, 38 L. Ed. 286.

A conveyance by a grantor, upon the eve of a decree being rendered against him for a large sum of money, which would go far to his ruin, of his whole property, real and personal, to his brother-in-law, for an asserted full consideration

b. *Brothers.*—The relationship of brothers does not, of and in itself, cast suspicion upon a transfer from one to the other of property, or create such a prima facie presumption against its validity as would require the court to hold it to be invalid without proof that there was fraud on the part of the grantor, participated in by the grantee. This proposition is so well settled that authorities need not be cited in its support.[31]

c. *Husband and Wife*—(1) *Conveyance to Wife*—(a) *Validity in General.*—In the absence of fraud, a wife may purchase property from her husband, such as his curtesy in her hands, without his creditors having any right to complain, in the absence of a specific lien.[32]

(b) *Presumption.*—But in a contest between the creditors of the husband and the wife, over property conveyed to her by him or by another, there is a presumption against her which she must overcome by affirmative proof.[33] And

which did not appear from the evidence to have been actually paid, is fraudulent as to existing creditors. Venable *v.* United States Bank, 2 Pet. 107, 112, 7 L. Ed. 364.

31. Brothers.—Gottlieb *v.* Thatcher, 151 U. S. 271, 279, 38 L. Ed. 157.

It was not error for the jury to be told that the relations of the parties to the transaction, they being brothers, made it necessary to carefully scrutinize the facts, but that their determination must, at last, depend upon the inquiry whether the transaction was honest and bona fide. Shauer *v.* Alterton, 151 U. S. 607, 626, 38 L. Ed. 286.

32. Validity in general.—Hitz *v.* National, etc., Bank, 111 U. S. 722, 726, 28 L. Ed. 577; Wheaton *v.* Sexton, 4 Wheat. 503, 4 L. Ed. 626.

Where the case is wholly free from fraud, a wife has the same right to buy her husband's curtesy in her real estate, to have it barred by a proper conveyance, as any one else had or could have had. Her equity was as good as that of any other creditor, and he could secure her as well as he could the bank. As the present complainant had no lien on the property, the joint right of husband and wife to sell it for value was undoubted, and the right to sell to her by the intervention of trustees is equally clear. The property she gave in exchange for his interest in her lots did not go to him to be secretly used in fraud of his creditors, but was conveyed directly to creditors in satisfaction of his debts. The conveyance was not without consideration and it was without fraud. Hitz *v.* National, etc., Bank, 111 U. S. 722, 726, 28 L. Ed. 577.

In Clark *v.* Beecher, 154 U. S. 631, 24 L. Ed. 705, a conveyance by a debtor to his wife was held properly condemned as fraudulent.

Conveyances in 1871 which were meritorious, upon good consideration, made by one in debt in only a trifling sum, and retaining an abundance of property for the discharge of those debts and who in fact subsequently, and as they became due, paid them, made by one continuing and expecting to continue in the same profitable and not hazardous business in which he had been engaged for nearly a score of years, with no thought of entering upon any new or hazardous business, and more than three years before any liability to V. was incurred or even thought of, and where the placing of the notes, bonds and mortgages in 1874 in the wife's name was in pursuance of an arrangement entered into when the husband was not in debt, and when no obligation, fixed or contingent, to V. had been entered into or thought of, under these circumstances it is error to hold that the transactions were fraudulent and void as against V. Schreyer *v.* Scott, 134 U. S. 405, 417, 33 L. Ed. 955.

Preference of wife as creditor.—See post, "Preference of Wife," III, C, 8, f.

Agreement for resale to wife of debtor by purchaser.—Where a lien creditor, C., by executory process under the Louisiana practice, obtained the seizure and sale of an insolvent debtor's property, and became the purchaser under an agreement with the debtor and his wife to resell the same to the latter; it was held that the purchaser obtained an absolute title, free from incumbrances subsequent thereto, and that there was nothing in the circumstances of the case as disclosed in this record to impeach the good faith, or affect the validity, of the sale to the wife. C. had the unquestionable right to subject to judicial sale the property held as security for his debt, and become its purchaser at two-thirds of its appraised value. No one was wronged by such a procedure, although it had the effect to disappoint every other creditor. C. could convey, or agree to convey, it to any one he chose. Carite *v.* Trotot, 105 U. S. 751, 758, 26 L. Ed. 1223.

The instruction that if the original sale was valid the purchasers had a legal right to dispose of the property to vendor's wife, is correct. Bamberger *v.* Schoolfield, 160 U. S. 149, 164, 40 L. Ed. 374.

Or to his children or any one else. Van Riswick *v.* Spalding, 117 U. S. 370, 29 L. Ed. 913. See, also, post, "Reservation of Benefit," III, C, 9, b.

33. Presumption against wife.—Shauer *v.* Alterton, 151 U. S. 607, 38 L. Ed. 286;

if money, which a married woman might have had secured to her own use, is allowed to go into the business of her husband, be mixed with his property, and applied to the purchase of real estate for his advantage, or for the purpose of giving him credit in business, and is thus used for a series of years, such real estate, unless there is at the time of its purchase a specific agreement that it shall belong to the wife, becomes the property of the husband for the purpose of paying his debts. A conveyance thereof to his wife, upon the occurrence of his bankruptcy, is a fraud upon his creditors, and void.[34] But where husband and wife evidently saw no necessity of dealing with each other at arm's length, and the title to the property was placed in her name when there was no legal or equitable reason why it should not be done, the rents and other cash receipts were not unnaturally kept in one account and handled as one fund. The lack of substantial indebtedness and the record of the transfer being established, the carelessness of their dealings tends to prove honesty rather than to establish fraud.[35] And if such specific agreement is proved and no creditor was mis-

Seitz *v.* Mitchell, 94 U. S. 580, 582, 24 L. Ed. 179.

"Such is the community of interest between husband and wife; such purchases are so often made a cover for a debtor's property, are so frequently resorted to for the purpose of withdrawing his property from the reach of his creditors and preserving it for his own use, and they hold forth such temptations for fraud, that they require close scrutiny. In a contest between the creditors of the husband and the wife there is, and there should be, a presumption against her which she must overcome by affirmative proof. Such has always been the rule of the common law; and the rule continues, though statutes have modified the doctrine that gave to the husband absolutely the personal property of the wife in possession, and the right to reduce into his possession and ownership all her choses in action." Seitz *v.* Mitchell, 94 U. S. 580, 582, 24 L. Ed. 179.

Purchases of real or personal property, made during coverture, by the wife of an insolvent debtor, are justly regarded with suspicion. She cannot prevail in contests between his creditors and her, involving their right to subject property so acquired to the payment of his debts, unless the presumption that it was not paid for out of her separate estate be overcome by affirmative proof. Seitz *v.* Mitchell, 94 U. S. 580, 24 L. Ed. 179.

Where husband and wife lived together, and there is nothing to show that the wife had any opportunity of obtaining money except from her husband, and creditors of the husband attack by bill conveyances of property to the wife as in fraud of their rights, and the answer does not aver that she paid for either of the lots conveyed to her out of her separate property, or that she had any separate property, nor does the proof show that she had any, such presumption is not overcome. Seitz *v.* Mitchell, 94 U. S. 580, 585, 24 L. Ed. 179.

34. Husband's apparent ownership.—Humes *v.* Scruggs, 94 U. S. 22, 24 L. Ed. 51; Hinde *v.* Longworth, 11 Wheat. 199, 6 L. Ed. 454; Garner *v.* Second Nat. Bank, 151 U. S. 420, 435, 38 L. Ed. 218.

35. Conveyance prior to any indebtedness.—Schreyer *v.* Scott, 134 U. S. 405, 416, 33 L. Ed. 955.

Although it is objected by the appellees that the husband's testimony is not to be depended upon, because contradictory, confused and uncertain; that there is no definiteness in it as to amounts and dates; and that wrong in the transactions is evident, because the moneys received for rent, after the conveyances, were deposited by him in his own name in bank, and were obviously managed and handled by him as his own, as no accounts were kept between husband and wife of their separate moneys, but all were mingled in one fund, in his hands, all this does not indicate fraud. If his testimony is worthless and to be rejected, then there is practically no testimony interpreting those transactions, and the court never presumes fraud. The very confusion and carelessness in the dealings between husband and wife make against rather than in favor of the claim of fraud. Schreyer *v.* Scott, 134 U. S. 405, 416, 33 L. Ed. 955.

Where the conveyances claimed to be fraudulent and void were made and recorded more than three years prior to the building contract, out of which creditor's claim arose; and, while the mortgages to Mrs. S. were executed and recorded during the same year with the building contract, yet the obligation assumed by S. guaranteeing the mortgage and the bond it secured was a voluntary one, without consideration, and after a contract expressly providing for payment in another way; was conditional, and only became a fixed indebtedness two years thereafter, when by the foreclosure proceedings the worthlessness of the guaranteed bond and mortgage was developed, obviously, very clear and direct testimony is essential to support an adjudication that transfers were fraudulent and void as against this subsequent creditor. Schreyer *v.* Scott, 134 U. S. 405, 409, 33 L. Ed. 955.

lead to his injury by her conduct, the conveyance will be valid.[36]

(c) *Consideration.*—While transactions by way of purchase or security between husband and wife should be carefully scrutinized, when they are shown to have been upon full consideration from one to the other, or, when voluntary, that the husband was at the time free from debt and possessed of ample means, the same protection should be afforded to them as to like transactions between third parties.[37]

Wife's Separate Property.—The transfer by a husband to his wife of the legal title to property of which she was prior thereto, the equitable owner, or in which she had at least a large equitable interest, is not voluntary.[38] And

Conceding all that is claimed by counsel in reference to irregularity in bankrupt proceedings in 1878, it is difficult to deduce therefrom any evidence of wrong in the transactions in 1871 and 1874. It would be a very unjust conclusion from such facts, that in 1871, when he made the conveyances to his wife, and in 1874, when he made the arrangement for the execution of the bonds and mortgages to his wife, anterior to any known or expected liability to the attacking creditor, he was acting with a view of subsequently going through bankruptcy, or defrauding him or any other creditor. Schreyer *v.* Scott, 134 U. S. 405, 417, 33 L. Ed. 955.

36. Conveyance in pursuance of explicit agreement.—Where a husband was without any means of his own and had in his possession, substantially, the entire estate of his wife, controlling and managing it for her, and the property in question was purchased and improved wholly with her money under an explicit assurance by him, before the purchase was made, that it would be put in her name; and she relied upon his compliance with that promise; and the husband, at the date of the deed to her owed her a larger sum than the amounts expended in purchasing and improving the property; and the conveyance to G., in order that he might convey to the wife, was made in good faith, for the purpose, and only for the purpose, of satisfying, to the extent of the value of the property conveyed, the debt due to the wife; and no one became a creditor of the husband in consequence of any representation made by her, or with her knowledge, that he owned the property, his creditors cannot subject such property as his, and equity will set aside conveyances thereof under execution sales as his property. Garner *v.* Second Nat. Bank, 151 U. S. 420, 433, 38 L. Ed. 218.

"If, before any rights of attaching creditors intervened, he did voluntarily what the law made it his duty to do, the transaction is not subject to impeachment by his creditors, unless the wife has been guilty of such fraudulent conduct as ought, in conscience, to estop her from claiming the property as against such creditors. If the wife had herself been guilty of deception, or if she had contributed to its success by countenancing it, she might, with justice, be charged with the consequence of her conduct. Sexton *v.* Wheaton, 8 Wheat. 229, 240, 5 L. Ed. 603. But the evidence furnishes no ground for the imputation of fraud against her." Garner *v.* Second Nat. Bank, 151 U. S. 420, 434, 38 L. Ed. 218.

"If the husband, in fact, had owned this property, and, in order to prefer a part of his creditors, had, in good faith, sold and conveyed it to them, with the intent to give a preference over other creditors, the right of such grantees to hold it, unless the case was brought within the insolvent laws of the state, could not be questioned. No different rule should be enforced in this case against a wife who has received a conveyance of property purchased with her money, and which should have been put in her name when so purchased." Garner *v.* Second Nat. Bank, 151 U. S. 420, 434, 38 L. Ed. 218.

"In Humes *v.* Scruggs, 94 U. S. 22, 27, 28, 24 L. Ed. 51, which was a suit by an assignee in bankruptcy to set aside a conveyance of real estate made by a bankrupt to his wife as being in fraud of the rights of creditors—the wife alleging in her answer that the land was purchased by the husband with her money, and that she believed for years that the title had been taken in her name—the court found that the proof showed a state of case the reverse of that claimed by his wife." Garner *v.* Second Nat. Bank, 151 U. S. 420, 435, 38 L. Ed. 218.

37. Consideration.—Bean *v.* Patterson, 122 U. S. 496, 500, 30 L. Ed. 1126; Humes *v.* Scruggs, 94 U. S. 22, 28, 24 L. Ed. 51.

"To the same general effect are numerous cases: Jewell *v.* Knight, 123 U. S. 426, 434, 31 L. Ed. 190, and authorities cited." Garner *v.* Second Nat. Bank, 151 U. S. 420, 433, 38 L. Ed. 218; Stickney *v.* Stickney, 131 U. S. 227, 238, 240, 33 L. Ed. 136.

38. Wife's separate property.—Where all that the testimony fairly discloses is, that at the time of her marriage the wife was possessed of separate property, which was the foundation and largely the source of subsequent accumulations which were invested in real estate as well as the principal, the conveyance of such real estate to the wife by the husband, the title being in his name, was not purely voluntary, but meritorious and upon good consideration. The same may be said as to the bonds and mortgages placed in her name.

similarly where he is bona fide indebted to her in an equal amount,[39] and the real consideration may be shown by parol evidence.[40]

(d) *Intermediate Conveyance to Third Party.*—The conveyance first to a third party, who paid nothing, but took the title in trust for the wife, and from him to her, was to satisfy the common-law inability to make a strict conveyance from husband to wife, and is no evidence of fraud.[41]

(e) *Marriage Settlements.*—See the title MARRIAGE CONTRACTS AND SETTLEMENTS.

(2) *Personal Liability of Wife.*—Where property is conveyed to a wife in fraud of her husband's creditors, a judgment in personam for its value cannot be taken against her, nor, in case of her death, against her executors.[42]

d. *Parent and Child.*—A conveyance procured by a father to his son, alleged to be fraudulent because the consideration flowed from the father, and as a

Schreyer *v.* Scott, 134 U. S. 405, 415, 33 L. Ed. 955.

Where it was agreed between H. and his wife that if he would make the deed of trust by which all the estate in the lots mentioned in it, including his interest, whatever it might be, and hers also, should be secured to Mrs. H. and her children by the intervention of trustees, she would make good the title of a lot which he had pledged for a debt, and would join him also in the deed to the receiver, of what was asserted to be his property, in both of which she had a large and valuable interest, the trust deed was, therefore, made on a valuable consideration. When a court of equity sees a man trying to rectify the wrong done his wife, it is not required to scan closely the value of what she gave at the moment for his relinquishment of his marital rights in her remaining property. Hitz *v.* National, etc., Bank, 111 U. S. 722, 726, 28 L. Ed. 577.

And where, in the findings of facts in a suit by a wife to obtain partition of property, against a creditor of her husband who claimed that the half standing in her name was held in fraud of his rights as an attaching creditor of her husband, it is expressly stated that she paid for the property in cash from her own separate funds, with this found, there is nothing whatever in the case to impeach or in any manner invalidate the conveyance to her. Davis *v.* Fredericks, 104 U. S. 618, 620, 26 L. Ed. 849.

39. Bona fide indebtedness to wife.—Where a deed by an insolvent husband to a trustee for his wife to secure an indebtedness from him to her, is assailed as fraudulent and void as against creditors, if there had been no other consideration for the deed than a desire to secure for his wife provision against the necessities of the future, it could not be sustained. It must find its support in the fact alleged in the recital, that the amount secured was a sum realized from the sale of her individual property, and used by him. It is not material whether the recital be accurate in stating that the sum received from the sale of her property was used in payment of the real estate covered by the deed; it is sufficient if he was indebted to his wife in the amount mentioned. Bean *v.* Patterson, 122 U. S. 496, 509, 30 L. Ed. 1126.

A loan by the wife to the husband, of money which is her separate property, upon his promise to repay it, creates an equity in her favor, which a court of equity will enforce, and where the jury found that the money delivered by the wife to the husband was by way of loan, and not of gift, and that his subsequent conveyance of land through a third person to her in repayment of that loan, was not made with the purpose of hindering, delaying, or defrauding creditors, that conveyance, to satisfy his equitable obligation to his wife, was not a voluntary conveyance, and was valid against his creditors. Medsker *v.* Bonebrake, 108 U. S. 66, 73, 27 L. Ed. 654.

But "If the husband in a state of absolute bankruptcy conveys to his wife property fairly worth $15,000 to $20,000, with no present consideration passing, but with a recital of past indebtedness to her to less than a fifth of its value, the transaction is fraudulent and void as to creditors." Humes *v.* Scruggs, 94 U. S. 22, 28, 24 L. Ed. 51.

40. Parol evidence of true consideration.—Hitz *v.* National, etc., Bank, 111 U. S. 722, 727, 28 L. Ed. 577.

It neither contradicts nor varies the recital of a nominal consideration to show that a valuable consideration passed from the wife to her husband for his conveyance of his life estate to the trustees for her benefit. Hitz *v.* National, etc., Bank, 111 U. S. 722, 727, 28 L. Ed. 577. See, also, the title PAROL EVIDENCE.

41. Intermediate conveyance to third party.—Medsker *v.* Bonebrake, 108 U. S. 66, 27 L. Ed. 654.

42. Personal liability.—Phipps *v.* Sedgwick, 95 U. S. 3, 24 L. Ed. 591, reaffirmed in Trust Co. *v.* Sedgwick, 97 U. S. 304, 24 L. Ed. 954.

Where a husband has transferred property or money to his wife in fraud of his creditors, it answers the demands of justice in such cases if the creditor, finding

cover for the latter's property from his creditors, which was fair and honest, and in satisfaction of a bona fide indebtedness from father to son, is valid.[43]

5. Employment of Grantor as Grantee's Agent or Attorney.—See, also, post, "Retention of Possession or Reservation of Benefits by Grantor," III, C, 9.

The fact that the grantee in a conveyance attacked as fraudulent, subsequently to the execution of such conveyance, appointed the grantor, who was also his brother, his attorney in fact for the conveyance of all his property in that state, etc., it being shown that this power of attorney applied to other property of the grantee besides that in dispute, cannot be claimed as a badge of fraud. There was nothing in the fact of the execution of the power, or in its provisions, to raise any presumption of fraud in the original purchase.[44] Even if stipulated for in the conveyance.[45] This is the rule in Alabama and is

the property itself in her hands or in the hands of one holding it with notice, appropriates it to pay his debt. But, if it is beyond his reach, the wife should no more be held liable for it than if the husband himself had spent it in support of his family, or even of his own extravagance. There cannot be a personal judgment against her therefor. Huntington *v.* Saunders, 120 U. S. 78, 81, 30 L. Ed. 580; Phipps *v.* Sedgwick, 95 U. S. 3, 24 L. Ed. 591; Trust Co *v.* Sedgwick, 97 U. S. 304, 24 L. Ed. 954.

New York.—"The statutes of the different states have gone very far in this country to modify the peculiar relations of husband and wife, as they existed at common law, in reference to their property. But they have not, except perhaps in Louisiana, gone so far as to recognize the civil-law rule of perfect independence in dealing with each other. While the statutes of New York have recognized certain rights of the wife to deal with and contract in reference to her separate property, they fall far short of establishing the principle that out of that separate property she can be made liable for money or property received at her husband's hands, which in equity ought to have gone to pay his debts. Equity has been ready, where such property remains in her hands, to restore it to its proper use, but not to hold her separate estate liable for what she has received, and probably spent at his dictation. Such a proposition would be a very unjust one to the wife still under the dominion, control, and personal influence of her husband." Phipps *v.* Sedgwick, 95 U. S. 3, 9, 24 L. Ed. 591.

And see generally, the titles HUSBAND AND WIFE; SEPARATE ESTATE OF MARRIED WOMEN.

43. Parent and child.—Vattier *v.* Hinde, 7 Pet. 252, 268, 8 L. Ed. 675.

Where the son was a bona fide creditor of his father, for the sum of $400, the circumstances under which this debt was created, or the relationship between the parties, cannot render it less sacred. The connection between the parties may excite suspicion, may justify a more scrutinizing investigation of all the circumstances; but if the result of this investigation be that the conveyance was in payment of a debt of the most sacred obligation, a debt which a conscientious debtor ought to have paid, it is valid in law. The consideration mentioned in the deed, is $350, and it is not suggested that the lot was worth more than that sum. Vattier *v.* Hinde, 7 Pet. 252, 268, 8 L. Ed. 675.

In Woodfolk *v.* Seddon, 154 U. S. 658, 31 L. Ed. 598, it was held that the consideration of the note executed by W. to his son, on which alone the title of the son to the property in controversy depends, was fictitious, and that the confession of judgment by the father in favor of the son, and the purchase of the property in controversy by the son under execution, were but parts of a scheme devised by the father and son to hinder and delay creditors of W. in the collection of their debts. And so with the purchase by the son at tax sale.

And in McLaughlin *v.* Bank, 7 How. 220, 228, 12 L. Ed. 675, a conveyance by a father to his daughter was held fraudulent.

44. Employment of grantor as grantee's agent or attorney.—Gottlied *v.* Thatcher, 151 U. S. 271, 278, 38 L. Ed. 157. See, also, Bomberger *v.* Schoolfield, 160 U. S. 149, 164, 40 L. Ed. 374.

And so where debtor and creditor were friends of many years standing, having grown old together, when grantor failed, and transferred a large part of his property to his principal creditor, including a mill, there was nothing unreasonable in the employment of the former by the latter to run the mill at seventy-five dollars a month and the use of the dwelling. This is what was done according to the testimony, and the explanation was properly held to be satisfactory. Crawford *v.* Neal, 144 U. S. 585, 598, 36 L. Ed. 552.

45. Stipulation therefor in conveyance.—"In Smith *v.* Craft, 123 U. S. 436, 31 L. Ed. 267, a bill of sale of a stock of goods, by way of preference of a bona fide creditor, was held not to be fraudulent as matter of law, by reason of a stipulation that the purchaser should employ the debtor at a reasonable salary to wind up the business." Huntley *v.* Kingman, 152 U. S.

also the general rule.[46]

6. Giving Bond to Pay Value if Set Aside.—Where the purchaser gave his bond to pay their value if he failed to sustain his title to the property, the conveyance of which was attacked, in this there was no fraud. It was a right the statute gave him as the claimant of the property, and he availed himself of it in a lawful way. He thus perfected his title to the goods by agreeing to pay their value if his original purchase should be held to be invalid. A debt thus incurred cannot be said to be created by fraud.[47]

7. Insolvency of Grantor.—A conveyance by a person deeply indebted, in anticipation of decrees and judgments, which, added to the existing encumbrances, amounted to the value of his property, was executed under circumstances which would lead a court to presume fraud upon creditors.[48]

8. Preference to Creditors—a. *Lawful in Absence of Statute.*—It is entirely well settled, both in England and America, that at common law a debtor, insolvent or in failing circumstances, has a right to prefer certain creditors to whom he is under special obligations, where done in good faith and without fraud, though by such preference the fund for the payment of the other creditors be lessened or even absorbed,[49] even though the grantor is also indebted to

527, 534, 38 L. Ed. 540. See, also, Etheridge *v.* Sperry, 139 U. S. 266, 35 L. Ed. 171.

Where a bill of sale contained a stipulation that the creditor should "employ said C. (debtor) in said business at the rate of $150 per month so long as" the bank should "carry on or continue said business," whether such a stipulation is valid or invalid depends upon its intention. If its object appeared on its face to have been to secure a benefit to the debtor or his family, it would be fraudulent in law. Lukins *v.* Aird, 6 Wall. 78, 18 L. Ed. 750. But if its sole purpose was to obtain services necessary to wind up the business and turn the goods into money as promptly and economically as possible, for the benefit of the other party, it is valid. Smith *v.* Craft, 123 U. S. 436, 441, 31 L. Ed. 267.

Where the only facts stated in the certificate (other than the bill of sale itself), directly bearing upon the validity of the stipulation, are that the creditor, with debtor as manager, carried on the business, reducing the stock as rapidly as possible, "with a view to closing it out," for about six months, when the stock remaining was sold by auction; that the creditors realized for the entire stock $20,000; and debtor received the sum of $150 a month, or about $900 in all, and, since the bill of sale, had no other interest, direct or indirect, in the stock of goods or its proceeds, it cannot be concluded as matter of law, either on the face of the bill of sale, or with the aid of this evidence of what was done under its provisions, that the compensation was unreasonable, or that the stipulation in question was fraudulent. Whether, taken in connection with all the previous transactions between the parties, it was fraudulent in fact, was a question to be decided by the circuit court. Smith *v.* Craft, 123 U. S. 436, 442, 31 L. Ed. 267.

46. **Alabama.**—Bamberger *v.* Schoolfield, 160 U. S. 149, 164, 40 L. Ed. 374.

"Indeed, under the rule as announced in Alabama, the court could have affirmatively instructed that the employment of the vendor in a clerical capacity could not affect the validity of the sale." Bamberger *v.* Schoolfield, 160 U. S. 149, 164, 40 L. Ed. 374. And see post, "Reservation of Benefit," III, C, 9, b.

47. **Giving bond to pay value if set aside.**—Wolf *v.* Stix, 99 U. S. 1, 7, 25 L. Ed. 309.

48. **Insolvency of grantor.**—Dent *v.* Ferguson, 132 U. S. 50, 62, 33 L. Ed. 242.

The real contract was one between grantor and grantee to defraud the creditors out of the property conveyed, and to so conceal and cloud the title that they could be circumvented, hindered and delayed, and coerced into settlements and compromises. The evidence shows beyond doubt that grantor willingly participated for ten years in carrying out this plot. Dent *v.* Ferguson, 132 U. S. 50, 62, 33 L. Ed. 242.

A sale of personal property, made much below its cost, by a man indebted to near or quite the extent of all he had, was set aside as a fraud on creditors, it having been made within a month after the property was bought, and before it was yet paid for; made, moreover, on Saturday, while the account of stock was taken on Sunday (the parties being Jews), and the property carried off early on Monday. Kempner *v.* Churchill, 8 Wall. 362, 19 L. Ed. 461. See, also, post, "Preference to Creditors," III, C, 8.

49. **Lawful in absence of statute.**—Huntley *v.* Kingman, 152 U. S. 527, 532, 38 L. Ed. 540; Marbury *v.* Brooks, 7 Wheat. 556, 577, 5 L. Ed. 522; Brooks *v.* Marbury, 11 Wheat. 78, 89, 6 L. Ed. 423; Magniac *v.* Thomson, 7 Pet. 348, 8 L. Ed. 709; Brashear *v.* West, 7 Pet. 608, 8 L. Ed. 801; Clarke *v.* White, 12 Pet. 178, 9 L. Ed. 1046; Tompkins *v.* Wheeler, 16 Pet. 106,

10 L. Ed. 903; Buckingham *v.* McLean, 13 How. 150, 151, 14 L. Ed. 90; Drury *v.* Cross, 7 Wall. 299, 302, 19 L. Ed. 40; Peters *v.* Bain, 133 U. S. 670, 686, 33 L. Ed. 696; Garner *v.* Second Nat. Bank, 151 U. S. 420, 432, 38 L. Ed. 218; Emerson *v.* Senter, 118 U. S. 1, 10, 30 L. Ed. 49; Bamberger *v.* Schoolfield, 160 U. S. 149, 160, 40 L. Ed. 374; Klein *v.* Hoffheimer, 132 U. S. 367, 378, 33 L. Ed. 373; Smith *v.* Craft, 123 U. S. 436, 441, 31 L. Ed. 267; Stevenson *v.* Pemberton, 1 Dall. 3, 1 L. Ed. 11.

A debtor may lawfully apply his property to the payment of the debts of such creditors as he may choose to prefer, when the transaction is bona fide; and he may elect the time when it is to be done, so as to make it effectual; such preference must necessarily operate to the prejudice of creditors not provided for, and cannot furnish any evidence of fraudulent intention. Tompkins *v.* Wheeler, 16 Pet. 106, 10 L. Ed. 903; Marbury *v.* Brooks, 7 Wheat. 556, 5 L. Ed. 522; Brooks *v.* Marbury, 11 Wheat. 78, 98, 6 L. Ed. 423; Shauer *v.* Alterton, 151 U. S. 607, 625, 38 L. Ed. 286; Davis *v.* Schwartz, 155 U. S. 631, 639, 39 L. Ed. 289. See, also, ante, "Powers Exercisable by Debtor over His Property," II.

And an insolvent debtor has a right to prefer one creditor to another in payment, by an assignment bona fide made, and no subsequent attachment, or subsequently acquired lien, will avoid the assignment. Spring *v.* South Carolina Ins. Co., 8 Wheat. 268, 5 L. Ed. 614.

Whether it be effected by the payment of money, or the consignment of goods to be converted into money by the preferred creditor, who is to pay himself first out of the proceeds, the balance to go to other creditors. Stevenson *v.* Pemberton, 1 Dall. 3, 1 L. Ed. 11.

"In the absence of any bankrupt or insolvent law, a debtor may lawfully give a preference to one of his creditors, if he does not thereby intend to defraud the others; and a sale and delivery of goods in satisfaction of an honest debt cannot be avoided by other creditors, unless made and received with intent in fact to defraud them. This is well settled by the decisions of this court, as well as by those of the highest court of the state of Indiana, where these transactions took place." Jewell *v.* Knight, 123 U. S. 426, 434, 31 L. Ed. 190, citing Buckingham *v.* McLean, 13 How. 150, 151, 14 L. Ed. 90; Warner *v.* Norton, 20 How. 448, 15 L. Ed. 950; Robinson *v.* Elliott, 22 Wall. 513, 520, 22 L. Ed. 758; Medsker *v.* Bonebrake, 108 U. S. 66, 27 L. Ed. 654; Stewart *v.* Dunham, 115 U. S. 61, 29 L. Ed. 329; Jones *v.* Simpson, 116 U. S. 609, 29 L. Ed. 742; People's Sav. Bank *v.* Bates, 120 U. S. 556, 30 L. Ed. 754; Huiskamp *v.* Moline Wagon Co., 121 U. S. 310, 319, 30 L. Ed. 971. See, also, Smith *v.* Craft, 123 U. S. 436, 31 L. Ed. 267; Hardt *v.* Heidweyer, 152 U. S. 547 557, 38 L. Ed. 548; Blennerhassett *v.* Sherman, 105 U. S. 100, 117, 26 L. Ed. 1080; Brooks *v.* Marbury, 11 Wheat. 78, 98, 6 L. Ed. 423; Conard *v.* Nicoll, 4 Pet. 291, 297, 7 L. Ed. 862.

"A collusive transfer, placing the property of a debtor out of the reach of his creditors, while securing to him its beneficial enjoyment, is not to be tolerated; yet an insolvent debtor may prefer a creditor, even though the latter has knowledge of such insolvency. The effect of the preference may be to delay his other creditors, but if the transaction is in good faith and made with the intention of paying the preferred debt, and without any secret trust, the conveyance by which the preference is affected is not fraudulent." Crawford *v.* Neal, 144 U. S. 585, 595, 36 L. Ed. 552; Brasher *v.* West, 7 Pet. 608, 8 L. Ed. 801.

"There can be no doubt, likewise, of the right of a debtor (and cases may be easily conceived, in which it would be a duty), independently of the bankrupt laws, to give a preference to some of his creditors, in exclusion of the rest; and from such a preference alone, the court would not be disposed, hastily, to infer collusion, secret trusts or meditated frauds." Burd *v.* Smith, 4 Dall. 76, 86, 1 L. Ed. 748.

The only remedy afforded by the common law against an abuse of the right of an insolvent debtor to prefer any of his creditors was in the principles of the statute of 13 Elizabeth, c. 5, which have been substantially reenacted in the various states of the Union. United States Rubber Co. *v.* American Oak Leather Co., 181 U. S. 434, 448, 45 L. Ed. 938. See Crawford *v.* Neal, 144 U. S. 585, 36 L. Ed. 552; Davis *v.* Schwartz, 155 U. S. 631, 39 L. Ed. 289.

Note endorsed by preferred creditor.— Where, among the debts for which an alleged fraudulent sale was made, was included a note of the debtor on which the preferred creditor and vendee firm was endorser, and there was no proof of any kind even tending to show the simulation of the note, but it was certainly, under the undisputed proof, due by debtor, and was drawn to the order of the vendees, who were, as endorsers, necessary parties to its negotiation; that firm had an obvious right, with the consent of the company by whom the paper had been discounted, to use it as a debt due them, and thus protect their endorsement. And there was no error, in refusing instructions invalidating the sale as to said note. Bamberger *v.* Schoolfield, 160 U. S. 149, 167, 40 L. Ed. 374.

Preferential mortgage.—The act of making a preferential mortgage by a debtor, though he knew that he was insolvent, and knew that he was preferring one creditor at the expense of others, is not forbidden by the common law, and is not a violation of the statute laws of most of

the United States at the time.[50]

Private Motive Immaterial.—And his private motives for giving the

the states of the Union. Nor is it an act forbidden by any general rule of morals or of abstract justice. It was in fact a meritorious act, aside from the positive rule established by the bankrupt law. Barbour *v.* Priest, 103 U. S. 293, 295, 26 L. Ed. 478; Davis *v.* Schwartz, 155 U. S. 631, 639, 39 L. Ed. 289, citing Stewart *v.* Dunham, 115 U. S. 61, 29 L. Ed. 329; Estes *v.* Gunter, 122 U. S. 450, 30 L. Ed. 1228; Smith *v.* Craft, 123 U. S. 436, 31 L. Ed. 267; Huntley *v.* Kingman, 152 U. S. 527, 38 L. Ed. 540.

"A debtor in failing circumstances having the right to prefer a creditor, if the preferred creditor has a bona fide debt, and takes a mortgage with the intent of securing such debt, and not with the purpose of aiding the debtor to hinder and delay other creditors, the mortgage is valid, even though the mortgagee knows that the debtor is insolvent and that the debtor's intention is to hinder and delay other creditors." Huiskamp *v.* Moline Wagon Co., 121 U. S. 310, 319, 30 L. Ed. 971.

But a mortgage of his entire estate, executed by an insolvent mortgagor to a creditor, who knows of his insolvency, and who for the purpose of giving him a fictitious credit, actively conceals the mortgage, withholds it from record, and represents him as having a large estate and unlimited credit, by which means he is enabled to contract other debts which he cannot pay, is void at common law. Blennerhassett *v.* Sherman, 105 U. S. 100, 26 L. Ed. 1080.

And the mere failure to record the mortgage is not ground for setting it aside for the benefit of subsequent creditors who have acquired no specific lien on the property described in the mortgage. But when it is done with a fraudulent purpose, it is. Blennerhassett *v.* Sherman, 105 U. S. 100, 117, 121, 26 L. Ed. 1080. And see the title MORTGAGES AND DEEDS OF TRUST.

Instruments operating as assignments and preferences thereby created.—See the title ASSIGNMENTS FOR BENEFIT OF CREDITORS, vol. 2, p. 612, et seq.

Preferences by corporations.—See the title CORPORATIONS, vol. 4, p. 741.

50. Over debt due United States.—United States *v.* Hooe, 3 Cranch 73, 2 L. Ed. 370.

The United States have no lien on the property of their debtor, until suit brought, or a notorious insolvency or bankruptcy has taken place; or, being unable to pay all his debts, he has made a voluntary assignment of all his property; or, the debtor having absconded, concealed or absented himself, his property has been attached by process of law. United States *v.* Hooe, 3 Cranch 73, 2 L. Ed. 370.

"The words of the act extend the meaning of the word insolvency to cases where 'a debtor, not having sufficient property to pay all his debts, shall have made a voluntary assignment thereof, for the benefit of his or her creditors.' The word 'property' is unquestionably all the property which the debtor possesses; and the word 'thereof' refers to the word 'property' as used, and can only be satisfied by an assignment of all the property of the debtor. Had the legislature contemplated a partial assignment, the words 'or part thereof,' or others of similar import, would have been added. If a trivial portion of an estate should be left out, for the purpose of evading the act, it would be considered as a fraud upon the law, and the parties would not be enabled to avail themselves of such a contrivance. But where a bona fide conveyance of part is made, not to avoid the law, but to secure a fair creditor, the case is not within the letter or the intention of the act." United States *v.* Hooe, 3 Cranch 73, 91, 2 L. Ed. 370.

Priority of United States.—See the title UNITED STATES.

By chattel mortgage.—See the title CHATTEL MORTGAGES, vol. 3, p. 738.

Alabama.—Under the law of Alabama, a debtor has the right to prefer a creditor, and if the sale is real and made in good faith for a fair price—is honestly executed to extinguish the debt, and does extinguish it, and contains no reservation of any interest or benefit in favor of the vendor—it is valid and passes the property to the vendee; the sale, if it possesses these enumerated qualities, would be legal, although any of the following facts might be found by the jury to have existed: (a) That the vendor was insolvent to the knowledge of the vendee; (b) even although there was a fraudulent intent on the part of the vendor to defeat his other creditors, because, if the sale possessed the attributes necessary to make it valid, as the law permitted the preference under the conditions stated, the mere intention of the vendor to defraud his other creditors by giving a preference to one would not render the sale invalid; and (c) although its known effect and necessary consequence was that the remaining creditors of the vendor would be unable to obtain the payment of their debts. Bamberger *v.* Schoolfield, 160 U. S. 149, 158, 40 L. Ed. 374; Micou *v.* National Bank, 104 U. S. 530, 543, 26 L. Ed. 834.

"By recent legislation in Alabama the provisions of § 1737 of the Alabama code, upon which these rulings were made, have been amended, so that a conveyance substantially of all a debtor's property in payment of prior debts is put upon the same footing with conveyances for the

preference cannot affect the exercise of the right, if the preferred creditor has done nothing improper to secure it.[51]

Fraudulent Intent Unknown to Grantee.—Even though the grantor had the purpose, when he made the deed, of hindering and delaying creditors not provided for by it, yet, if the preferred creditors were not parties or privies to his fraudulent purpose, but accepted the deed in good faith to secure the debts really due them, it would be valid as to them.[52]

security of debts. Strickland *v.* Gay, 16 South. Rep. 77, 78. The questions, however, here are obviously to be determined by the law of Alabama existing at the time the transactions occurred." Bamberger *v.* Schoolfield, 160 U. S. 149, 162, 40 L. Ed. 374.

Dakota.—"By the statutes of Dakota it is provided that 'a debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand, in preference to another;' also, that 'every transfer of property or charge thereon made, every obligation incurred, and every judicial proceeding taken with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor and their successors in interest, and against any persons upon whom the estate of the debtor devolves in trust for the benefit of other than the debtor.'" Shauer *v.* Alterton, 151 U. S. 607, 618, 38 L. Ed. 286.

Iowa.—In Iowa, a mortgage or other conveyance of his property by an insolvent debtor to one or more of his creditors, with intent to give them preference, is valid, in the absence of fraud. Davis *v.* Schwartz, 155 U. S. 631, 39 L. Ed. 289.

As to operation as general assignment, see the title ASSIGNMENTS FOR BENEFIT OF CREDITORS, vol. 2, p. 614, et seq.

Mississippi.—It is legal in Mississippi for an insolvent or failing debtor bona fide to convey all his property to pay an actual debt, although a preference is thereby created and other creditors must go unpaid, when there is no intent to secure a benefit to himself. Stewart *v.* Dunham, 115 U. S. 61, 66, 29 L. Ed. 329; Fitzpatrick *v.* Flannagan, 106 U. S. 648, 658, 27 L. Ed. 211; Huntley *v.* Kingman, 152 U. S. 527, 534, 38 L. Ed. 540.

Whatever else the prohibition against unfair preferences in the Mississippi statute might be supposed to include, it certainly did not make all preferences illegal. The supreme court of that state has decided that no preference could be held to be unfair which, tested by the rules of law, is legal; and that as to be illegal it must be fraudulent, and as all fraudulent dispositions of his property by a debtor are prohibited in other words, the clause relating to unfair preferences is mere surplusage. This construction is confirmed by the fact that the words in question have been omitted from the code of 1880 by the legislature of Mississippi. This interpretation of the statute is correct, and is accordingly adopted by this court. Fitzpatrick *v.* Flannagan, 106 U. S. 648, 659, 27 L. Ed. 211.

Missouri.—In Missouri a debtor in failing circumstances may give a preference to one or more of his creditors to the exclusion of others; and such disposition of his effects is not impeachable on the ground of fraud, because it embraces all his property; and accordingly assignments by insolvent debtors of all their property to pay particular creditors are upheld. Union Bank *v.* Kansas City Bank, 136 U. S. 223, 229, 34 L. Ed. 341.

The Missouri statutes only prevent any preference of creditors "by assignment," yet do not avoid deeds of trust, in the nature of mortgages, which were only securities for the payment of debts. Union Bank *v.* Kansas City Bank, 136 U. S. 223, 231, 34 L. Ed. 341.

Ohio.—In Ohio mortgages made by a trading corporation after it had become insolvent, and had ceased to do business, to prefer some of its creditors, are invalid and ineffectual against its creditors generally, without regard to the question whether the mortgages were or were not parts of the same transaction as an assignment under the statute. Smith, etc., Purifier Co. *v.* McGroarty, 136 U. S. 237, 241, 34 L. Ed. 346. See, also, the title ASSIGNMENTS FOR BENEFIT OF CREDITORS, vol. 2, p. 616.

Rhode Island.—"It is agreed that, according to the law of Rhode Island, the debtor in insolvent circumstances has a right to prefer creditors in the distribution of his estate, or in the application of it to the payment of his debts." Parker *v.* Phetteplace, 1 Wall. 684, 689, 17 L. Ed. 675.

Texas.—"The laws of Texas permitted a failing debtor to prefer creditors according to his election." Clements *v.* Moore, 6 Wall. 299, 311, 18 L. Ed. 786.

51. Private motive immaterial.—Marbury *v.* Brooks, 7 Wheat. 556, 5 L. Ed. 522; Tompkins *v.* Wheeler, 16 Pet. 106, 10 L. Ed. 903; Emerson *v.* Senter, 118 U. S. 1, 10, 30 L. Ed. 49.

The motives which may have induced the preference, although communicated to the agent, cannot, in reason, affect the transaction, provided nothing has occurred on the part of the creditors, which is in any degree exceptionable, either in law or justice. Brooks *v.* Marbury, 11 Wheat. 78, 89, 6 L. Ed. 423.

52. Fraudulent intent unknown to

General Assignment on Same Day.—If the preferential sale was valid, the making of the general assignment on the same day did not render it illegal.[53]

Unlawful Consideration Invalidates.—But any unlawful consideration, moving from the preferred creditor, to induce the preference, will avoid the deed which gives it.[54]

Burden of Proof of Amount and Justness of Claim.—When the transaction is assailed by an antecedent creditor, the burden rests on a creditor who has been preferred to prove the existence, amount, and justness of his claim, and when paid in property he must also prove that the property was taken at a price not materially below its fair market value.[55]

Effect of Abortive Negotiation for Mutual Extension of Credit to Debtor.—It cannot be contended that, because the preferred creditor had written a letter to the contesting creditor, proposing a mutual extension of credit to the debtor, he could not afterwards receive payment of the debt by a sale from the debtor which created a preference, without operating a fraud upon

grantee.—Emerson *v.* Senter, 118 U. S. 1, 10, 30 L. Ed. 49; Marbury *v.* Brooks, 7 Wheat. 556, 577, 5 L. Ed. 522; Brooks *v.* Marbury, 11 Wheat. 78, 89, 6 L. Ed. 423; Tompkins *v.* Wheeler, 16 Pet. 106, 118, 10 L. Ed. 903. See, also, ante, "Intent in General," III, C, 1.

As to knowledge of insolvency, see post, "What Constitutes a Preference," III, C, 8, c.

53. General assignment on same day.—Bamberger *v.* Schoolfield, 160 U. S. 149, 160, 40 L. Ed. 374.

"An insolvent debtor having, under repeated decisions of this court, the right to sell and convey property in absolute payment of an existing debt, provided the price is fair and reasonable, and no use or benefit is reserved to himself, such absolute sale and conveyance will not, at the instance of other creditors, be declared and treated as part of a general assignment executed soon afterwards (Code, 1737), though executed in anticipation of it, and with notice on the part of the creditor that the debtor intended to make a general assignment." Bamberger *v.* Schoolfield, 160 U. S. 149, 160, 40 L. Ed. 374. See the title ASSIGNMENTS FOR BENEFIT OF CREDITORS, vol. 3, p. 614, et seq.

54. Unlawful consideration invalidates.—Marbury *v.* Brooks, 7 Wheat. 556, 5 L. Ed. 522.

55. Burden of proof of amount and justness of claim.—Bamberger *v.* Schoolfield, 160 U. S. 149, 162, 40 L. Ed. 374.

Such debtor cannot, under pretense of preferring certain creditors, pay to them sums largely in excess of their demands, and thus prevent his other creditors from receiving any payment. Hardt *v.* Heidweyer, 152 U. S. 547, 557, 38 L. Ed. 548.

If the law permits the debtor, in failing circumstances, to make choice of the persons he will pay, it denies him the right, in doing it, to contrive that the unpreferred creditor shall never be paid. In other words, the law condemns any plan in the disposition of property which necessarily accomplishes a fraudulent result. Drury *v.* Cross, 7 Wall. 299, 302, 19 L. Ed. 40.

While creditors had a right to take a conveyance of their debtor's property or choses in action to pay or secure their debt, if done fairly and honestly, even though a preference was thereby created, yet if such creditors took more than what appeared to be reasonably worth the amount of their debt, it was a fraud upon the other creditors; and the court, in giving the converse of this proposition, correctly said that "if the garnishees (the creditors) on that day received no more from the insolvent debtors than was reasonably sufficient to satisfy their claim, the jury were to find for the garnishees." Klein *v.* Hoffheimer, 132 U. S. 367, 378, 33 L. Ed. 373.

So where, by the testimony of a member of the grantee firm himself it was made very clear that he was aware, at the time of the transaction by which he obtained the choses in action, that the debtors were insolvent, or at least were in failing circumstances and unable to pay their debts; and that he received from them all or nearly all of the notes and accounts due them, and professed to take them in payment of the debt of his firm, it was not unreasonable therefore, that the court should charge that, under these circumstances, he and his partners should establish the fairness of the proceeding by which they came into the possession of these notes and accounts. The burden of proof was upon them, although in the answer to interrogatories they positively denied having property or credits of the debtor in their hands, or that they were indebted to them. What they swore to as witnesses is of more force than such general denial. Klein *v.* Hoffheimer, 132 U. S. 367, 377, 33 L. Ed. 373.

Still, the fact that the property thus conveyed was much in excess of the debts secured thereby, is not in itself necessarily indicative of fraud; but in all such cases the question of good faith is one of fact, and a mere error of judgment will not be imputed as a fraud. Davis *v.*

such other creditor, where the proposal of the letter was not acceded to, but such other creditor made terms of his own with the debtor without regard thereto.[56]

Preferences between Partnership and Individual Creditors.—Where it is claimed that a deed is fraudulent in law, "because it appropriates partnership assets to pay individual debts in preference to the debts of the partnership," and where, as here, the conveyance included all the property of the grantors as partners and individually, for the benefit of partnership and individual creditors, it should be construed distributively, and the partnership assets be applied to the payment of partnership debts and the individual assets to individual liabilities.[57]

b. *Prohibition by Statute.*—A failing debtor cannot be allowed to employ indirect means to accomplish that which the law prohibits to be done directly.[58]

Effect on Right to Distribution.—See post, "Sale and Distribution," VI, H, 3.

c. *What Constitutes a Preference.*—**Transfer to One Creditor While Insolvent.**—The transfer by a debtor who is insolvent, of his property, or a considerable portion of it, to one creditor as a security for a pre-existing debt, without making any provision for an equal distribution of its proceeds to all his creditors, operates as a preference to such transferee, and must be taken as prima facie evidence that a preference was intended, unless the debtor or transferee can show that the debtor was at the time ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts.[59]

Schwartz, 155 U. S. 631, 641, 645, 39 L. Ed. 289

As to reservation of benefit, see post, "Reservation of Benefit," III, C, 9, b.

53. Effect of abortive negotiation for mutual extension of credit to debtor.—Bamberger *v.* Schoolfield, 160 U. S. 149, 168, 40 L. Ed. 374.

57. Preferences between partnership and individual creditors.—Peters *v.* Bain, 133 U. S. 670, 686, 33 L. Ed. 696. "The difficulty, at the time the assignment was made, attendant upon any attempt to separate the partnership and individual assets, and the partnership and individual debts, would be considered under the view of the state courts, in passing upon the question of intent to defraud in failing to specifically distinguish between them." See, also, the title PARTNERSHIP.

By joint act of husband and wife.—See ante, "Property Not Belonging to Debtor or Exempt," II, B, 7.

58. Prohibition by statute.—White *v.* Cotzhausen, 129 U. S. 329, 342, 32 L. Ed. 677

Where there is a state statute securing equality among the creditors of a debtor who, being insolvent, has determined to yield the dominion of his entire estate, and surrender it for the benefit of creditors, some of them cannot be preferred by the simple device of not making a formal assignment, and permitting them, under the cover or by means of conveyances, bills of sale or written transfers, to take his whole estate on account of their respective debts, to the exclusion of other creditors. White *v.* Cotzhausen, 129 U. S. 329, 341, 32 L. Ed. 677. See the title ASSIGNMENTS FOR BENEFIT OF CREDITORS, vol. 2, p. 616.

Conflict of laws.—Where a creditor received from his debtor in Massachusetts goods as security for or in satisfaction of his debt, in violation of the insolvent laws of that state, and is subsequently sued by trustee process in Massachusetts for the value of such goods by the assignee in insolvency, his liability therefor is not changed by a proceeding in attachment by him against such goods in New York as debtor's property under its laws, and a sale thereunder to him, as the preference was consummated in Massachusetts. Rothschild *v.* Knight, 184 U. S. 334, 46 L. Ed. 573.

Where the supreme court of the state decided that "the action is not for recovery of a penalty, but to recover the value of goods conveyed in fraud of the laws relating to insolvency, and it properly might be commenced by trustee process," that the conveyance to plaintiffs in error was made to give a fraudulent preference must necessarily have been found as a fact by the jury, and such finding be accepted in this court. Rothschild *v.* Knight, 184 U. S. 334, 341, 46 L. Ed. 573.

59. Transfer to one creditor while insolvent.—Wager *v.* Hall, 16 Wall. 584, 21 L. Ed. 504. See, also, Toof *v.* Martin, 13 Wall. 40, 20 L. Ed. 481, where it is said the burden of proof is upon him in such a case to prove the contrary.

Unless the debtor was in fact insolvent it cannot be held that such a grantee had reasonable cause to believe that he was, but if it appears that the debtor was in fact insolvent as alleged, and that the means of knowledge were at hand, and

d. *Promise to Give Preference.*—A precedent promise to give a preference in case of insolvency does not constitute a fraud on other creditors as a matter of law.[60]

e. *Promise Not to Give Preferences.*—A verbal promise not to make preferences constituted no lien upon grantor's property, and its disregard did not affect the validity of the deed.[61]

f. *Preference of Wife.*—The fact that one of the creditors preferred was the debtor's wife does not affect the question.[62]

g. *Preference of Child.*—And thus conferring upon an insolvent debtor the right of absolute choice among his creditors, the law does not require one who

that such facts and circumstances were known to the grantee as were clearly sufficient to put a person of ordinary prudence and discretion upon inquiry, it is well settled that it would be his duty to make all such reasonable inquiries to ascertain the true state of the case. Wager *v.* Hall, 16 Wall. 584, 601, 21 L. Ed. 504.

"Purchasers are required to exercise ordinary prudence in respect to the title of the seller, and if they fail to investigate when put upon inquiry, they are chargeable with all the knowledge which it is reasonable to suppose they would have acquired if they had performed their duty in that regard. Creditors have reasonable cause to believe that a debtor, who is a trader, is insolvent when such a state of facts is brought to their notice respecting the affairs and pecuniary condition of the debtor as would lead a prudent business man to the conclusion that he is unable to meet his obligations as they mature in the ordinary course of business." Wager *v.* Hall, 16 Wall. 584, 601, 21 L. Ed. 504; Toof *v.* Martin, 13 Wall. 40, 20 L. Ed. 481.

60. Promise to give preference.—Where it was claimed that an agreement by a debtor with a certain creditor, if such creditor would lend him money from time to time, that if anything should occur by which he was not able to pay his debts, he would secure him, constituted a fraud upon his other creditors, so as to invalidate the subsequent sale of his stock to such creditor, it was held that, as the debtor might lawfully prefer one of his creditors if there was no actual fraud, it cannot, in the absence of any finding upon that point, be said, as matter of law, either that the previous agreement to prefer was fraudulent, or that it was not; but the question of fraud or no fraud involved a question of fact, which, if this case had been on the common-law side of the court, and either party had desired it, must have been submitted to a jury. Smith *v.* Craft, 123 U. S. 436, 441, 31 L. Ed. 267; Bank *v.* Hunt, 11 Wall. 391, 20 L. Ed. 190.

61. Promise not to give preferences.—Peters *v.* Bain, 133 U. S. 670, 693, 33 L. Ed. 696.

62. Preference of wife.—Jewell *v.* Knight, 123 U. S. 426, 435, 31 L. Ed. 190; Magniac *v.* Thompson, 7 Pet. 348, 8 L. Ed. 709; Bean *v.* Patterson, 122 U. S. 496, 30 L. Ed. 1126.

"In Magniac *v.* Thompson, 7 Pet. 348, 397, 8 L. Ed. 709, this court said that, among creditors equally meritorious, a debtor may conscientiously prefer one to another, and it can make no difference that the preferred creditor is his wife. So in Bean *v.* Patterson, 122 U. S. 496, 500, 30 L. Ed. 1126, which related to a conveyance of real estate by a husband for the benefit of his wife, and which conveyance was alleged to have been made in good faith to secure debts due to her for sums previously realized by him from sales of her individual property, the court said: 'If, therefore, there had been no other consideration for the deed than a desire to secure for his wife provision against the necessities for the future, it could not be sustained. * * * That the property in Pennsylvania, deeds of which are mentioned above, was used for his benefit, and to pay and secure his debts, is sufficiently established. The amount realized therefrom, as we read the evidence, was greater than the sum named in the trust deed as due to her. That deed for her security stands, therefore, upon a full consideration. Had it been given to a third party for a like debt it would not be open to question that it would have been unassailable. The result is not changed because the wife is the person to whom the debt is due and not another.'" Garner *v.* Second Nat. Bank, 151 U. S. 420, 432, 38 L. Ed. 218.

Where a factor G. had in his possession goods consigned to him, of about the value of $45,000, and had advanced, as against those goods, by cash and acceptances, the sum of about $54,000, which acceptances were negotiable securities, which had passed in the market into the hands of bona fide holders, and on which he was primarily liable, he had a valid lien on the goods for the $54,000. His consignor, in transferring the goods to G., as absolute owner of them, on the 28th of February, 1881, recognized the lien and admitted that its liability to G. exceeded the value of the goods; and the transaction was in effect a foreclosure of the lien. The interest of the American Mills Company in the goods was only contingent, and no court of equity, in a case like the present, can declare that G.

is at the same time father and guardian to discriminate against his own flesh and blood, to whom he is indebted as their trustee. He may lawfully prefer them when he cannot pay all.[63]

h. *Preference of Surety on Official Bond.*—See the titles PRINCIPAL AND SURETY; PUBLIC OFFICERS.

9. RETENTION OF POSSESSION OR RESERVATION OF BENEFITS BY GRANTOR.—See ante, "Conveyances Fraudulent on Their Face," III, C, 2.

a. *Retention of Possession*—(1) *In General.*—A debtor in failing circumstances cannot sell and convey his land, even for a valuable consideration, by deed without reservations, and yet secretly reserve to himself the right to possess and occupy it, for even a limited time, for his own benefit. Nor will this rule of law be changed by the fact that the right thus to occupy the property for a limited time is a part of the consideration of the sale, the money part of the consideration being on this account proportionably abated.[64] The retention of the possession even where not stipulated for in the conveyance or a supplementary agreement thereto, is a circumstance of suspicion which requires to be explained.[65] And it has been held that where an absolute bill of

could not transfer the goods to his wife, as against his other creditors and those of the company, in partial payment of a bona fide indebtedness to her. Fourth Nat. Bank *v.* American Mills Co., 137 U. S. 234, 237, 34 L. Ed. 655. See, also, ante, "Husband and Wife," III, C, 4, c.

63. Preference of child.—Micou *v.* National Bank, 104 U. S. 530, 543, 26 L. Ed. 834. See Mellen *v.* Buckner, 139 U. S. 388, 35 L. Ed. 199. See, also, ante, "Parent and Child," III, C, 4, d.

64. Retention of possession.—Lukins *v.* Aird, 6 Wall. 78, 18 L. Ed. 750; Huntley *v.* Kingman, 152 U. S. 527, 533, 38 L. Ed. 540.

"The fraud in this case is an inference of law, on which the court is as much bound to pronounce the conveyances in question void as to creditors, as if the fraudulent intent were directly proved." Lukins *v.* Aird, 6 Wall. 78, 79, 18 L. Ed. 750. See, also, Warner *v.* Norton, 20 How. 448, 460, 15 L. Ed. 950; Crawford *v.* Neal, 144 U. S. 585, 595, 36 L. Ed. 552; Shauer *v.* Alterton, 151 U. S. 607, 626, 38 L. Ed. 286.

"Such a transfer may be upon a valuable consideration, but it lacks the element of good faith; for while it professes to be an absolute conveyance on its face, there is a concealed agreement between the parties to it, inconsistent with its terms, securing a benefit to the grantor, at the expense of those he owes. A trust, thus secretly created, whether so intended or not, is a fraud on creditors, because it places beyond their reach a valuable right —the right of possession—and gives to the debtor the beneficial enjoyment of what rightfully belongs to his creditors." Lukins *v.* Aird, 6 Wall. 78, 79, 18 L. Ed. 750; Huntley *v.* Kingman, 152 U. S. 527, 533, 38 L. Ed. 540.

An agreement between persons insolvent and a bank, whereby the insolvents, for the purpose of securing their existing indebtedness to the bank, as well as to obtain future advances, promise its president to deliver to the bank, whenever it may desire, the entire stock of goods which they may have at the time on hand in a store kept by them, the goods being in the meantime retained in their possession, is void as against their other creditors. Bank *v.* Hunt, 11 Wall. 391, 20 L. Ed. 190.

Such an agreement does not create any lien upon the property, or entitle the bank to any preference over other creditors in the event of the debtors being afterwards proceeded against under the bankrupt act. Any subsequent sale, made in pursuance of the agreement, does not take effect by relation at its date. Bank *v.* Hunt, 11 Wall. 391, 20 L. Ed. 190.

65. Circumstance of suspicion though not stipulated for.—Callan *v.* Statham, 23 How. 477, 481, 16 L. Ed. 532; Tompkins *v.* Wheeler, 16 Pet. 106, 119, 10 L. Ed. 903. The continuance of the vendor in the possession and occupation and full enjoyment of the premises, the same after the deed as before, and absence of interest in the subject manifested by the vendee, are circumstances not satisfactorily explained; also, the heavy indebtedness of vendor, and suits pending and maturing to judgment—all well known to the vendee.

Deeds of large tracts of land made by a grantor when deeply in debt, and when suits were pending against him, and who shortly afterwards petitioned for the benefit of the bankrupt act, the possession and occupation of the land continuing the same after the sale as before, and the consideration money one-half only of the actual value, held to be fraudulent and void as against creditors. Hudgins *v.* Kemp, 20 How. 45, 15 L. Ed. 853.

"In Twyne's case, the facts that the sale was accompanied by a secret trust in favor of the debtor, and that the vendor remained in possession, showed that it was not intended as a bona fide preference to the creditor, but merely as a trick to keep the property away from the other

sale of property is made, and the possession does not accompany the deed, but remains with the vendor, the transfer is not only voidable, but is absolutely void,[66] but later cases hold that the presumption of fraud is rebuttable,[67] but only where actual change of possession is in the power of the parties.[68]

creditors." Davis *v.* Schwartz, 155 U. S. 631, 639, 39 L. Ed. 289.

"In a recent case in the court of appeals of New York, Todd *v.* Nelson, 109 N. Y. 316, 327, that court thus stated the law: 'The theory upon which deeds conveying the property of an individual to some third party have been set aside as fraudulent in regard to subsequent creditors of the grantor has been that he has made a secret conveyance of his property while remaining in the possession and seeming ownership thereof, and has obtained credit thereby, while embarking in some hazardous business requiring such credit, or the debts which he has incurred were incurred soon after the conveyance, thus making the fraudulent intent a natural and almost a necessary inference, and in this way he has been enabled to obtain the property of others who were relying upon an appearance which was wholly delusive." Schreyer *v.* Scott, 134 U. S. 405, 409, 33 L. Ed. 955. See, also, ante, "Insolvency of Grantor," III, C, 7.

But though, if the fund had remained in the possession of debtor, for his own benefit, it might have cast a suspicion upon the fairness of the transaction, here there is no proof of any such object or design, nor of any fact from which an inference of mala fides can be drawn; but on the contrary, the object of his continuing in the possession of the property is satisfactorily accounted for by the circumstances of the case. It consisted principally of unsettled accounts, and choses in action, which he was much more competent to settle than a stranger could have been. It was, therefore, for the benefit of the creditors, that he continued to settle up these accounts and pay over the money to his creditors, as the proofs show that he did. This was by the express consent of some of the creditors, and the presumed consent of all, as no dissent or complaint appears to have been made by any; and no one had any right to complain, but the parties who were to receive the benefit of the assignment. Tompkins *v.* Wheeler, 16 Pet. 106, 119, 10 L. Ed. 903.

66. When sale absolute.—Hamilton *v.* Russell, 1 Cranch 309, 2 L. Ed. 118; Bank *v.* Higginbottom, 9 Pet. 48, 60, 9 L. Ed. 46.

In the case of Hamilton *v.* Russell, 1 Cranch 309, 310, 2 L. Ed. 118, the court held, under the statute of Virginia against frauds, that an absolute bill of sale, unless possession "accompanies and follows" the deed, is fraudulent; and the case of Edwards *v.* Harben, 2 Term Rep. 587, was cited. It is admitted that the statute is in affirmance of the common law. Warner *v.* Norton, 20 How. 448, 459, 15 L. Ed. 950.

The act of the Virginia assembly against fraudulent sales, protected by being recorded, does not comprehend absolute bill of sale, among those where the title may be separated from the possession, and yet the conveyance be a valid one, if recorded within eight months. Hamilton *v.* Russell, 1 Cranch 309, 315, 2 L. Ed. 118.

67. Presumption rebuttable.—"For many years past the tendency has been, in England and in the United States, to consider the question of fraud as a fact for the jury under the instruction of the court. And the weight of authority seems to be now, in this country, favorable to this position. Where possession of goods does not accompany the deed, it is prima facie fraudulent, but open to the circumstances of the transaction, which may prove an innocent purpose. But if such explanation may be given, it is a departure from the stringent rule in the case of Edwards *v.* Harben." Warner *v.* Norton, 20 How. 448, 460, 15 L. Ed. 950.

"It would seem to be difficult, on principle, to maintain that the possession of goods sold is, per se, fraud, to be so pronounced by the court, as that cuts off all explanation of the transaction, which may have been entirely unexceptionable. If circumstances, at law, may be proved to rebut the presumption of fraud, the case must be submitted to the jury." Warner *v.* Norton, 20 How. 448, 460, 15 L. Ed. 950.

And so in the case of transfer of real property. Crawford *v.* Neal, 144 U. S. 585, 598, 36 L. Ed. 552.

And the fact that a debtor, after a judicial sale of his property, was allowed to remain in possession for a while by the purchasers, is no ground of complaint to creditors who could not otherwise attack the sale. Micou *v.* National Bank, 104 U. S. 530, 543, 26 L. Ed. 834.

68. Must be within power of parties.—Without undertaking to suggest whether, in any case, the want of possession of the thing sold constitutes, per se, a badge of fraud, or is only prima facie a presumption of fraud, it is sufficient to say that in case even of an absolute sale of personal property, the want of such possession is not presumption of fraud, if possession cannot, from the circumstances of the property, be within the power of the parties. Conard *v.* Atlantic Ins. Co., 1 Pet. 386, 7 L. Ed. 189, followed in Conard *v.* Nicoll, 4 Pet. 291, 310, 7 L. Ed.

Whether there was a colorable delivery or not, is a matter of fact for the jury.[69]

Where Sale Not Absolute.—In cases where the sale is not absolute, but conditional, the want of possession, if consistent with the stipulations of the parties, and a fortiori, if flowing directly from them, has never been held to be, per se, a badge of fraud.[70]

862; Harris *v.* De Wolf, 4 Pet. 147, 150, 7 L. Ed. 811.

Thus, where the goods at the time of the transfer were at sea, on a voyage, in which they were to be sold, or exchanged by the consignee, and the proceeds sent back in the same ships, it was, therefore, properly in the contemplation of the parties, and indeed, a necessary result of their stipulation, that the goods should not be intercepted, or taken possession of, by the company, until the close of the voyage; and that the return shipments should conform to this arrangement. There is no pretense to say that the plaintiffs did not seek possession of the goods, within a reasonable time after the arrival of the goods home. Their power to accomplish it was dislodged by the execution of the United States, and they obtained, as early as practicable, possession of the bills of lading, and vouchers of their rights. But so far as the want of possession was matter of evidence presumptive of fraud, it was left open to the consideration of the jury; and the grievance now is not that it was so left, but that the court ought to have instructed the jury, as matter of law, that the want of possession, under the circumstances of the case, was, per se, a badge of fraud, which it was not. Conard *v.* Atlantic Ins. Co., 1 Pet. 386, 449, 7 L. Ed. 189, followed in Conard *v.* Nicoll, 4 Pet. 291, 310, 7 L. Ed. 862; Harris *v.* De Wolf, 4 Pet 147, 150, 7 L. Ed. 811.

69. **Whether there was a colorable delivery or not,** was a matter of fact for the jury, and not a matter of law for the court. It is clearly not within the case of Hamilton *v.* Russell, 1 Cranch 309, 2 L. Ed. 118. Warner *v.* Norton, 20 How. 448, 460, 15 L. Ed. 950.

"The fifth and sixth charges were, that the jury were to determine the facts as to the possession after the sale; and that, if a sale is made by a party, and the vendor remain in possession, it is ordinarily a badge of fraud, and requires explanation; and under the sixth they left the case to the jury, to determine whether the sale was in good faith and for an honest purpose; which instructions were, as we think, correct, and in accordance with the general doctrine on the subject." Warner *v.* Norton, 20 How. 448, 461, 15 L. Ed. 950.

70 **When sale not absolute.**—Conard *v.* Atlantic Ins. Co., 1 Pet. 386, 7 L. Ed. 189, followed in Conard *v.* Nicoll, 4 Pet. 291, 310, 7 L. Ed. 862; Hamilton *v.* Russell, 1 Cranch 309, 317, 2 L. Ed. 118.

Mortgage to secure against prospective liability.—Where an insolvent debtor's deed in Mississippi was in fact a mortgage of the property to secure against a prospective liability, in such cases it is usual for the grantor or mortgagor to remain in possession of the property until the maturity of the obligation and a sale of the premises, and standing by itself, the deed was not open to any serious objection on that account. And even that reservation was defeated by the assignment, which included the property in question with other property of the assignor, and provided that the assignee should take possession of the same and sell and dispose of it with all convenient diligence. The creditors were not, therefore, in any way hindered or defrauded by the alleged reservation. Estes *v.* Gunter, 122 U. S. 450, 455, 30 L. Ed. 1228.

"And in Estes *v.* Gunter, 122 U. S. 450, 30 L. Ed. 1128, a deed by an insolvent debtor in Mississippi to secure sureties upon his note, though made in advance of, and in contemplation of, a general assignment for the benefit of creditors, was held to be valid under the laws of that state, though containing a provision that the creditor should remain in possession until the maturity of the note. In this case, also, the common law did not seem to have been affected by any local statute." Huntley *v.* Kingman, 152 U. S. 527, 534, 38 L. Ed. 540.

In United States *v.* Hooe, 3 Cranch 73, 88, 2 L. Ed. 370, the court sustained the validity of a deed made to save grantee harmless on account of his having become the security of grantor to the United States, and on account of notes to be indorsed by grantee for the accommodation of grantor, it being alleged that these are purposes for which it is supposed this deed of trust could not lawfully have been executed. The deed had been pronounced fraudulent under the statute of 13th of Elizabeth, by the lower court.

"That statute contains a proviso that it shall not extend to conveyances made upon good consideration, and bona fide. The goodness of the consideration, in the case at bar, has been admitted; but it is alleged that the conveyance is not bona fide; and for this, Twyne's Case has been principally relied on. But in that case, the intent was believed by the court to be fraudulent, and in this case, it is admitted not to have been fraudulent. It is contended that all the circumstances from which fraud was inferred in that case, are to be found in this; but the court can find between them no trait of similitude. In that case, the deed was of

(2) *Statutory Provisions.*—A statute may require the change of possession to be open and visible, or the transfer will be fraudulent in law regardless of valuable consideration, good faith and any actual intent to defraud.[71] "Immediate" delivery under such a statute means as soon as practicable.[72]

all the property; was secret; was of chattels, and purported to be absolute, yet the vendor remained in possession of them, and exercised marks of ownership over them. In this case, the deed is of part of the property; is of record; is of lands, and purports to be a conveyance which, according to its legal operation, leaves the property conveyed in possession of the grantor." United States *v.* Hooe, 3 Cranch 73, 89, 2 L. Ed. 370.

"In the case of Hamilton *v.* Russell, 1 Cranch 309, 2 L. Ed. 118, this court declared an absolute bill of sale of a personal chattel, of which the vendor retained the possession, to be a fraud. But the difference is a marked one between a conveyance which purports to be absolute, and a conveyance which, from its terms, is to leave the possession in the vendor. If, in the latter case, the retaining of possession was evidence of fraud, no mortgage could be valid. The possession universally remains with the grantor, until the creditor becomes entitled to his money, and either choses or is compelled to exert his right. That the grantor is to receive the rents and profits until the grantee shall become entitled to demand the money which the deed is intended to secure, is a usual covenant." United States *v.* Hooe, 3 Cranch 73, 89, 2 L. Ed. 370.

"All the covenants in this deed appear to the court to be fair, legitimate and consistent with common usage. It will barely be observed that the validity of this conveyance is to be tested by the statutes of Virginia, which embraces this subject. But this is not mentioned as having any influence in this case." United States *v.* Hooe, 3 Cranch 73, 89, 2 L. Ed. 370.

Chattel mortgage.—The fact that the execution of chattel mortgages was immediately followed by a delivery of possession of the property mortgaged, so far from being a badge of fraud, has rather a contrary tendency, and was evidently resorted to to avoid an implication of fraud from the retention of possession by the mortgagor. A prompt and vigorous enforcement of an honest debt is by no means indicative of fraud, and it does not lie in the mouth of the plaintiffs, who were themselves taking steps in the same direction as the mortgagees, to cavil at their success. Davis *v.* Schwartz, 155 U. S. 631, 640, 39 L. Ed. 289. See the title CHATTEL MORTGAGES, vol. 3, pp. 728, 734.

71. Statutory provisions construed.—It has been held, under a statute, declaring the transfer of personal property—the vendor having at the time possession or control thereof—to be conclusively fraudulent and void, as against creditors, unless such transfer is accompanied by an immediate delivery, and followed by an actual and continued change of possession, that the change must be of that character that customers and those accustomed to frequent the premises may be at once advised of the change of possession by the changed appearance of the property or its change of custody. And this is true, whatever may be the good intention or bona fides of the transaction; even the law will not tolerate such transfers as against creditors. The change of possession must be made open and visible, and if not, as against creditors without knowledge of the transfer, it will be void, though made for a valuable consideration in good faith and without any actual intent to defraud. In such case the law conclusively presumes a fraudulent intent, and the party to such sale will not be heard to prove the contrary. Shauer *v.* Alterton, 151 U. S. 607, 623, 38 L. Ed. 286.

The court said to the jury that the statute means that the sale shall be open and public, that the world may be apprised of the change of ownership; and that the change of possession must be actual and continued, and not subject to some secret trust between the buyer and seller. Shauer *v.* Alterton, 151 U. S. 607, 623, 38 L. Ed. 286.

"While the court was at liberty to recall to the minds of jurors all the facts and circumstances bearing upon this issue, we cannot say that it erred in not doing so, or that it erred in leaving to the jury to determine whether, under all the evidence, there was such immediate delivery and such actual change of possession of the property in controversy as was necessary, under the statute as explained, to make the transfer valid against creditors." Shauer *v.* Alterton, 151 U. S. 607, 624, 38 L. Ed. 286.

72. "Immediate" delivery construed.—Where a bill of sale of a stock of goods was executed Saturday night at 9 o'clock, and the goods, which were at a place 23 miles away, were taken possession by vendee the next morning, Sunday, at four o'clock, and remained in his possession until the goods were seized under the levy of an attachment made the next morning, it appears that there was not a single hour in which business could be, or was usually, transacted, that intervened between the execution and delivery of the bill of sale and the transfer of the possession of the property. This was certainly an immediate delivery of possession under the statute (which made a sale where there was not "immediate" delivery

(3) *As Security for Price.*—The retention of possession by the sellers until, and as security for, the payment of the price, is not inconsistent with an actual sale by which title passed to the buyer.[73]

conclusively fraudulent), and that possession continued until interrupted by the seizure by the defendants. Kleinschmidt *v.* McAndrews, 117 U. S. 282, 288, 29 L. Ed. 905.

Dakota.—So in Dakota, Civil Code, §§ 2021, 2023, 2024; Complied Laws of Territory of Dakota, §§ 4654, 4656, 4657. Shauer *v.* Alterton, 151 U. S. 607, 618, 38 L. Ed. 286.

Illinois.—The policy of the law in Illinois will not permit the owner of personal property to sell it, either absolutely or conditionally, and still continue in possession of it, so as to exempt it from seizure or attachment at the suit of creditors of the vendor. If between the parties, without delivery, the sale is valid, it has no effect on third persons who, in good faith, purchase it, and an attaching creditor stands in the light of a purchaser, and as such will be protected. Dooley *v.* Pease, 180 U. S. 126, 128, 45 L. Ed. 457; Hervey *v.* Rhode Island Locomotive Works, 93 U. S. 664, 23 L. Ed. 1003. See, also, Fosdick *v.* Schall, 99 U. S. 235, 250, 25 L. Ed. 339; Harkness *v.* Russell, 118 U. S. 663, 678, 30 L. Ed. 285.

"Secret liens which treat the vendor of personal property, who has delivered possession of it to the purchaser, as the owner until the payment of the purchase money, cannot be maintained in Illinois. They are held to be constructively fraudulent as to creditors, and the property, so far as their rights are concerned, is considered as belonging to the purchaser holding the possession." Dooley *v.* Pease, 180 U. S. 126, 129, 45 L. Ed. 457.

In Dooley *v.* Pease, 180 U. S. 126, 45 L. Ed. 457, a sale of personalty, by a debtor to his creditor in payment of the debt or a security therefor, was attacked as fraudulent as to other creditors of the vendor, under the following circumstances: The president of the debtor corporation executed and delivered the bill of sale to one of its creditors of goods in a store conducted by S. as its agent. S. was employed by the creditor to sell said goods, but no change in the possession of the goods was made, except that S. insured same in the name of the creditor, opened a new set of books to keep his accounts in, and delivered an inventory of the goods to the creditor's attorney, and also billed portions of the goods to purchasers in the name of the creditor, depositing the proceeds of such sales to the latter's credit. The signs on the outside of the store remained the same, the employees the same, and the goods apparently in the possession of the debtor, so far as appeared to the public. No advertisement of the transfer was made, or notice thereof given, but the salesmen were instructed not to inform the public nor customers of such transfer. It was held that this did not constitute as matter of law, a visible, open and notorious change of possession required by the law of Illinois to protect such goods from levy or attachment by other creditors.

"The facts stated in the findings were evidentiary only, and instead of being conclusive of publicity, tended rather to show intentional concealment." Dooley *v.* Pease, 180 U. S. 126, 132, 45 L. Ed. 457.

Missouri.—Under the statute of frauds of Missouri every sale by a vendor of goods and chattels unless accompanied by delivery within a reasonable time (regard being had to the situation of the property), and followed by an actual and continued change of possession is fraudulent and void as against the creditors of the vendor or subsequent purchasers in good faith. Revised Statutes of 1865, p. 440, ch. 107; Allen *v.* Massey, 17 Wall. 351, 352, 21 L. Ed. 542.

The possession which the purchaser is required to take of the property sold, in order to render the sale valid under this statute, must be open, notorious, and unequivocal, such as would inform the public, or those who were accustomed to deal with the party, that the property had changed hands, and that the title had passed from the vendor to the purchaser. Allen *v.* Massey, 17 Wall. 351, 354, 21 L. Ed. 542.

Under this statute a sale of household furniture in a house occupied jointly by vendor and vendee, both using the furniture alike, and there being no other change of possession than that the vendor, after going around with the vendee and looking at the furniture and agreeing on the price, turned it over to the vendee and executed a bill of sale before a notary, both parties then, after the sale, occupying the house and using the furniture exactly as before, is void as against the vendor's creditors. Allen *v.* Massey, 17 Wall. 351, 21 L. Ed. 542.

Pennsylvania.—"In the case of a voluntary sale of goods, the law, both in Pennsylvania and England, regards the continuance of the debtor's possession as a badge of fraud. In England, the law is the same, where the sale is made by the sheriff; (a) but in Pennsylvania, a different rule, in that case, has prevailed; and where a relation or friend, after a fair purchase, at public sale, leaves the goods in the occupancy and use of the debtor, it never has been deemed a fraud upon creditors." Waters *v.* McClellan, 4 Dall. 208, 1 L. Ed. 803.

73. **As security for price.**—Arkansas

b. *Reservation of Benefit.*—There is a class of cases undoubtedly in which transfers of property are adjudged to be fraudulent, although there be no actual fraud meditated by the parties. Such are the cases of an assignment by an insolvent debtor reserving portions of the assigned property for his own benefit, requiring releases from creditors as a condition of participating in the fund, and the like.[74] Whatever transfer of the title to property, by a failing or insolvent debtor, may be valid, any instrument which secures to the assignor an interest in or an unlimited control over the property conveyed, and which has the effect of hindering or delaying creditors, is void as being a fraud upon those creditors.[75] The question is not one of law, so much as it is one of fact and

Cattle Co. *v.* Mann, 130 U. S. 69, 78, 32 L. Ed. 854.

74. **Reservation of benefit.**—Stephen *v.* Beall, 22 Wall. 329, 340, 22 L. Ed. 786; Lukins *v.* Aird, 6 Wall. 78, 80, 18 L. Ed. 750; Huntley *v.* Kingman, 152 U. S. 527, 537, 38 L. Ed. 540.

"If a man were to convey his whole estate, and afterwards to contract debts, there would be much reason to suspect a secret trust for his own benefit; the transaction would be closely inspected, and a sweeping conveyance of his whole property would, undoubtedly, form an important item in the testimony to establish fraud. So, in many other cases which might be adduced." Brashear *v.* West, 7 Pet. 608, 614, 8 L. Ed. 801. And see the title ASSIGNMENTS FOR BENEFIT OF CREDITORS, vol. 2, p. 602.

75. **Same.**—Means *v.* Dowd, 128 U. S. 273, 282, 32 L. Ed. 429; Huntley *v.* Kingman, 152 U. S. 527, 535, 38 L. Ed. 540; Shauer *v.* Alterton, 151 U. S. 607, 619, 38 L. Ed. 286.

An arrangement by which a grantor placed his property in grantee's hands to be used in liquidating his debts, and, when this was done, the property, or so much of it as had not been consumed in the payment of debts, was to be restored to him, and that in the meanwhile he was to have enough of the rents to live on, is so entirely inconsistent with the absolute conveyance of the property as executed between the parties, that it has all the features of a fraud upon creditors. It reserves to the grantor the enjoyment of the rents and profits of the property conveyed, to which the creditors have a right of immediate appropriation to their debts, and involves a secret trust for the return to himself of property of which such creditors have the immediate right of sale. The law does not countenance any such transaction, but leaves both parties in the position where they have placed themselves. Dent *v.* Ferguson, 132 U. S. 50, 67, 33 L. Ed. 242; Lukins *v.* Aird, 6 Wall. 78, 18 L. Ed. 750.

Agreement for reconveyance after payment of debt.—Upon a bill filed by the assignee in bankruptcy of a debtor, H., it was alleged that a confession of judgment by H., the issuing of executions and sale under such executions of debtor's land to the judgment creditor, F., and a subsequent conveyance by such creditor to H., of such real estate, by way of mortgage to secure the amount still due such creditor, were fraudulent simulations for the purpose of enabling H. to put his property beyond the reach of his creditors and of enabling this creditor, by means of an unlawful preference to obtain payment of his claim in full, H., having become a voluntary bankrupt in the meanwhile and having obtained his discharge in bankruptcy before the date of the last mentioned deed, and being alleged to have been insolvent during the whole period involved. It was held, the allegations of fraud and collusion being denied in the answer filed by the creditor thus preferred, that the case made by the bill was not established, but on the contrary the answer of the creditor was supported by the proofs, and his acts and doings throughout appeared to have been fair and honest, and the debt due him, so secured, an honest debt. Norton *v.* Hood, 124 U. S. 20, 31 L. Ed. 364.

An agreement made between them by which the creditor contracted to reconvey the property if his debt should be punctually paid in installments specified, was held not to contain or suggest anything fraudulent. It assigns fair and natural motives for the favor he was doing to H. Although the agreement was executed by H. as well as the creditor, it contains no covenants or stipulations on the part of H., and no agreement by H. to pay the amounts mentioned in it, making up the balance due on the judgment. The only stipulations in it are those made by the creditor. He does not, by the agreement, sell and transfer the property to H., but only stipulates that he will sell and transfer it on condition that H. shall punctually make the payments specified in it; H. wholly failed to take the benefit of this agreement, but, instead thereof, immediately after the first day of payment mentioned in it, he filed a petition in bankruptcy. By the terms of the agreement, all rights existing under it in favor of H. had ceased prior to the filing of the petition in bankruptcy, and there was no right growing out of the agreement which passed, or could pass, to the assignee in bankruptcy, as representing H., because, in that respect the rights of the plaintiff attached only to rights which

good faith.[76]

10. Want or Inadequacy of Consideration—a. *Want of Consideration.*—The want of a valuable consideration may be a badge of fraud, but it is only presumptive, and not conclusive, evidence of it, and may be met and rebutted by evidence on the other side.[77]

Bona Fide Debt.—A bona fide debt is pro tanto a valuable consideration to

existed in favor of Hood at the time of the filing of the petition in bankruptcy. Norton *v.* Hood, 124 U. S. 20, 31, 31 L. Ed. 364.

The only other right which the plaintiff could have, in his capacity as assignee in bankruptcy, was the right to reach property transferred by H. in fraud of his creditors. As to that, the proof is that no property was transferred by H. in fraud of his creditors, or taken by defendant in fraud of such creditors. Norton *v.* Hood, 124 U. S. 20, 32, 31 L. Ed. 364.

Employment of grantor and resale to wife.—See ante, "Employment of Grantor as Grantee's Agent or Attorney," III, C, 5. See, also, ante, "Conveyance to Wife," III, C, 4, c, (1).

Assuming the bona fides of the sale and its validity, except in so far as its legality may have been affected by the employment of vendor in a clerical capacity, and the subsequent sale by the vendee to vendor's wife, the fact of the employment and resale, no question being made as to the reality of the transfer, could at best have been only competent evidence to be considered by the jury in determining whether or not a secret benefit was reserved to the debtor in the original transaction, which was the issue on this branch of the case. Certainly, if nothing else appeared but the mere employment of vendor subsequent to the sale, to assist in the disposition of the goods and the getting in of the book accounts, such fact would not be a circumstance in itself sufficient to prove within the meaning of the Alabama law that the transaction was fraudulent. Bamberger *v.* Schoolfield, 160 U. S. 149, 164, 40 L. Ed. 374.

Provision for purchase by creditors with claims at face value.—A deed of assignment for the benefit of creditors, with preferences, contained a peculiar provision for bidding by the creditors of the second class at any public sale that might be made of the assigned property, with the right in such creditors to pay therefor "at its full face value the amount found due such purchaser secured by this deed, or so much thereof as may be necessary to enable such creditor to complete the payment of his purchase money," the proceeds to be distributed to the creditors secured in the order named, and in the distribution between those creditors purchasing property and paying therefor under this provision, and those who made no purchase, such rule of equality to be observed as will be just and proper. It was held that fraudulent intent was not a necessary deduction from this clause permitting these creditors to avail themselves of their claims in bidding, as creditors of the first class were to be paid before this clause could take effect, thus precluding its operation to their prejudice. And such intention was supported by the facts. The second-class creditors are all treated alike, and if it could be said that the clause might operate to create a preference as between them, the grantors had a right to prefer; but inasmuch as each can bid, and the trustees have power to divide the property into parcels to enable as many creditors as possible to become bidders, and are charged with the duty to observe such rule of equality between those who purchase and those who do not, as will be just, it is not easy to see how a preference could be obtained. The question is not whether the trustees might prove unfaithful—a contingency of which there is no intimation here—but whether the provisions of the deed, if carried out according to their apparent intent, would be fraudulent in their operation. Such is not the reasonable inference, and the manifest object was to stimulate bidding, prevent a sacrifice of the property, and benefit the creditors, and this without any advantage to the assignors other than that involved in having their assets go as far as possible in payment of their debts. The deed is not void in law because of the insertion of the provision in question. Peters *v.* Bain, 133 U. S. 670, 687, 689, 33 L. Ed. 696.

76. Question of fact and good faith.—Etheridge *v.* Sperry, 139 U. S. 266, 278, 35 L. Ed. 171; Jewell *v.* Knight, 123 U. S 426, 31 L. Ed. 190; Smith *v.* Craft, 123 U S. 436, 31 L. Ed. 267.

Reservations and stipulations in assignments.—See the title ASSIGNMENTS FOR BENEFIT OF CREDITORS, vol 2, pp. 621-623.

Power of disposal in mortgagor of chattels.—See the title CHATTEL MORTGAGES, vol. 3, p. 731, et seq.

Reservation of surplus in chattel mortgage.—See the titles CHATTEL MORTGAGES, vol. 3, pp. 339, 340.

Instructions.—See post, "Instructions," VI, G.

77. Want of consideration.—Hinde *v.* Longworth, 11 Wheat. 199, 213, 6 L. Ed 454. It will be noted that only the want or inadequacy of consideration as a badge of fraud is treated here. The subject of voluntary conveyances, as such, is treated post, "Voluntary Conveyances," IV.

Between persons in confidential relations.—See ante, "Confidential Relations," III, C, 4.

support a transfer of property by the debtor to such creditor,[78] or even future advances,[79] or a moral, though unenforcible obligation to pay for services rendered.[80]

b. *Inadequacy of Consideration.*—A deed made upon a valuable and adequate consideration which is actually paid, and where the change of property is bona fide, or such as it purports to be, cannot be considered as a conveyance to defraud creditors.[81] And if adequate when made, it does not become inadequate through subsequent developments.[82] To constitute a valuable consideration, it is not necessary that money should be paid; but if, as in this case, it be expended on the faith of the contract, it constitutes a valuable consider-

78. **Bona fide debt.**—Etheridge *v.* Sperry, 139 U. S. 266, 277, 35 L. Ed. 171; Robinson *v.* Elliott, 22 Wall. 513, 520, 22 L. Ed. 758; Mellen *v.* Buckner, 139 U. S. 388, 35 L. Ed. 199, where it is held, following Johnson *v.* Waters, 111 U. S. 640, 28 L. Ed. 547, that an act of sale, and donation by a father to his daughter of community property under the Louisiana law, while void as a donation, was good as a sale to the amount due the daughter from her mother's estate, together with the amount she was directed to pay to a creditor. In other words to the amount of what was due her from him as a debt.

Existing debt.—A creditor secured by deed of trust on property concededly of less value than the debt, with the right to direct the sale of the property publicly or privately, may accept the property in satisfaction of his debt and direct its conveyance by the trustee to himself, to the debtor's children or any other person, without affording other creditors any just grounds of complaint. Van Riswick *v.* Spalding, 117 U. S. 370, 29 L. Ed. 913.

The extinguishment of an existing indebtedness is a valuable consideration for a purchase made in good faith. Crawford *v.* Neal, 144 U. S. 585, 595, 36 L. Ed. 552.

The consideration here was not in any view so inadequate as to raise an inference of bad faith, and it probably exceeded the value of the property conveyed. Crawford *v.* Neal, 144 U. S. 585, 597, 36 L. Ed. 552.

It was also held in Crawford *v.* Neal, 144 U. S. 585, 601, 36 L. Ed. 552, that the holding of the lower court that the decided weight of the evidence supported the conclusion that the notes, the surrender of which unpaid was claimed as the consideration for another of the deeds in question, were paid before the conveyance to grantee was made, and that therefore that conveyance was without consideration and fraudulent against the creditors of grantor, was correct. The court said: "We have patiently examined the evidence contained in the record, and it is impossible for us to reverse the decree for error or mistake in the conclusions of the master and the court, depending, as they do, upon the weighing of conflicting testimony, and entitled, as they are, to every reasonable presumption in their favor." And see ante, "Preference to Creditors," III, C, 8.

79. **Future advances.**—"That the property stood bound for future advances is, in itself, unexceptionable. It may, indeed, be converted to improper purposes, but it is not positively inadmissible. It is frequent, for a person who expects to become more considerably indebted, to mortgage property to his creditor, as a security for debts to be contracted, as well as for that which is already due." United States *v.* Hooe, 3 Cranch 73, 89, 2 L. Ed. 370.

80. **Voluntary payment for services rendered.**—Where a contract was wholly contingent upon the success of the obligee in the performance of his part, as to his right to compensation, and it was never performed either by him personally or by his assignees, so that there was no legal obligation upon the other party to pay anything for such services as he had rendered, yet, where he had rendered valuable services, as was conceded by the other party, there was nothing to prevent compensation therefor taking the form of a donation or personal gift to his widow, without same being subject to the claims of his creditors. Gilfillan *v.* McKee, 159 U. S. 303, 315, 40 L. Ed. 161.

81. **Adequate valuable consideration.**—Wheaton *v.* Sexton, 4 Wheat. 503, 4 L. Ed. 626.

"Of such a contract, it cannot be predicated that it is with intent to defeat or defraud creditors, since, although the property itself no longer remains subject to the judgment, a substitute is furnished by which that judgment may be satisfied. Nor is it any impeachment of such a deed, that it is made to the use of the family of the maker. The trustee, in that case, becomes the benefactor, and not the husband. It is not a provision made by him for his family, but by another." Wheaton *v.* Sexton, 4 Wheat. 503, 507, 4 L. Ed. 626.

82. **Not affected by subsequent developments.**—Trust Co. *v.* Sedwick, 97 U. S. 304, 307, 24 L. Ed. 954; Dent *v.* Ferguson, 132 U. S. 50, 60, 33 L. Ed. 242; King *v.* Thompson, 9 Pet. 204, 9 L. Ed. 102; Lloyd *v.* Fulton, 91 U. S. 479, 487, 23 L. Ed. 363.

Thus, if a promise to cancel the debts of the grantor, which was the consideration for the conveyance, was a fair and valid transaction when it was made, it did not become less so because subse-

ation.[83] And a grossly inadequate price is, under some circumstances, evidence of fraud, and a fit subject of inquiry by a jury, in determining the validity of a sale made under legal process,[84] or in pais.[85] Wherever there is an appearance of fraud, the inadequacy of price, though not conclusive, in itself, to avoid a sale, affords an argument of great weight against a purchaser to whom the fraud is imputed.[86] The true consideration may be shown by parol evidence, where a nominal one is recited.[87]

quent occurrences enabled grantee to effect a settlement with the creditors upon the payment of a small percentage of their respective claims; and if the means he employed to effect such compromises were not proper, it might give the overreached creditors cause of complaint, but certainly not the grantor. Had he been able to persuade the creditors to give a release of their claims without any consideration whatever, that could not retroact and make inadequate what was an adequate consideration when the contract was made. Dent *v.* Ferguson, 132 U. S. 50, 60, 33 L. Ed. 242.

The price agreed to on the face of the instrument itself was not so grossly inadequate as to create the presumption of fraud and undue influence, aside from, and independent of, any proof other than the single fact that the parties thereto bore the relation to each other of principal and agent. Assuming for the present, and for present purposes only, that the agreement was bona fide as respects third persons, creditors of the parties, and considering it with exclusive reference to the reciprocal rights of the two parties to it, the evidence is not such as to raise the presumption of fraud and therefore to call for or justify the interposition of a court of equity for the cancellation of the contract. The fairness of the transaction, on this point, should be determined by the condition of things at the time the contract was made and executed, and not by what occurred afterwards, except so far as subsequent developments may reflect light upon it. Dent *v.* Ferguson, 132 U. S. 50, 58, 33 L. Ed. 242.

83. Payment of money unnecessary.—King *v.* Thompson, 9 Pet. 204, 9 L. Ed. 102.

84. Inadequate consideration as evidence of fraud.—Blanchard *v.* Brown, 3 Wall. 245, 250, 18 L. Ed. 69.

85. Same.—Crawford *v.* Neal, 144 U. S. 585, 597, 36 L. Ed. 552; Kempner *v.* Churchill, 8 Wall. 362, 369, 19 L. Ed. 461.

It is true that mere inadequacy of consideration, unless extremely gross, does not per se prove fraud. But the direct testimony here confirms the fact that vendee urged the acceptance of his offer to purchase with arguments such as this: "There is some pretty rough talk in town about you. You had better not delay this matter. You had better let me have the goods and put the money in your pocket and let the creditors go to the devil." The circumstantial evidence amply confirms this direct evidence of fraud. 1st. The false receipts given for full value on Saturday. 2d. The account of stock made out on Sunday. 3d. The removal of the goods into a cellar on Monday. The defendant's endeavor to prove by experts, that the price given was sufficient, tends only to confirm the fraud. Kempner *v.* Churchill, 8 Wall. 362, 369, 19 L. Ed. 461.

The fact that the property conveyed was nominally more than double in value to the amount of debts secured thereby is not in itself indicative of fraud, since the property conveyed was a stock of goods of somewhat uncertain value, and when sold realized but little more than was necessary to pay off the mortgages. Indeed, the federal supreme court held directly in Downs *v.* Kissam, 10 How. 102, 108, 13 L. Ed. 346, that it was not even a badge of fraud that a mortgage was made to cover more property than would secure the debt due. Davis *v.* Schwartz, 155 U. S. 631, 641, 39 L. Ed. 289.

86. Same.—Weitzell *v.* Fry, 4 Dall. 218, 221, 1 L. Ed. 807.

Where a person took the benefit of the bankrupt law of the United States; omitted, in first schedule of property, to take any notice of a claim which he had against the Mexican Republic, for the unlawful seizure of the cargo of a vessel; filed an amended schedule, in which he mentioned the claim so indistinctly as to give no information of its value, although he was then prosecuting it before the board of commissioners; concealed the evidence of the property, so that the assignee in bankruptcy reported that it was of no value, and sold the whole, for a nominal consideration, to the sister of the bankrupt, who afterwards transferred it to him; the purchase was fraudulent, under the 4th section of the bankrupt law, and also by the general principles of equity. Clark *v.* Clark, 17 How. 315, 15 L. Ed. 77.

87. True consideration shown by parol.—Hitz *v.* National, etc., Bank, 111 U. S. 722, 727, 28 L. Ed. 577.

Although the sum of one dollar is mentioned in this trust deed as the consideration, the true consideration can be shown by parol evidence. It is always understood that the one dollar in such connection is merely nominal and is never actually paid. In this case it means no more than that nothing was paid by the trustees, who took no beneficial interest

c. *Burden of Proof.*—Where a bill in chancery was filed to set aside a deed as being fraudulent against creditors, and it is charged in the bill that the consideration mentioned in the deed was not paid, it is not satisfactory that the defendant relies upon the answer that it was paid, considering the answer, which is responsive to the bill, as evidence of the payment, when the execution of the deed is surrounded by circumstances of suspicion.[88] And as against creditors of an insolvent debtor, the one claiming as a purchaser must prove that he paid a valuable and adequate consideration, but is not bound to negative the reservation of a benefit to a debtor.[89]

IV. Voluntary Conveyances.

A. Validity in General.—A voluntary deed is good as between the parties, and can be avoided only by creditors who were such at the date of the conveyance.[90] In all purely voluntary conveyances it is the fraudulent intent of the donor which vitiates. If actually insolvent, he is held to knowledge of his condition; and if the necessary consequence of his act is to hinder, delay, or defraud his creditors, within the statute, the presumption of the fraudulent intent is irrebuttable and conclusive, and inquiry into his motives is inadmissible.[91]

Hitz *v.* National, etc., Bank, 111 U. S. 722, 727, 28 L. Ed. 577.

Where the answer under oath called for, shows a valuable and meritorious consideration, which answer is uncontradicted by any evidence whatever, and is well supported on cross-examination of defendants in their depositions, it cannot be disregarded as inadmissible because unfavorable to the party who demanded it. This would be to permit the party to trifle with the powers of the court at its pleasure. Hitz *v.* National, etc., Bank, 111 U. S. 722, 727, 28 L. Ed. 577.

Transactions between husband and wife.—See ante, "Conveyance to Wife," II, C, 4, c, (1).

88. Burden of proof.—Callan *v.* Statham, 23 How. 477, 16 L. Ed. 532.

In the present case, the payment of the purchase money was alleged to be a secret transaction between the vendor and vendee, and there were other circumstances attending the deed which surrounded it with suspicion. The evidence of payment must have been in the possession of the defendants, and they ought to have produced it. Callan *v.* Statham, 23 How. 477, 16 L. Ed. 532.

The title of the defendant, although encumbered, could have been made clear; the price alleged to have been paid was inadequate; the vendor remained in possession and collected all the rents without accounting to the vendee; the circumstance that the vendor was heavily in debt, and suits pending and maturing to judgment when he made the deed—all these things induce the supreme appellate court not to disturb the decree of the court below, which directed the property to be sold for the satisfaction of creditors. Callan *v.* Statham, 23 How. 477, 16 L. Ed. 532. See post, "Voluntary Conveyances," IV.

89. Same.—Bamberger *v.* Schoolfield, 160 U. S. 149, 163, 40 L. Ed. 374.

90. Validity in general.—Adams *v.* Collier, 122 U. S. 382, 391, 30 L. Ed. 1207; Warren *v.* Moody, 122 U. S. 132, 30 L. Ed. 1108.

The making of a conveyance by a grantor in business, without intending or making any change in the character of his business, who had then ample property to pay his debts, is not fraudulent. Schreyer *v.* Scott, 134 U. S. 405, 412, 33 L. Ed. 955; Parish *v.* Murphree, 13 How. 92, 98, 14 L. Ed. 65.

The subsequent unexpected depreciation in the value of other real estate owned by grantor, so that it failed to pay more than the first mortgage thereon, leaving a second mortgage unpaid, coupled with unexpected business reverses, creates no presumption of any fraudulent intent in a previous conveyance to grantor's wife. Schreyer *v.* Scott, 134 U. S. 405, 414, 33 L. Ed. 955.

If it were proved that the voluntary deed conveyed the bulk of the grantor's estate, it does not follow that the conveyance must be fraudulent. If a man, entirely unincumbered, has a right to make a voluntary settlement of a part of his estate, it is difficult to say how much of it he may settle. In the case of Stephens *v.* Olive, the whole real estate appears to have been settled, subject to a mortgage for a debt of £500, yet that settlement was sustained. The proportional magnitude of the estate conveyed may awaken suspicion, and strengthen other circumstances; but, taken alone, it cannot be considered as proof of fraud. A man who makes such a conveyance, necessarily impairs his credit, and, if openly done, warns those with whom he deals not to trust him too far; but this is not fraud. Sexton *v.* Wheaton, 8 Wheat. 229, 250, 5 L. Ed. 603.

91. Same.—Washington Cent. Bank *v.* Hume, 128 U. S. 195, 211, 32 L. Ed. 370.

"But the circumstances of each particu-

And when one engaged or about to engage in any business has the means to meet its usual exigencies, and devotes such means in good faith to the business, and has besides other means which he chooses to settle upon any object of his bounty, unlooked-for disasters on his part, subsequently occurring, will not affect the validity of the settlement, because they afford no ground for the imputation of unfairness.[92]

B. Validity as to Creditors—1. In General.—The ordinary rule of common law is, that a voluntary deed by a person heavily indebted is fraudulent and void as to prior creditors merely upon the ground that he was so indebted, but as to subsequent creditors is only void upon evidence that the deed was

lar case should be considered, as in Partridge *v.* Gopp, 1 Eden, 163, 168; S. C. Ambler, 596, 599, where the Lord Keeper, while holding that debts must be paid before gifts are made, and debtors must be just before they are generous, admitted that 'the fraudulent intent is to be collected from the magnitude and value of the gift.'" Washington Cent. Bank *v.* Hume, 128 U. S. 195, 211, 32 L. Ed. 370. See Parish *v.* Murphree, 13 How. 92, 98, 14 L. Ed. 65.

"Where fraud is to be imputed, or the imputation of fraud repelled, by an examination into the circumstances under which a gift is made to those towards whom the donor is under natural obligation, the test is said, in Kiff *v.* Hanna, 2 Bland 33, to be the pecuniary ability of the donor at that time to withdraw the amount of the donation from his estate without the least hazard to his creditors, or in any material degree lessening their then prospects of payment; and in considering the sufficiency of the debtor's property for the payment of debts, the probable, immediate, unavoidable, and reasonable demands for the support of the family of the donor should be taken into the account and deducted, having in mind also the nature of his business and his necessary expenses." Washington Cent. Bank *v.* Hume, 128 U. S. 195, 211, 32 L. Ed. 370. See, also, ante, "Constitution," III, A, 2; post, "Validity as to Creditors," IV, B.

92. Unaffected by subsequent developments.—Trust Co. *v.* Sedgwick, 97 U. S. 304, 307, 24 L. Ed. 954; Sexton *v.* Wheaton, 8 Wheat. 229, 251, 5 L. Ed. 603; Schreyer *v.* Scott, 134 U. S. 405, 414, 33 L. Ed. 955.

In testing the validity of a transaction, the subsequent fall of property, or the failure of grantor, cannot be taken into view, but the inquiry must be limited to his circumstances at that time. It is not shown that the persons for whom he was bound, as indorser, were then unable to pay the respective sums for which he was responsible; and it would be improper to consider these sums as debts due by grantor; he was responsible for their payment, on certain contingencies; but the fact that his credit remained unimpaired, for several years after the contract, shows, that neither his credit, nor the credit of those for whom he was indorser, was considered doubtful. In this state of facts, grantor was in a condition to dispose of the house and lot, not worth more than $2,500, on the terms stated. King *v.* Thompson, 9 Pet. 204, 9 L. Ed. 102.

The short period which intervened between the execution of this conveyance and the failure of grantor, ought to be taken into view together; but they do not, as this case stands, establish a fraud. There is no allegation in the bill, nor is there any reason to believe that any of the debts which pressed upon grantor at the time of his failure were contracted before he entered into commerce in 1809, which was more than two years after the execution of the deed. It appears that, at the date of its execution, he had no view to trade. Although his failure was not very remote from the date of the deed, yet the debts and the deed can in no manner be connected with each other; they are as distinct as if they had been a century apart. In the case of Stephens *v.* Olive, the debt was contracted in less than twelve months after the settlement was made; yet it could not overreach the settlement. These circumstances, then, both occurred in the case of Stephens *v.* Olive, and were not considered as affecting the validity of that deed. The reasons why they should not be considered in this case as indicating fraud are stronger than in England. In this district, every deed must be recorded in a place prescribed by law. All titles to land are placed upon the record. The person who trusts another on the faith of his real property, knows where he may apply to ascertain the nature of the title held by the person to whom he is about to give credit. In this case, the title never was in grantor. His creditors, therefore, never had a right to trust him, on the faith of this house and lot. Sexton *v.* Wheaton, 8 Wheat. 229, 251, 5 L. Ed. 603.

"But where there are heavy subsisting liabilities, doubtful solvency, a large settlement made upon the wife at the outset of the business, and failure and insolvency to a large amount shortly follow, it is impossible to avoid the conviction that there was a deliberate plan to provide for the settler and his family in any event, and to throw the burden of the losses that might occur upon his creditors. The intention animating such conduct is condemned alike by ethics and the law." The case at

made in contemplation of future indebtedness.[93] But the rule as now established is, that prior indebtedness is only presumptive and not conclusive proof of fraud, and this presumption may be explained and rebutted. Fraud is always a question of fact with reference to the intention of the grantor. Where there is no fraud, there is no infirmity in the deed. Every case depends upon its circumstances, and is to be carefully scrutinized. But the vital question is always the good faith of the transaction. There is no other test.[94] And same is

bar falls within this category. Trust Co. *v.* Sedgwick, 97 U. S. 304, 307, 24 L. Ed. 954.

93. Validity as to creditors generally.—McDonald *v.* Dewey, 202 U. S. 510, 529, 50 L. Ed. 1128; Sexton *v.* Wheaton, 8 Wheat. 229, 5 L. Ed. 603; Hinde *v.* Longworth, 11 Wheat. 199, 6 L. Ed. 454; Kehr *v.* Smith, 20 Wall. 31, 36, 22 L. Ed. 313; Graham *v.* Railroad Co., 102 U. S. 148, 153, 26 L. Ed. 106; Moore *v.* Page, 111 U. S. 117, 28 L. Ed. 373; Horback *v.* Hill, 112 U. S. 144, 149, 28 L. Ed. 670; Schreyer *v.* Scott, 134 U. S. 405, 410, 33 L. Ed. 955; Wallace *v.* Penfield, 106 U. S. 260, 27 L. Ed. 147; Adams *v.* Collier, 122 U. S. 382, 391, 30 L. Ed. 1207; Warren *v.* Moody, 122 U. S. 132, 30 L. Ed. 1108; McLaughlin *v.* Bank, 7 How. 220, 12 L. Ed. 675.

"It is a well-settled rule of law that if an individual, being solvent at the time, without any actual intent to defraud creditors, disposes of property, for an inadequate consideration, or even makes a voluntary conveyance of it, subsequent creditors cannot question the transaction. They are not injured. They gave credit to the debtor in the status which he had after the voluntary conveyance was made." Graham *v.* Railroad Co., 102 U. S. 148, 153, 26 L. Ed. 106; Mattingly *v.* Nye, 3 Wall. 370, 19 L. Ed. 380; Sexton *v.* Wheaton, 8 Wheat. 229, 5 L. Ed. 603; Parish *v.* Murphree, 13 How. 92, 98, 14 L. Ed. 65; Clark *v.* Killian, 103 U. S. 766, 26 L. Ed. 607; Horbach *v.* Hill, 112 U. S. 144, 149, 28 L. Ed. 670; Gray *v.* National Steamship Co., 115 U. S. 116, 121, 29 L. Ed. 309. See, also, ante, "Construction," III, A, 2.

The statute of 13 Eliz., c. 5, avoids all conveyances not made on a consideration deemed valuable in law, as against previous creditors. Sexton *v.* Wheaton, 8 Wheat. 229, 5 L. Ed. 603.

Unadjusted and unascertained claim not an existing "debt."—It was held in Sexton *v.* Wheaton, 8 Wheat. 229, 252, 5 L. Ed. 603, that the existence of an unadjusted and unascertained claim against the grantor at the time of the conveyance, which afterwards turned out to be unfounded, was not an existing "debt," but here, on its adjustment, grantor was proved to be the creditor instead of debtor. It would be going too far to say that this conveyance was fraudulent, where there is nothing on which to found the suspicion, but the single fact that such a claim was understood to exist.

94. Modern rule.—Lloyd *v.* Fulton, 91 U. S. 479, 485, 23 L. Ed. 363.

And it is said in Hinde *v.* Longworth, 11 Wheat. 199, 213, 6 L. Ed. 454, that a voluntary deed is not absolutely void as against creditors, although it may be so under certain circumstances; but the mere fact of being in debt to a small amount would not make the deed fraudulent, if it could be shown that the grantor was in prosperous circumstances, and unembarrassed, and that the gift was a reasonable one, leaving enough for the payment of his debts.

Formerly, according to the rule of English jurisprudence, voluntary deeds, as against existing creditors, were void. Townsend *v.* Windham, 2 Ves. 10. The same principle was applied in such cases in this country. It has been overruled in the English courts. It has been also overruled by the federal supreme court (Hinde *v.* Longworth, 11 Wheat. 199, 213, 6 L. Ed. 454; Kehr *v.* Smith, 20 Wall. 31, 35, 22 L. Ed. 313) and in most of the states of our Union. The state adjudications to this effect are too numerous to be cited. Lloyd *v.* Fulton, 91 U. S. 479, 485, 23 L. Ed. 363.

Where there is no actual fraud, and the debtor reserved property worth more than twice and a half the amount of his debts, expecting and intending to pay all he owed, and he continued able to do so until he lost his means by the hazards of business, and the creditor rested supine for a long time, and did not take his judgment until more than eight years after his notes matured, and more than six years after the execution of the trust deed, more than seven years having elapsed when the levy was made, and the validity of the deed was then challenged for the first time, the creditor cannot successfully attack the conveyance. Lloyd *v.* Fulton, 91 U. S. 479, 487, 23 L. Ed. 363. And see ante, "Powers Exercisable by Debtor over His Property," II; "Want or Inadequacy of Consideration," III, C, 10.

Missouri.—In Missouri the "doctrine is well settled that a voluntary conveyance by a person in debt is not, as to subsequent creditors, fraudulent per se. To make it fraudulent, as to subsequent creditors, there must be proof of actual or intentional fraud. As to creditors existing at the time, if the effect and operation of the conveyance are to hinder or defraud them, it may, as to them, be justly regarded as invalid; but no such reason can be urged in behalf of those who become creditors afterwards." Whether it is fraudulent or not is to be determined from all the circumstances, although the fact

true of such conveyances by a corporation.[95]

2. Voluntary Conveyance to Wife.—A voluntary conveyance by an insolvent man to his wife is voidable at the instance of existing creditors.[96] But where a conveyance from a husband to his wife is voluntary, but the former was at the time free from debt and possessed of ample means, the same protection should be afforded as to a like transaction between third parties.[97]

of the indebtedness is of weight upon the question. Wallace *v.* Penfield, 106 U. S. 260, 264, 27 L. Ed. 147.

Georgia.—"Such is also the law of the state (of Georgia) whence this case came to this court. Weed *v.* Davis, 25 Ga. 686. It is a rule of property there; and this court is therefore bound to apply it, in the case in hand, as if we were sitting as a local court in that state." Lloyd *v.* Fulton, 91 U. S. 479, 485, 23 L. Ed. 363.

95. By corporation.—In case of a corporation, as of a natural person, any conveyance of its property while indebted, without authority of law and in fraud of existing creditors, is void as against them. Wabash, etc., R. Co. *v.* Ham, 114 U. S. 587, 595, 29 L. Ed. 235; Richardson *v.* Green, 133 U. S. 30, 44, 33 L. Ed. 516; McDonald *v.* Williams, 174 U. S. 397, 403, 43 L. Ed. 1022.

96. Voluntary conveyance to wife.—Wheaton *v.* Sexton, 4 Wheat. 503, 506, 4 L. Ed. 626; Phipps *v.* Sedgwick, 95 U. S. 3, 24 L. Ed. 591.

In ordinary cases, a voluntary conveyance of a man, to the use of his wife, when circumstanced as the grantor here was, would unquestionably be void. But it is contended that, in this instance, a court of equity would have decreed him to make the conveyance he did execute, and, therefore, it was not a voluntary conveyance. That there are cases in which the court would lend its aid to protect the acquisitions of a wife from the creditors of a husband, may well be admitted; but on this case, it is enough to observe, that if the husband may, upon his own recital, make out such a case, there would no longer exist any difficulty in evading the rights of creditors. Wheaton *v.* Sexton, 4 Wheat. 503, 506, 4 L. Ed. 626.

The court, upon consideration of the facts in Phipps *v.* Sedgwick, 95 U. S. 3, 24 L. Ed. 591, held that certain real estate settled upon a woman by her husband was purchased with the assets of the firm whereof he was a member and that the assignee in bankruptcy of the firm was, after the payment of the mortgage thereon, entitled to the proceeds thereof.

Upon the supposition that one partner was, on the first day of December, fairly entitled to consider his interest in the business as worth $227,000, it was not good faith to his creditors to withdraw about one-third of that capital and invest it in his wife's name, so that it was placed beyond the reach of his creditors, and made to constitute a luxurious home for himself? If the business which the partnership was doing was a small and a safe business, and the shape in which this sum of $227,000 stood was such as made it unquestionable as representing so much money, while the withdrawal of $90,000, if otherwise fair, might be sustained, it would still be of doubtful validity as against creditors. Phipps *v.* Sedgwick, 95 U. S. 3, 6, 24 L. Ed. 591.

There is no proof that she took any part in bringing about the settlement, or that there was any guilty knowledge on her part in the transaction. It is fairly to be presumed that she confided in the good faith of her husband, and simply yielded obedience to his wishes. The provision of her will attests her devotion to him. The fund did not exist in her lifetime, and her estate has been in no wise benefited by it. The transfer of the property was his act, not hers. She was only a passive recipient. Her will—doubtless influenced, if not controlled by him—gave him her entire estate for life, and, after his death, gave it to his family. No provision was made for her family. Trust Co. *v.* Sedgwick, 97 U. S. 304, 308, 24 L. Ed. 954.

97. Where solvent when made.—Bean *v.* Patterson, 122 U. S. 496, 500, 30 L. Ed. 1126; Moore *v.* Page, 111 U. S. 117, 28 L. Ed. 373; Stewart *v.* Platt, 101 U. S. 731, 25 L. Ed. 816; Jones *v.* Clifton, 101 U. S. 225, 25 L. Ed. 908.

Where neither the conveyance to the wife nor the withdrawal of the husband's means from his business for the purpose of improving the land settled upon her, had the effect and operation to hinder or defraud his then existing creditors, nor does the evidence justify the conclusion that the conveyance was executed, or the improvements made, with an intent to hinder or defraud either existing or subsequent creditors, giving full weight to all the circumstances, there is no reason to impute fraud to the husband, it appearing that when it was conveyed to her, as well as during all the period when he improved it by the erection of a dwelling and other houses thereon, he had, according to the weight of the evidence, property which his creditors could reach, exceeding, in value, all his existing indebtedness by several thousand dollars. Wallace *v.* Penfield, 106 U. S. 260, 262, 264, 27 L. Ed. 147.

Assuming, in the first instance, that both transfers were purely voluntary, the deeds to Mrs. S. were made and recorded three years before the building contract was signed, or the work done.

Failure to Sustain Burden of Proof of Payment of Wife's Funds.—Where the allegation that the purchase money was derived from the wife's private individual funds, is supported by circumstances which may disclose fair motives for the conveyance, but which are not sufficient to prove that the consideration, in point of law, moved from her, it must, therefore, be considered as a voluntary conveyance; and, if sustained, must be sustained on the principle that it was made under circumstances which do not impeach its validity, when so considered.[98]

Participation in Fraudulent Purpose.—A wife, the grantee in a deed voluntary and alleged to be fraudulent, who is herself the instrument of deception, or who contributes to its success, by countenancing it, may, with justice, be charged with the consequences of her conduct. But this is not such a case, and the rights of the wife are unimpaired by anything she is shown to have done.[99]

3. Voluntary Conveyance to Child.—A deed from a parent to a child, for the consideration of love and affection, is not absolutely void as against creditors. It may be so, under certain circumstances; but the mere fact of being in debt to a small amount would not make the deed fraudulent, if it could be shown that the grantor was in prosperous circumstances, and unembarrassed, and that the gift to the child was a reasonable provision, according to his state and condition in life, and leaving enough for the payment of the debts of the grantor.[1]

out of which Vanderbilt's claim arose. There was thus that constructive notice referred to in Wallace *v.* Penfield, 106 U. S. 260, 262, 27 L. Ed. 147, as sufficient and the evidence showed that he had actual as well as constructive notice. Schreyer *v.* Scott, 134 U. S. 405, 411, 33 L. Ed. 955.

98. Failure to sustain burden of proof of payment of wife's funds.—Sexton *v.* Wheaton, 8 Wheat. 229, 241, 5 L. Ed. 603.

99. Participation in fraudulent purpose.—Sexton *v.* Wheaton, 8 Wheat. 229, 240, 5 L. Ed. 603.

Where it was alleged that the grantor's wife aided in practicing a fraud on the plaintiff, or in creating or giving countenance to the opinion, that the grantor was more wealthy than in truth he was, and same was denied, nor is there any evidence in support of it, other than the admission in her answer, that she had seen a letter written by him to the plaintiff, in which he gave, she thought, too flattering a picture of his circumstances, this admission is, however, to be taken with the accompanying explanation, in which she says, that she had dissuaded him, she had hoped successfully, from sending the letter in its then form. This fact does not fix upon the wife such a fraud as ought to impair her rights, whatever they may be. The plaintiff could not know that this letter was seen by the wife, or in any manner sanctioned by, or known to her. He had, therefore, no right to suppose that there was any waiver of her interest, whatever it might be, nor had he a right to assume anything against her, or her claims, in consequence of his receiving this letter. The case is very different from one in which the wife herself makes a misrepresentation, or hears and countenances the misrepresentation of her husband. The person who acts under such a misrepresentation, acts under the confidence in the good faith of the wife herself. He has a right to consider that faith as pledged; and if he is deceived, he may complain that she has herself deceived him. Sexton *v.* Wheaton, 8 Wheat. 229, 238, 5 L. Ed. 603. See also, ante, "Husband and Wife," III, C, 4, c.

1. Voluntary conveyance to child.—Hinde *v.* Longworth, 11 Wheat. 199, 213, 6 L. Ed. 454.

The holding of this court in Johnson *v.* Waters, 111 U. S. 640, 28 L. Ed. 547, that the act of sale and donation of community property made by M. to his daughter Julia in March, 1858, was void as a donation under the law of Louisiana; and that if it could be held good as a sale it could only be for the part which went to pay her the amount due from her mother's estate, together with the amount she was directed to pay to a creditor of M., reaffirmed. It was good as a sale to the amount due the daughter and a donation as to the residue. Mellen *v.* Buckner, 139 U. S. 388, 397, 35 L. Ed. 199.

"A review of all the decisions of Lord Hardwicke, will show his opinion to have been, that a voluntary conveyance to a child, by a man, not indebted at the time, if a real and bona fide conveyance, not made with a fraudulent intent, is good against subsequent creditors. The decisions made since the time of Lord Hardwicke maintain the same principle." Sexton *v.* Wheaton, 8 Wheat. 229, 247, 5 L. Ed. 603.

Validity unaffected by subsequent events.—A few days after the marriage

C. Validity as to Purchasers.—A voluntary conveyance, is, at this day, held by the courts of England to be absolutely void, under the statute of 27 Eliz., against a subsequent purchaser, even although he purchased with notice.[2] But the American rule is not so drastic. By it, a subsequent sale, without notice, by a person who had made a settlement, not on valuable consideration, is presumptive evidence of fraud, which throws on those claiming under such settlement the burden of proving that it was made bona fide, but it is not conclusive.[3]

V. Operation and Effect.

A. Effect of Fraud Generally.—Fraud in Law.—As respects fraud in law as contradistinguished from fraud in fact, where that which is valid can be separated from that which is invalid, without defeating the general intent, the maxim, "void in part, void in toto," does not necessarily apply, and the instrument may be sustained notwithstanding the invalidity of a particular provision.[4]

of J. T. with the daughter of G. K., in 1812, the latter, residing in Georgetown, in the District of Columbia, and having a large active capital, and a large real estate there, proposed to grant J. T. a house and lot in Georgetown, then much out of repair, and untenantable, provided he would repair the same, so as to make it a comfortable residence; and saying, that he intended the property for his daughter; this proposition was accepted by J. T., who repaired the property, expending upwards of $4,000 on the same; and he, with his wife, resided on it about four years. Before his removal from it, a correspondence on the subject of the conveyance of the property to J. T. and his wife, took place, which ended in propositions to convey the property, on certain terms, beneficial to J. T. and wife, in pursuance of, and intended to be in execution of, the original offer of G. K. to J. T., made immediately after the marriage; no conveyance was made. J. T. and wife removed from Georgetown, and G. K. collected and paid to J. T. the rents of the property, for sometime after their removal; G. K. died in 1820, insolvent; his debts amounted to $36,000, and his whole estate, both real and personal, when sold, did not pay thirty-nine per cent. of his debts; the property claimed by J. T. and wife, in this case, was sold for $1,600, by a trustee, under a decree in chancery, obtained by the creditors of G. K., but the sale had not been ratified. J. T. and wife filed a bill against the heirs of G. K., and the trustee of the creditors of G. K., claiming a conveyance of the property, and for general relief. In no point of view, could such a contract as that in this case be considered voluntary; there was not only a good consideration, that of natural affection, but a valuable one; to constitute a valuable consideration, it is not necessary that money should be paid; but if, as in this case, it be expended on the faith of the contract, it constitutes a valuable consideration. King *v.* Thompson, 9 Pet. 204, 9 L. Ed. 102.

"There appears to have been no fraudulent intent in the case; no disposition to defeat the claims of present creditors, or to cover the property from future demands. It seems to have been a bona fide transaction; and one which neither a court of law nor of equity could refuse to sanction." King *v.* Thompson, 9 Pet. 204, 220, 9 L. Ed. 102. See, also, ante, "Parent and Child," III, C, 4, d.

2. Validity as to purchasers—English rule.—Cathcart *v.* Robinson, 5 Pet. 264, 279, 8 L. Ed. 120. Their decisions do not maintain that a transaction, valid at the time, is rendered invalid by the subsequent act of the party. They do not maintain, that the character of the transaction is changed, but that testimony afterwards furnished may prove its real character. The subsequent sale of the property is carried back to the deed of settlement, and considered as proving that deed to have been executed with a fraudulent intent to deceive a subsequent purchaser.

At the commencement of the American revolution, the construction of the statute of Elizabeth seems not to have been settled; the leaning of the courts towards the opinion that every voluntary settlement would be deemed void as to subsequent purchasers, was very strong; and few cases are to be found, in which such convevance had been sustained; but those decisions seem to have been made, on the principle, that such subsequent sale furnishes a strong presumption of a fraudulent intent, which threw on the person claiming under the settlement, the burden of proving it, from the settlement itself, or from extrinsic circumstances, to be made in good faith; rather than as furnishing conclusive evidence, not to be repelled by any circumstances whatever. Cathcart *v.* Robinson, 5 Pet. 264, 8 L. Ed. 120.

3. American doctrine.—Cathcart *v.* Robinson, 5 Pet. 264, 8 L. Ed. 120, following the principle of the minority of the English cases above referred to.

4. Effect of fraud in law.—Peters *v.* Bain, 133 U. S. 670, 688, 33 L. Ed. 696; Cunningham *v.* Norton, 125 U. S. 77, 31

B. As to Parties—1. VALIDITY.—A conveyance fraudulent as to creditors is yet valid as between the parties.[5] And a fraudulent purchaser of property, when deprived of its possession by attacking creditors, cannot recover of them for repairs or improvements, or for incumbrances lifted by him whilst in possession. What he does, he does in his own wrong. And besides, the property was his, subject only to be declared void as to these creditors, so that he was paying off an incumbrance on his own property when he so paid what he now seeks to recover, or be subrogated to the lien of.[6]

2. IN PARI DELICTO RULE.—Courts of equity refuse to annul and also to enforce contracts in fraud of the rights of others, when called to act as between the parties.[7] Nor will the character of such agreement be changed by

L. Ed. 624; Denny *v.* Bennett, 128 U. S. 489, 496, 32 L. Ed. 491; Muller *v.* Norton, 132 U. S. 501, 33 L. Ed. 397.

5. Valid as between parties.—Wolf *v.* Stix, 99 U. S. 1, 7, 25 L. Ed. 309; Luhrs *v.* Hancock, 181 U. S. 567, 573, 45 L. Ed. 1005; Railroad Co. *v.* Soutter, 13 Wall. 517, 523, 20 L. Ed. 543. See Pearsall *v.* Smith, 149 U. S. 231, 233, 37 L. Ed. 713.

It is clear that a fraudulent deed, between the parties, would be binding and available; however, as to the persons whom it was intended to defraud, it might be voidable. Tucker *v.* Moreland, 10 Pet. 58, 76, 9 L. Ed. 345.

Conveyances of property in fraud of creditors are good as between the parties, and only void as to creditors. Ballard *v.* Searls, 130 U. S. 50, 54, 32 L. Ed. 846.

Conveyances fraudulent as to creditors may not only be valid on their face, but they are really valid as between the parties; though they are void as against creditors, and the property, both at law and in equity, is subject to the payment of the debts of the deceased grantor. Hagan *v.* Walker, 14 How. 29, 34, 14 L. Ed. 312.

Debtor's assignee.—A transfer made to defraud creditors is valid between the parties to it; the debtor has no right of action to set it aside; and, therefore, no such right passes to the assignee as part of the debtor's estate. (Obiter.) Pearsall *v.* Smith, 149 U. S. 231, 233, 37 L. Ed. 713.

Conditional sale.—"The owner of a stock of goods may make an absolute sale of them to his creditor, in payment of a debt. If an absolute, why not a conditional, sale, with such conditions as he and his creditor may agree upon? As between the parties no court would question this right, or refuse to enforce the conditions. The interests of the general public are not prejudiced by any such transaction between debtor and creditor." Etheridge *v.* Sperry, 139 U. S. 266, 277, 35 L. Ed. 171.

6. Outlays and incumbrances discharged.—Railroad Co. *v.* Soutter, 13 Wall. 517, 523, 20 L. Ed. 543.

The court said: "But the complainants are wrong in asserting that the property was not theirs. It was theirs. Their purchase was declared void only as against the creditors of the La Crosse and Milwaukee Railroad Company (the original debtor). In other words, it was only voidable, not absolutely void. By satisfying these creditors they could have kept the property, and their title would have been good, as against all the world. The property was theirs; but, by reason of the fraudulent sale, was subject to the incumbrance of the debts of the La Crosse company. This was the legal effect of the decree declaring their title void. Therefore, they were, in fact, paying off an incumbrance on their own property when they paid into court the money which they are now seeking to recover back." Three justices dissented on the ground that the recovery should have been allowed as a payment made under mistake of fact. Railroad Co. *v.* Soutter, 13 Wall. 517, 524, 20 L. Ed. 543.

Liability for rent—Set-off of amount paid receiver for creditors.—In Grant *v.* Buckner, 172 U. S. 232, 43 L. Ed. 430, where a party claiming under a conveyance alleged to be fraudulent as to the creditors of grantor, and which was held fraudulent and voidable as to an undivided one-half interest of the property in question, took a lease from the receiver for the creditors rather than be dispossessed, and who paid rent to the receiver for the whole property up to the time when it was held fraudulent only as to a one-half interest, when he was subsequently sued for rent due for such undivided half after that time, he could set off against this demand one-half of the amount paid by him as rent for the whole property before such decision was made. This was a final adjudication of his rights, and he was not precluded from obtaining the benefit of this decision in the state courts by the fact that the receiver was an officer of the federal court, or by any proceedings had in that court. See Johnson *v.* Waters, 111 U. S. 640, 28 L. Ed. 547; Mellen *v.* Buckner, 139 U. S. 388, 35 L. Ed. 199. See, also, the title SET-OFF, RECOUPMENT AND COUNTER-CLAIM.

7. In pari delicto rule.—Dent *v.* Ferguson, 132 U. S. 50, 66, 33 L. Ed. 242; Railroad Co. *v.* Soutter, 13 Wall. 517, 525, 20 L. Ed. 543. See Hunt *v.* Oliver, 118 U. S. 211, 218, 30 L. Ed. 128; Selz *v.* Unna, 6 Wall. 327, 336, 18 L. Ed. 799, when it is said: "A court of equity will not en-

showing that the claim of the third party, whose rights were to be affected by

force an agreement made with the intent that it shall operate as a fraud upon the private rights and interests of third persons."

If a person conveys his property for the purpose of hindering, delaying or defrauding his creditors, and for eleven years acquiesces and concurs in the devices, collusive suits and impositions upon the court in furtherance of this purpose, without taking a single legal step to annul said conveyance or to stop such proceedings, a court of equity will not aid him or his heirs to recover the property from the grantee or his heirs after the fraud is accomplished. Dent *v.* Ferguson, 132 U. S. 50, 64, 33 L. Ed. 242; Randall *v.* Howard, 2 Black 585, 17 L. Ed. 269.

The object of this suit, as clearly and explicitly stated in the bill, is to secure to the complainants the entire benefit of the confessed fraud by having all the property, with all the intermediate rents and profits added, free from all liens and liabilities, returned to them. The real complaint is that the fraudulent vendee refused to perform his part of the fraudulent understanding with the fraudulent vendor; and the avowed purpose of the suit is to compel the defendants to perform it. The prayer cannot be granted without overturning established principles of equity. Dent *v.* Ferguson, 132 U. S. 50, 68, 33 L. Ed. 242.

It is not the province of a court of equity to make a fraudulent debtor the special object of its favor because he has not received a large enough consideration for his "confessed fraud." That court is not a divider of the inheritance of iniquity between the respective heirs of two confederates in fraud. Mr. Justice Baldwin, delivering the opinion of the court, in Bartle *v.* Coleman, 4 Pet. 184, 189, 7 L. Ed. 825, uses the following language: "The law leaves the parties to such a contract as it found them. If either has sustained a loss by the bad faith of a particeps criminis, it is but a just infliction for premeditated and deeply practised fraud; which, when detected, deprives him of anticipated profits, or subjects him to unexpected losses. He must not expect that a judicial tribunal will degrade itself by an exertion of its powers, by shifting the loss from the one to the other; or to equalize the benefits or burthens which may have resulted by the violation of every principle of morals and of laws." Dent *v.* Ferguson, 132 U. S. 50, 66, 33 L. Ed. 242.

In Randall *v.* Howard, 2 Black 585, 17 L. Ed. 269, the complainants and defendant had made an agreement to defeat the claims of third persons to certain lands which the complainants had mortgaged to the defendant to secure a debt, so as to cloak the ownership by means of a foreclosure sale at which the defendant should purchase and hold the nominal title. After obtaining the title, he fraudulently dispossessed the complainants and asserted the right of ownership in himself. The prayer of the bill was to restrain the defendant from disposing of the land, and to restore it, or so much of it as remained after paying the debt, to complainants. The court, Mr. Justice Davis delivering the opinion, held that the agreement was a fraudulent one, to defeat a claim set up by other parties for a portion of the mortgaged lands by the covering up, through the aid of the court, the real ownership of the property, and said (p. 588): "A fraudulent agreement was entered into to defeat, as is charged, 'a fraud attempted against the complainants.' * * * A court of equity will not intervene to give relief to either party from the consequences of such an agreement. The maxim, in pari delicto potior est conditio defendantis, must prevail. It is against the policy of the law to enable either party, in controversies between themselves, to enforce an agreement in fraud of the law, or which was made to injure another;" citing 1 Story's Equity, § 298. Dent *v.* Ferguson, 132 U. S. 50, 64, 33 L. Ed. 242.

"The same principle was applied in Wheeler *v.* Sage, 1 Wall. 518, 17 L. Ed. 646. In that case an agreement was entered into between complainants and defendant to secure the title to valuable real estate of an insolvent debtor, at the expense and sacrifice of his creditors, which the defendant violated, and, in conjunction with another person, secured an interest in the property to himself. The bill prayed that he be declared a trustee for the complainants, and required to convey to them that portion of the land to which, under the agreement, they were entitled. The court, Mr. Justice Davis delivering the opinion, said (p. 529): 'Generally, when a party obtains an advantage by fraud, he is to be regarded as the trustee of the party defrauded, and compelled to account. But, if a party seeks relief in equity, he must be able to show that on his part there has been honesty and fair dealing. If he has been engaged in an illegal business and been cheated, equity will not help him.' And then, after a review of the evidence in that case, the opinion concluded in these words: 'A proceeding like this is against good conscience and good morals, and cannot receive the sanction of a court of equity. The principle is too plain to need a citation of authorities to confirm it. It is against the policy of the law to help either party in such controversies. The maxim, "in pari delicto," etc., must prevail' (p. 530)." Dent *v.* Ferguson, 132 U. S. 50, 64, 33 L. Ed. 242. See the title FRAUD AND DECEIT, ante, p. 394.

it, was also fraudulent.[8] But money deposited by a debtor with another, with the intent to cheat and defraud his creditors, may be recovered back by him.[9] And there is a distinct class of decisions affecting subsequent and collateral contracts not partaking of the fraud which affects the main transaction.[10]

3. Personal Liability of Grantee.—Although the law implies fraud from the purchase of property from a debtor with the intent thereby to hinder and delay his creditors in the collection of their debts, such a purchase does not create a debt from the purchaser to the creditors.[11]

Liability for Choses Received by Way of Preference.—When an insolvent debtor assigns to a creditor with full knowledge of the insolvency, certain notes and accounts due said debtor in full payment and satisfaction of such creditor's debt, which transfer was afterwards attacked as collusive and fraudulent as to other creditors by garnishee proceedings against such transferee, the transferee was liable if at all, not only for the money collected on such notes and accounts, but for the value of those which remained in his hands to at least, as the court correctly instructed, an amount sufficient to pay the debt of the attacking creditors, as the plaintiff's case goes upon the idea of a fraudulent

8. Fraud of third party immaterial.—Randall *v.* Howard, 2 Black 585, 17 L. Ed. 269.

9. Recovery of deposit made with fraudulent intent.—In an action brought to recover a deposit alleged to have been made by plaintiff with defendant, to be paid to plaintiff on his order, and not so paid, there was no error in excluding evidence offered by the defendants conducing to show that the money claimed by the plaintiff to have been deposited with them to be paid to him on his order was so deposited with the intent to cheat and defraud his creditors. The evidence, if admitted, would not have relieved the defendants from responsibility to account for it. Block *v.* Darling, 140 U. S. 234, 239, 35 L. Ed. 476.

"The plaintiff's suit to compel the return of the money may be regarded as one in disaffirmance of the arrangement under which the defendants claimed to have received it; and, if successful, would tend to defeat the alleged purpose of defrauding his creditors by having it kept upon secret deposit with the defendants. It is not a suit to recover money received and paid out under an illegal or immoral contract which has been fully executed. The suit is necessarily a disavowal upon the part of the plaintiff of any purpose to hide this money from his creditors. To allow the defendants to retain it upon the ground that he had originally the purpose to conceal it from his creditors would be inconsistent with the spirit and policy of the law. Spring Co. *v.* Knowlton, 103 U. S. 49, 58, 26 L. Ed. 347, and authorities there cited." Block *v.* Darling, 140 U. S. 234, 239, 35 L. Ed. 476.

10. Subsequent and collateral contracts.—Dent *v.* Ferguson, 132 U. S. 50, 66, 33 L. Ed. 242.

But "a new contract, founded on a new and independent consideration, although in relation to property respecting which there had been unlawful or fraudulent transactions between the parties, will be dealt with by the courts on its own merits. If the new contract be fair and lawful, and the new consideration be valid and adequate, it will be enforced. If, however, it be unfair or fraudulent, or the new consideration so inadequate as to import fraud, imposition or undue influence, it will be rescinded and justice done to the parties. Armstrong *v.* Toler, 11 Wheat. 258, 6 L. Ed. 468; McBlair *v.* Gibbes, 17 How. 232, 15 L. Ed. 132; Brooks *v.* Martin, 2 Wall. 70, 17 L. Ed. 732; Planters' Bank *v.* Union Bank, 16 Wall. 483, 21 L. Ed. 473; Railroad Co. *v.* Durant, 95 U. S. 576, 24 L. Ed. 391. But in all of those cases the court was careful to distinguish and sever the new contract from the original illegal contract." Dent *v.* Ferguson, 132 U. S. 50, 66, 33 L. Ed. 242.

11. Personal liability of grantee.—Wolf *v.* Stix, 99 U. S. 1, 7, 25 L. Ed. 309. As between the debtor and the purchaser the sale is good, but as between a creditor and the purchaser it is void. The purchaser does not subject himself to a liability to pay to creditors the value of what he buys. All the risk he runs is that the sale may be avoided, and the property reclaimed for their benefit.

A purchaser of a stock of goods from a debtor confessedly insolvent, where the purchaser knows that the debtor's purpose is to hinder and delay a particular creditor, and also that if the debtor intended a fraud on his creditors generally, the purchase would necessarily be giving him facilities in that direction, is not responsible in equity (the sale being an open one, for a fair price, and followed by change of possession) for any part of the consideration money which the debtor had applied to payment of his debts; but is responsible for any part which he has diverted from such payment. Clements *v.* Moore, 6 Wall. 299, 18 L. Ed. 786. And see post, "Personal Decree," VI, H, 2.

conversion by the transferee of the assets by which the control thereof passed to them, not a mere assignment out of which the debt was to be paid.[12]

C. As to Creditors and Purchasers.—See ante, "Voluntary Conveyances," IV. While a conveyance with intent to defraud existing creditors is voidable as to them, and in some states said to be void,[13] and the property remains liable to attachment as that of the grantor,[14] in reality, it is voidable only, not void,

12. **Liability for choses received by way of preference.**—Klein *v.* Hoffheimer, 132 U. S. 367, 379, 33 L. Ed. 373.

13. **Existing creditors.**—Luhrs *v.* Hancock, 181 U. S. 567, 573, 45 L. Ed. 1005; Grant *v.* Buckner, 172 U. S. 232, 43 L. Ed. 430; Clements *v.* Moore, 6 Wall. 299, 18 L. Ed. 786; Harrell *v.* Beall, 17 Wall. 590, 21 L. Ed. 692; Woodfolk *v.* Seddon, 154 U. S. 658, 31 L. Ed. 598; Chandler *v.* Von Roeder, 24 How. 224, 227, 16 L. Ed. 633.

Where the plaintiffs in an action of trespass to try title to land, were creditors of the grantor under whom defendant claimed, at the time of the conveyance to him, it was error to exclude testimony to show that the deed was fraudulent under which the defendant claimed. The supreme court of Texas have decided that conveyances made with an intent to defraud creditors are void. Chandler *v.* Von Roeder, 24 How. 224, 16 L. Ed. 633.

It is made so by the common law, and no statute is necessary to this result. Baker *v.* Humphrey, 101 U. S. 494, 499, 25 L. Ed. 1065; Clements *v.* Moore, 6 Wall. 299, 18 L. Ed. 786.

The supreme court of Texas have decided that when a deed is a mere pretense, collusively devised, and the parties do not intend other than an ostensible change of the property, the property does not pass as to creditors; and even when the parties intend an irrevocable disposition of the property, but the conveyance has been made with the intent to defraud creditors, that the conveyance is void, and this decision conforms to the current doctrine relative to the just construction of this statute. Chandler *v.* Von Roeder, 24 How. 224, 227, 16 L. Ed. 633.

Michigan.—The statute of Michigan against fraudulent conveyances (2 Comp. Laws of Mich. 146) declares such conveyances void. Baker *v.* Humphrey, 101 U. S. 494, 499, 25 L. Ed. 1065; Clements *v.* Moore, 6 Wall. 299, 18 L. Ed. 786.

14. **Liability to attachment.**—A fraudulent sale of goods does not pass title against creditors of the grantor, and if the sale was a fraud upon the creditors of grantor, the goods were liable to an attachment at the suit of those creditors. It was an error, therefore, to exclude the evidence thereof in a trespass action against such creditors. The attachment should also have been received in connection with the proof of the unauthorized and fraudulent sale. It is no sufficient objection to it that it did not itself prove all the facts necessary to constitute a complete defense. Deitsch *v.* Wiggins, 15 Wall. 539, 547, 21 L. Ed. 228.

And a deed made with the intent to defraud the creditors of the grantor, particularly S., was void, under the statute of Texas, as to such creditors. It did not, therefore, as between S., and the parties to the deed, stand in the way of S.'s causing, as he did, an attachment to be levied upon the land as the property of his fraudulent debtor. Thompson *v.* Baker, 141 U. S. 648, 654, 35 L. Ed. 889.

Equally ineffectual, as against such creditor, was the conveyance by grantee, and the quitclaim deed of grantor to I. No consideration of any kind passed from I. to either of the fraudulent grantors, and those deeds were void as to prior creditors. Thompson *v.* Baker, 141 U. S. 648, 654, 35 L. Ed. 889.

Priority.—Where land has been fraudulently conveyed and the grantee in such conveyance has conveyed the land to a third person, an attachment in an action against the original grantor will create a lien superior to the title held by either of the grantees. Thompson *v.* Baker, 141 U. S. 648, 35 L. Ed. 889, citing Warren County *v.* Marcer, 97 U. S. 96, 105, 24 L. Ed. 977; Union Trust Co. *v.* Southern Nav. Co., 130 U. S. 565, 570, 32 L. Ed. 1043.

The rights of a mortgagee under a mortgage from I. and under the decree, sale and purchase in the suit brought by him, having been acquired while the land was under a valid levy by S.'s attachment, as the property of the debtor, were subject to whatever rights were acquired by S., as purchaser, under the decree in his suit. The debtor being a party to that suit, his interest in the land, levied upon by S.'s attachment could not be conveyed by him so as to defeat the final decree in that suit. And no greater rights could be acquired by a purchaser from the debtor after the attachment, than he himself had. Thompson *v.* Baker, 141 U. S. 648, 655, 35 L. Ed. 889.

"In Hancock *v.* Henderson, 45 Texas 479, 484, where the contest was between the holder of an attachment lien upon land, and a person who purchased from the grantees of the defendant in the attachment, who, it was alleged, had conveyed the land to such grantees with the fraudulent intent to hinder his creditors, such purchaser having no actual notice of issuing of the attachment or of the levy, the court said: 'That a valid levy created a lien on the land attached, and, when properly returned on the writ into the

and a bona fide purchaser from the fraudulent grantee gets a good and indefeasible title.[15] And holding a note for a debt constitutes such a creditor.[16]

Subsequent Creditors and Purchasers.—A debtor has a right to dispose of his property in the ordinary course of business for a valuable consideration, and a creditor has a right to purchase it. The complainant, not showing that he was at the time a creditor, cannot complain.[17] And the same is true as to

court from which it issued, is notice to third parties, are propositions which it is not deemed necessary to discuss.'" Thompson *v.* Baker, 141 U. S. 648, 655, 35 L. Ed. 889. See, also, Warren County *v.* Marcer, 97 U. S. 96, 105, 24 L. Ed. 977; Union Trust Co. *v.* Southern Nav. Co., 130 U. S. 565, 570, 32 L. Ed. 1043.

15. Voidable only, not void.—If a conveyance was fraudulent as to creditors, it was not absolutely void, and only voidable by them. United States *v.* 422 Casks of Wine, 1 Pet. 547, 550, 7 L. Ed. 257; Railroad Co. *v.* Soutter, 13 Wall. 517, 524, 20 L. Ed. 543.

"A conveyance in fraud of creditors, although declared by the statute to be void as to them, is nevertheless valid as between the parties and their representatives, and passes all of the estate of the grantor to the grantee; and a bona fide purchaser from such grantee takes such estate, even against the creditors of the fraudulent grantor, purged of the anterior fraud that affected the title. Such a conveyance is not, as has been sometimes supposed, 'utterly void,' but it is only so in a qualified sense. Practically it is only voidable, and that at the instance of creditors proceeding in the mode prescribed by law, and even then not as against a bona fide purchaser. The operation of a lien of a judgment, being limited by statute to the property then belonging to the judgment debtor, is not a mode prescribed by which a creditor may attack a conveyance fraudulent as to himself, or assert any right as such against the grantor therein. This lien is constructive in its character, and is not the result of a levy or any other act directed against this specific property. It is the creature of the statute, and cannot have effect beyond it." Luhrs *v.* Hancock, 181 U. S. 567, 573, 45 L. Ed. 1005.

Where a married woman became a trustee of land for the benefit of her son-in-law, and executed a deed (without joining her husband) to a bona fide purchaser, who had paid the purchase money to the cestui que use, it was not necessary, under the circumstances of the case, for her husband to join in the deed, and her children, who were her heirs at law, having brought a suit at law to recover the land from the bona fide purchaser, a court of equity will interpose to restrain their proceedings. The alleged illegality of the consideration of the deed of trust —viz, that it was intended to protect the property of her son-in-law, who was insolvent—was not sufficient to destroy the independent equity of the bona fide purchaser, nor was it necessary to make the son-in-law a party when the bona fide purchaser sought relief in a court of equity against the title of the heirs. Gridley *v.* Wynant, 23 How. 500, 16 L. Ed. 411.

The purchaser is not a mere volunteer seeking to enforce its terms, nor does his equity depend upon the validity of the trust for its support. He has an independent equity, arising from his purchase from persons professing to hold a legal relation to each other and to the subject of the contract, and to enforce his right there is no need for any inquiry into the consideration or motives that operated upon these parties to assume their relation of trustee and cestui que trust. In such a case, equity does not refuse to lend its assistance. Gridley *v.* Wynant, 23 How. 500, 503, 16 L. Ed. 411; McBlair *v.* Gibbes, 17 How. 232, 15 L. Ed. 132.

The general doctrines of courts of law, on the subject of frauds imputable where the possession remains in one, and the right in another, never has been supposed to extend to a purchaser with notice, much less to a purchaser, whom the local law affects with notice of the highest order. Shelby *v.* Guy, 11 Wheat. 361, 373, 6 L. Ed. 495.

Prejudice to creditors is necessary to make a deed fraudulent as to them. Gregg *v.* Sayre, 8 Pet. 244, 252, 8 L. Ed. 932.

16. Same.—A note held by a bank for a debt due to it, and renewed from time to time with the same maker and indorser, is sufficient to constitute the bank a creditor in claiming to have conveyances set aside as fraudulent, although the note was not due when the conveyances were made, and the present note was renewed afterwards. McLaughlin *v.* Bank, 7 How. 220, 12 L. Ed. 675.

A contingent debt, likely to become absolute, and which afterwards does become absolute, is, both on principle and precedent, enough to furnish a motive to make a fraudulent conveyance to hinder or avoid its eventual payment. And this may be presumed to have been done here, provided circumstances exist indicative of fraud. King *v.* Thompson, 9 Pet. 204, 220, 9 L. Ed. 102. Such circumstances must exist; and when the liability is contingent, like that of a warrantor or indorser, the conveyance cannot be considered as per se fraudulent. McLaughlin *v.* Bank, 7 How. 220, 229, 12 L. Ed. 675.

17. Subsequent creditors.—Horbach *v.*

subsequent purchasers as well as creditors,[18] in the absence of an established fraudulent intent to withhold it from future creditors.[19]

Immediate Grantee—Knowledge or Notice of Fraudulent Intent.—See ante, "Intent in General," III, C, 1.

D. Curing Invalidity.—It is a settled principle that a deed voluntary or even fraudulent in its creation, and voidable by a purchaser, may become good by matter ex post facto.[20]

Hill, 112 U. S. 144, 149, 28 L. Ed. 670; Graham *v.* Railroad Co., 102 U. S. 148, 26 L. Ed. 106; Porter *v.* Pittsburg, etc., Steel Co., 120 U. S. 649, 673, 30 L. Ed. 830; Schreyer *v.* Scott, 134 U. S. 405, 410, 33 L. Ed. 955; Chandler *v.* Von Roeder, 24 How. 224, 227, 16 L. Ed. 633.

"It is a well-settled principle, that subsequent creditors cannot be heard to impeach an executed contract, where their dealings with the company, of which they claim the benefit, occurred after the contract became an executed contract." Porter *v.* Pittsburg, etc., Steel Co., 120 U. S. 649, 673, 30 L. Ed. 830; Graham *v.* Railroad Co., 102 U. S. 148, 26 L. Ed. 106.

"The principle that subsequent creditors cannot question a voluntary or fraudulent disposition of property by their debtor, not intended as a fraud against them, is especially applicable in cases of constructive fraud, like that charged in the present bill. Suppose it be true that the purchase of the lands in question by or for the benefit of officers of the company actively concerned in the transaction could be set aside at the instance of the company as a constructive fraud, yet if there was no actual fraud, if the company received full consideration for the property sold, how can it be said that subsequent creditors of the company are injured?" Graham *v.* Railroad Co., 102 U. S. 148, 160, 26 L. Ed. 106.

"In the present case we are satisfied from the evidence that the property was sold for its fair value at the time, and that no actual loss accrued to the railroad company's estate. It would be unjust and a great hardship, therefore, on the mere ground of the constructive fraud, to allow creditors who had no interest at the time to seize and dispose of the property sold." Graham *v.* Railroad Co., 102 U. S. 148, 160, 26 L. Ed. 106.

Of corporation.—There is no reason why the disposal by a corporation of any of its property should be questioned by subsequent creditors of the corporation, any more than a like disposal by an individual of his property should be so. The same principles of law apply to each. Graham *v.* Railroad Co., 102 U. S. 148, 161, 26 L. Ed. 106.

Subsequent judgment liens.—A judgment against a debtor, who has fraudulently conveyed away land, does not become a lien thereon. Miller *v.* Sherry, 2 Wall. 237, 17 L. Ed. 827; Luhrs *v.* Hancock, 181 U. S. 567, 573, 45 L. Ed. 1005. And see the title JUDGMENTS AND DECREES.

Liability of preferred creditor.—See ante, "Preference to Creditors," III, C, 8.

18. **Subsequent purchasers.**—"In Graham *v.* Railroad Co., 102 U. S. 148, 154, 26 L. Ed. 106, it was said: 'It seems clear that subsequent creditors have no better right than subsequent purchasers, to question a previous transaction in which the debtor's property was obtained from him by fraud, which he has acquiesced in, and which he has manifested no desire to disturb. Yet, in such a case, subsequent purchasers have no such right.'" Schreyer *v.* Scott, 134 U. S. 405, 410, 33 L. Ed. 955.

"It is stated to have been a principle of the common law that a fraud could only be avoided by him who had a prior interest in the estate affected by the fraud, and not by him who subsequently to the fraud acquired an interest in the estate. Upton *v.* Basset, Cro. Eliz. 445, and recognized in 3 Co. 83 a." Graham *v.* Railroad Co., 102 U. S. 148, 154, 26 L. Ed. 106.

Conveyance to secure antecedent debt not a purchase for value.—In 2 American Leading Cases, 5th Amer. Ed., p. 233, it is stated, and properly, as the doctrine established by a preponderance of authority, that "whatever the rule may be in the case of negotiable instruments, it is well settled that the conveyance of lands or chattels as security for an antecedent debt will not operate as a purchase for value, or defeat existing equities." People's Sav. Bank *v.* Bates, 120 U. S. 556, 567, 30 L. Ed. 754.

19. **Same.**—Where the answers denied the allegations of fraud, and there was no evidence to overcome the denials, and the pleadings in the case did not authorize the conclusion, as matter of law, that grantor had conveyed or caused to be conveyed the property with the fraudulent intention of thereafter engaging in business, or having business transactions, and, in the event of financial embarrassment arising therefrom, to withhold it from his creditors, a subsequent creditor has no ground of complaint. Clark *v.* Killian, 103 U. S. 766, 769, 26 L. Ed. 607; Graham *v.* Railroad Co., 102 U. S. 148, 153, 26 L. Ed. 106.

20. **Curing invalidity.**—Sumner *v.* Hicks, 2 Black 532, 535, 17 L. Ed. 355. See the title ASSIGNMENTS FOR BENEFIT OF CREDITORS, vol. 2, p. 602.

E. Fraudulent Deed as Color of Title.—See the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION.

VI. Remedies.

A. Law and Equity Remedies Compared—1. WHEN JURISDICTION CONCURRENT.—To relieve against fraud, and to set aside and cancel fraudulent conveyances, are among the ordinary duties of courts of chancery. Courts of law, however, have concurrent jurisdiction of questions of fraud, when properly raised; and, although they cannot cancel or set aside fraudulent instruments of writing, yet when they are produced in evidence by a party claiming any right under them, their fraudulent character may, under proper circumstances, be shown, and their validity in the particular case contested.[21] Especially where the title to real property is concerned.[22]

21. **When jurisdiction concurrent.**—Miles *v.* Caldwell, 2 Wall. 35, 39, 17 L. Ed. 755.

"When the fact of fraud is established in a suit at law, the buyer loses the property without reference to the amount or application of what he has paid, and he can have no relief either at law or in equity." Clements *v.* Moore, 6 Wall. 299, 312, 18 L. Ed. 786.

"When the proceeding is in chancery, the jurisdiction exercised is more flexible and tolerant. The equity appealed to—while it scans the transaction with the severest scrutiny—looks at all the facts, and giving to each one its due weight, deals with the subject before it according to its own ideas of right and justice. In some instances it visits the buyer with the same consequences which would have followed in an action at law. In others, it allows a security to stand for the amount advanced upon it. In others, it compels the buyer to account only for the difference between the under price which he paid and the value of the property. In others, although he may have paid the full value, and the property may have passed beyond the reach of the process of the court, it regards him as a trustee, and charges him accordingly. Where he has honestly applied the property to the liabilities of the seller it may hold him excused from further responsibility. The cardinal principle in all such cases is, that the property of the debtor shall not be diverted from the payment of his debts to the injury of his creditors, by means of the fraud." Clements *v.* Moore, 6 Wall. 299, 312, 18 L. Ed. 786.

In this case the court states the different modes in which law and equity respectively deal with fraudulent conveyances. Clements *v.* Moore, 6 Wall. 299, 18 L. Ed. 786.

Trespass to try title.—Creditors, who have purchased property of their debtor at an execution sale thereof, who were creditors at the time of a conveyance thereof by debtor, are within the protection of the statute of fraudulent conveyances, and may attack the deed in an action of trespass to try title thereto brought against the grantees thereunder. Chandler *v.* Von Roeder, 24 How. 224, 227, 16 L. Ed. 633.

22. **Title to real property involved.**—"While, in view of our decisions in Insurance Co. *v.* Bailey, 13 Wall. 616, 20 L. Ed. 501, and Buzard *v.* Houston, 119 U. S. 347, 30 L. Ed. 451, there may be a doubt whether this remedy is available in personal actions, the law is well settled that where the title to real property is concerned, equity has a concurrent jurisdiction, because it may not only enjoin an action at law, but may order a cancellation of the fraudulent conveyance, and prohibit the bringing of further suits at law upon the fraudulent title, and thus afford a more complete relief than is possible in a court of law." Wehrman *v.* Conklin, 155 U. S. 314, 328, 39 L. Ed. 167.

"The leading case in the federal courts upon this point is Bean *v.* Smith, 2 Mason 252, in which Mr. Justice Story held that, notwithstanding the restrictive clause of the judiciary act, Rev. Stat., § 723, a judgment creditor might file a bill in equity against his debtor to set aside a fraudulent conveyance, since there is not, in the proper sense of the term, a plain, adequate, and complete remedy at law." Wehrman *v.* Conklin, 155 U. S. 314, 328, 39 L. Ed. 167.

"There is a class of cases which hold that where there is actual fraud no remedy at law is complete and adequate, except that which removes the fraudulent title. As early as 1750, it was held by Lord Chancellor Hardwicke, in Bennet *v.* Musgrove, 2 Ves. Sen. 51, that a bill would lie by an execution creditor to set aside a fraudulent conveyance, whether he could recover at law or not. Objection having been made to the bill upon the ground that the remedy at law was complete, the Lord Chancellor observed: 'But be it as it may, whether he could recover or not, he is entitled to come into this court; the distinction in this court being, where a subsequent purchaser for valuable consideration would recover the estate, and set aside or get the better of a precedent voluntary conveyance, if that conveyance was fairly made without actual fraud, the court will say, take your remedy at law; but wherever the con-

2. Creditors' Bill or Suit to Set Aside.—A creditors' bill, to subject property of the defendant fraudulently standing in the name of a third party to the payment of a judgment, and to remove a fraudulent judgment which might stand as a cloud upon the title of the debtor, is within the jurisdiction of equity.[23] A court of equity of one state has no inherent power, by the mere force of its decree, to annul an alleged fraudulent deed for property in another state, but it can merely act by coercion of a party defendant subject to its jurisdiction.[24] But where the remedy at law is full, adequate and complete, a bill in equity will not lie.[25]

Against Administrator of Deceased Debtor.—A court of equity has jurisdiction of a bill against the administrator of a deceased debtor and a person to whom real and personal property was conveyed by the deceased debtor, for the purpose of defrauding creditors.[26]

veyance is attended with actual fraud, though they might go to law by ejectment, and recover the possession, they may come into this court to set aside that conveyance; which is a distinction between actual and presumed fraud from its being merely a conveyance.' This is still the law in England. Blenkinsopp *v.* Blenkinsopp, 1 De G., M. & G. 495." Wehrman *v.* Conklin, 155 U. S. 314, 328, 39 L. Ed. 167.

23. **Creditors' bill or suit to set aside.**—Mississippi Mills *v.* Cohn, 150 U. S. 202, 207, 37 L. Ed. 1052.

In 2 Beach on Modern Equity Jurisprudence, § 883, it is said: "A court of equity will aid a judgment creditor to reach the property of his debtor by removing fraudulent judgments or conveyances or transfers which defeat his legal remedy at law." See, also, 3 Pomeroy's Eq. Juris., § 1415.

A complaint which is in form and substance such a complaint as is made in "a creditor's bill," to set aside a conveyance of their debtor's property as a fraudulent contrivance to hinder and delay them in the recovery of their debts, is a case of equitable jurisdiction, and one requiring equitable relief as distinguished from legal. In a territory of the United States where the systems of common law and chancery are found as separate systems, chancery can alone give relief on such a bill. Dunphy *v.* Kleinsmith, 11 Wall. 610, 20 L. Ed. 223.

24. **Property beyond jurisdiction.**—Carpenter *v.* Strange, 141 U. S. 87, 106, 35 L. Ed. 640.

Hence, although in case of fraud, the jurisdiction of a court of chancery may be sustained over the person, notwithstanding lands not within the jurisdiction may be affected by the decree (Massie *v.* Watts, 6 Cranch 148, 3 L. Ed. 181), yet it does not follow that such a decree is in itself necessarily binding upon the courts of the state where the land is situated. Carpenter *v.* Strange, 141 U. S. 87, 106, 35 L. Ed. 640.

25. **Adequate remedy at law.**—Kramer *v.* Cohn, 119 U. S. 355, 356, 30 L. Ed. 439; Dowell *v.* Mitchell, 105 U. S. 430, 26 L. Ed. 1142; Buzard *v.* Houston, 119 U. S. 347, 30 L. Ed. 451.

Thus, where a bill in equity was filed by the assignee in bankruptcy of C., against him and D., alleging that C., before the adjudication of bankruptcy, and with intent to defraud his creditors, concealed his property and sold it for a large sum of money, and, after obtaining his discharge in bankruptcy, invested that money in a stock of goods, with which he had since carried on business in the name of D., so far as the plaintiff's claim was against C. personally, an action at law to recover the value of the property fraudulently concealed and sold by him would afford a full, adequate and complete remedy. The only pretence for resorting to equity was the allegation that the proceeds of that property had been invested in the stock in goods of a business carried on by him in the name of D., whereby it was sought to affect the latter and the goods with a trust in favor of the creditors of C., and of the plaintiff as representing them. But the proof wholly failed to support that allegation, and showed that the plaintiff had no right of action, except to recover pecuniary damages against C. alone. It thus appeared that the plaintiff never had any claim within the cognizance of a court of equity; and the bill was rightly dismissed generally as to the second defendant, and without prejudice to an action at law against the first defendant. Kramer *v.* Cohn, 119 U. S. 355, 356, 30 L. Ed. 439. See the titles BANKRUPTCY, vol. 2, p. 908; EQUITY, vol. 5, p. 815.

26. **Against administrator of deceased debtor.**—Hagan *v.* Walker, 14 How. 29, 14 L. Ed. 312; McLaughlin *v.* Bank, 7 How. 220, 12 L. Ed. 675.

In such a case, the court does not exercise an auxiliary jurisdiction to aid legal process, and consequently it is not necessary that the creditor should be in a condition to levy an execution, if the fraudulent obstacle should be removed. Hagan *v.* Walker, 14 How. 29, 14 L. Ed. 312.

Although the bill does not show that there are not other assets in the hands of the administrator sufficient to pay this

Necessity for Judgment or Other Lien.—The principle that a general creditor cannot assail as fraudulent against creditors, an assignment or transfer of property made by his debtor until he has first established his debt by the judgment of a court of competent jurisdiction, and has either acquired a lien upon the property, or is in a situation to perfect a lien thereon and subject it to the payment of his judgment, upon the removal of the obstacle presented by the fraudulent assignment or transfer, is elementary.[27] And a state statute declaring that the state courts should have jurisdiction of such bills by simple contract creditors, or judgment creditors who have not had executions returned unsatisfied, does not change the rule for the federal courts.[28] The bill cannot be sustained under the prayer for general relief, as brought for the administration of the assets under the assignment, as such relief would not be agreeable to the case made by the bill, which was directed to the setting aside of that instrument. The circuit court was, therefore, in error in proceeding in the case.[29] And it

debt, and contains no allegation that the administrator was ever requested to pay it, this bill does expressly aver, that, aside from the property fraudulently conveyed, there is not, any where, any property of decedent out of which the debt could be collected; and although it states that the fraudulent grantor and grantee both remained in possession, and took the crops jointly, and that these crops were of great value, yet, inasmuch as between themselves the crops belonged to the grantee, and as it was the object of the conveyances to prevent them from being applied to the benefit of creditors, there is no presumption that any thing arising from this joint possession ever came to the hands of the administrator, and, therefore, that a demand on him would have been a vain act, which the creditor was not compelled to do. Hagan *v.* Walker, 14 How. 29, 35, 14 L. Ed. 312.

Where a creditor's suit was brought against one who was endorser on notes held by complainant, to set aside an alleged fraudulent conveyance by such debtor to his daughter, it was held, that, a judgment having been obtained against the administrator of the endorser, which fixed his liability, this judgment against the administrator in which a devastavit had been suggested, and a return of nulla bona to an execution, was good evidence against the surety of the administrator, and also against the fraudulent grantee of the intestate. McLaughlin *v.* Bank, 7 How. 220, 12 L. Ed. 675.

Although the creditor has a remedy against the surety of the administrator by a suit at law upon the bond, yet he may also file a bill in chancery against all the parties who are concerned in the alleged fraud, and such other persons as are interested in the estate. McLaughlin *v.* Bank, 7 How. 220, 12 L. Ed. 675.

Although by the laws which prevail in the District of Columbia, the personal estate of a deceased person should be resorted to for the payment of debts before applying to the realty; yet, where the administrator was found guilty of a devastavit, and the personal property was chiefly left in the hands of the surety, who was also the person charged with being a fraudulent grantee of the intestate, the general rule is not applicable. McLaughlin *v.* Bank, 7 How. 220, 12 L. Ed. 675.

In a bill against the fraudulent grantee, it is not necessary to aver a deficiency of the personal estate of the deceased; it is sufficient to aver the fraud and the waste of the personal assets by such grantee, who was also the personal representative. McLaughlin *v.* Bank, 7 How. 220, 12 L. Ed. 675.

27. Necessity for judgment or other lien.—Cates *v.* Allen, 149 U. S. 451, 457, 37 L. Ed. 804; Case *v.* Beauregard, 101 U. S. 688, 690, 25 L. Ed. 1004; Adler *v.* Fenton, 24 How. 407, 16 L. Ed. 696. And see the title CREDITORS' SUITS, vol. 5, p. 27, et seq.

The mere fact that a party is a creditor is not enough. He must be a creditor with a specific right or equity in the property; and this is the foundation of the jurisdiction in chancery because jurisdiction on account of the alleged fraud of the debtor does not attach as against the immediate parties to the impugned transfer, except in aid of the legal right. Cates *v.* Allen, 149 U. S. 451, 458, 37 L. Ed. 804.

Simple contract creditors, who have not reduced their claims to judgment, have therefore no standing in the United States circuit court, sitting as a court of equity, upon a bill to set aside and vacate a fraudulent conveyance. Cates *v.* Allen, 149 U. S. 451, 456, 37 L. Ed. 804.

28. State statute does not change rule.—Cates *v.* Allen, 149 U. S. 451, 456, 37 L. Ed. 804; Scott *v.* Neely, 140 U. S. 106, 35 L. Ed. 358. See the title CREDITORS' SUITS, vol. 5, pp. 32, 33.

29. Same.—Cates *v.* Allen, 149 U. S. 451, 459, 37 L. Ed. 804.

By the code of West Virginia, c. 133, § 2: "A creditor, before obtaining a judgment or decree for his claim, may institute any suit to avoid a gift, conveyance, assignment, or transfer of or charge upon the estate of his debtor, which he might institute after obtaining such judg-

has been held that it must be a domestic judgment.[30]

3. Action for Damages.—In the absence of special legislation, we may safely affirm, that a general creditor cannot bring an action on the case against his debtor, or against those combining and colluding with him to make dispositions of his property, although the object of those dispositions be to hinder, delay, and defraud creditors.[31]

B. Garnishment.—In some states money or effects in the hands of the garnishee, which are fraudulently withdrawn from the creditors of a defendant, may be reached, in an attachment or judgment, by garnishee process.[32]

C. Injunction.—It has been held that injunction will not lie to prevent the debtor from fraudulently disposing of his property at the instance of a creditor at large or before judgment.[33]

ment or decree, and he may, in such suit, have all the relief in respect to said estate which he would be entitled to after obtaining a judgment or decree for the claim which he may be entitled to recover." Dewey *v.* West Fairmont Gas Coal Co., 123 U. S. 329, 332, 31 L. Ed. 179.

30. **Domestic judgment essential.**—"In Chaflin *v.* McDermott, 20 Blatchford 522, 12 Fed. Rep. 375, it was held, that a creditor's bill, founded on a judgment recovered against a debtor in a state court in California, would not lie in a circuit court of the United States in New York, to set aside a fraudulent transfer of personal property made by the debtor in California, by means of collusive judgments and sales under executions issued thereon, no judgment having been obtained or execution issued in such circuit court or in any state court of New York." National Tube Works Co. *v.* Ballou, 146 U. S. 517, 522, 36 L. Ed. 1070.

31. **Action for conspiracy.**—Where a creditor, whose debt was not yet due at the time of bringing the action, brought a suit against his debtors and two other persons, for a conspiracy to enable the debtors to dispose of their property fraudulently so as to hinder and defeat the creditors in the collection of their lawful demands, the action will not lie. The debtors were the lawful owners of the property at the time the suit was commenced. They had the legal right to use and enjoy it to the exclusion of others, and no one had any right to interfere with their use or disposition; and there is no right conferred by the law upon a creditor to prevent the accomplishment of fraud by his debtor, and to pursue him, and others assisting him, for a revocation of acts done to hinder, delay, or defraud him, in the collection of his demands. Adler *v.* Fenton, 24 How. 407, 16 L. Ed. 696. See the title CONSPIRACY, vol. 3, p. 1108.

32. **Garnishment.**—Williams *v.* Hill, 19 How. 246, 252, 15 L. Ed. 570. See, generally, the title ATTACHMENT AND GARNISHMENT, vol. 2, p. 660.

33. **Injunction.**—"In Wiggins *v.* Armstrong (2 Johns. Ch. 144), Chancellor Kent held that a creditor at large, or before judgment, was not entitled to the interference of a court of equity by injunction to prevent the debtor from disposing of his property in fraud of the creditor; citing * * * authorities, and stating that the reason of the rule seemed to be that until the creditor had established his title he had no right to interfere, and it would lead to unnecessary and perhaps a fruitless and oppressive interruption of the debtor's rights; adding, 'unless he has a certain claim upon the property of the debtor he has no concern with his frauds.'" Scott *v.* Neely, 140 U. S. 106, 113, 35 L. Ed. 358. See the title CREDITORS' SUITS, vol. 5, p. 27, et seq.

"The authorities are clear, that chancery will not interfere to prevent an insolvent debtor from alienating his property to avoid an existing or prospective debt, even when there is a suit pending to establish it. In Moran *v.* Dawes, Hopkin's Ch. R. 365, the court says: 'Our laws determine with accuracy the time and manner in which the property of a debtor ceases to be subject to his disposition, and becomes subject to the rights of his creditor. A creditor acquires a lien upon the lands of his debtor by a judgment; and upon the personal goods of the debtor, by the delivery of an execution to the sheriff. It is only by these liens that a creditor has any vested or specific right in the property of his debtor. Before these liens are acquired, the debtor has full dominion over his property; he may convert one species of property into another, and he may alienate to a purchaser. The rights of the debtor, and those of a creditor, are thus defined by positive rules; and the points at which the power of the debtor ceases, and the right of the creditor commences, are clearly established. These regulations cannot be contravened or varied by any interposition of equity. There are cases in which the violation of the rights of a creditor within these limits has formed the subject of an action at law against third persons. Smith *v.* Tonstall, Carth., 3; Penrose *v.* Mitchell, 8 S. and R., 522; Kelsy *v.* Murphy, 26 Pen. R., 78; Yates *v.* Joyce, 11 John., 136. But the analogies of the law, and the doctrine of adjudged cases, will not allow of an extension by the courts of the remedy

D. Parties—1. PARTIES PLAINTIFF.—Conveyances by insolvent debtors in fraud of their creditors may be attacked by their statutory assignees, though equity would not aid the debtors themselves to recover the property.[34]

2. PARTIES DEFENDANT.—**Fraudulent Grantor, Heirs and Devisees.**—The alleged fraudulent grantor is a necessary party defendant to the bill.[35] And so with the heirs and devisees of a deceased grantor.[36]

Encumbrancers.—And a prior encumbrancer.[37] But if the prior encumbrancer is out of the jurisdiction or cannot be joined without defeating it, it is a fit cause to dispense with his presence, and order a sale subject to his encumbrance, which will not be affected by the decree.[38]

Grantee or Alienee.—And where a grantee claims under the deed in more than one capacity, e. g., as executrix and as individual, she should be impleaded in both capacities.[39]

Alienee.—And a person who holds assets of the debtor, or his administrator, is a proper party defendant.[40]

employed in those cases in favor of a general creditor. This subject was discussed much at large in Lamb *v.* Stone, 11 Pick. 527." Adler *v.* Fenton, 24 How. 407, 411, 16 L. Ed. 696.

See ante, "Powers Exercisable by Debtor over His Property," II.

34. Statutory assignees may sue.—For the property transferred would, in the eye of the law, remain the debtors' and pass to the assignees, who would not be subject to the rule that those who commit iniquity have no standing in equity to reap the fruits thereof. But equities or rights belonging to particular creditors are not, by operation of law, transferred to such assignees. Hubbard *v.* Tod, 171 U. S. 474, 498, 43 L. Ed. 246.

35. Grantor as necessary party.—"In Gaylords *v.* Kelshaw, 1 Wall. 81, 82, 17 L. Ed. 612, it was held by this court that in a bill to set aside a conveyance as made without consideration and in fraud of creditors, the alleged fraudulent grantor is a necessary defendant, because it was his debts that were sought to be collected and his fraudulent conduct that required investigation." Swan Land, etc., Co. *v.* Frank, 148 U. S. 603, 610, 37 L. Ed. 577.

And if, being made defendant, his citizenship is not set forth on the record, the bill must be remanded or dismissed. Gaylords *v.* Kelshaw, 1 Wall. 81, 17 L. Ed. 612.

36. Heirs and devisees.—Where a suit is brought by creditors to set aside as fraudulent and void conveyances by their deceased debtor, made prior to his death, s mble that his only heirs and the devisees in his unprobated will, should be parties to the bill. The mere allowance of the debt of a creditor by the probate court is not conclusive evidence against them in a suit to reach the real estate of their ancestor and devisor. Walker *v.* Powers, 104 U. S. 245, 251, 26 L. Ed. 729.

37. Prior encumbrancer.—It is proper to make a prior encumbrancer, who holds the legal title, a party to the bill, in order that the whole title may be sold under the decree; for the purpose of such a decree, the prior encumbrancer is a necessary party; but the court may order a sale subject to the encumbrance, without having the prior encumbrancer before it, and in fit cases it will do so. Hagan *v.* Walker, 14 How. 29, 14 L. Ed. 312.

Mortgagee.—In proceedings to set aside a conveyance of real estate, made in fraud of the rights of creditors, it is not necessary to make a mortgagee of the estate a party, his rights under the mortgage not being brought into question. Venable *v.* United States Bank, 2 Pet. 107, 7 L. Ed. 364.

Trustee and cestui que trust under trust deed.—Where money was borrowed from a bank upon a promissory note, signed by the principal and two sureties, and the principal debtor, by way of counter security, conveyed certain property to a trustee, for the purpose of indemnifying his sureties, while it was necessary to make the trustee and the cestuis que trust parties to a bill filed by the bank, asserting a special lien upon the property thus conveyed, yet where the principal debtor had made a fraudulent conveyance of the property, which had continued in his possession, after the execution of the first deed, and then died, a bill was good, which was filed by the bank against the administrators, for the purpose of setting aside the fraudulent conveyance, and bringing the property into the assets of the deceased, for the benefit of all creditors who might apply. McRea *v.* Branch Bank, 19 How. 376, 15 L. Ed. 688.

38. Where joinder would defeat jurisdiction.—Hagan *v.* Walker, 14 How. 29, 14 L. Ed. 312.

39. Grantee in dual capacity.—Carpenter *v.* Strange, 141 U. S. 87, 105, 35 L. Ed. 640.

40. Person in possession of assets of deceased debtor.—That a single creditor may maintain a bill against an administrator of a deceased debtor, for a discovery of assets and the payment of his debt, there can be no doubt. That, in some cases, he may join with the administrator

E. Pleading—1. ALLEGATION OF FRAUD.—When it is sought to set aside a conveyance as fraudulent, the fraud, with the facts connected with it, should be alleged in the bill.[41]

2. DENIAL OF FRAUD.—The general denial of fraud in the answer of the defendants is equivalent to nothing more than a denial of a conclusion of law.[42]

F. Evidence—1. PRESUMPTIONS AND BURDEN OF PROOF.—**Fraud Never Presumed.**—The law presumes that the sale was made in good faith and with honest intentions; in absence of proof to the contrary, the validity of the sale could not be questioned.[43]

Burden of Proof on Attacking Creditor.—The burden of proving the fraud alleged rests upon the attacking creditor.[44] Although the burden may be

a third person, who is in possession of property which is amenable to the payment of the debt, is also clear. The instances in which it has been actually held that such third person might be joined, are chiefly cases of collusion between the administrator and the third person possessed of assets, insolvency of the administrator, and where the third person was the surviving partner of the deceased. But it will be found that the equitable right of the creditor to join a third person, and have a discovery and an appropriation of assets held by him, has never been limited to these particular cases. For, while it is generally agreed that some special case must be made, it is also declared in all the cases, that what is to constitute it has not been limited by any precise and rigid rule. Hagan *v.* Walker, 14 How. 29, 33, 14 L. Ed. 312.

41. **Allegation of fraud.**—Knox *v.* Smith, 4 How. 298, 11 L. Ed. 983. A bill in chancery which recites that the complainants had recovered a judgment at law in a court of the United States, upon which an execution had issued and been levied upon certain property by the marshal; that another person, claiming to hold the property levied upon by virtue of some fraudulent deed of trust, had obtained a process from a state court, by which the sheriff had taken the property out of the hands of the marshal; and praying that the property might be sold, cannot be sustained. If the object had been to set aside the deed of trust as fraudulent, the fraud, with the facts connected with it, should have been alleged in the bill. See the title FRAUD AND DECEIT, ante, p. 424 et seq.

In suit against estate of deceased debtor.—See ante, "Creditors' Bill or Suit to Set Aside," VI, A, 2.

42. **Denial in answer.**—Lathrop *v.* Drake, 91 U. S. 516, 520, 23 L. Ed. 414.

Effect of denial in answer.—See post, "Weight and Sufficiency," VI, F, 3.

43. **Fraud never presumed.**—Shauer *v.* Alterton, 151 U. S. 607, 625, 38 L. Ed. 286.

"Fraud is not presumed, either as a matter of law or fact, unless under circumstances not fairly susceptible of any other interpretation." Tucker *v.* Moreland, 10 Pet. 58, 78, 9 L. Ed. 345; Schreyer *v.* Scott, 134 U. S. 405, 416, 33 L. Ed. 955.

"Existing creditors may of course challenge the good faith of the transaction, but if they cannot disturb an absolute sale when made in good faith, why should they be permitted to challenge a conditional sale if made in like good faith? The fact that fraudulent relations are possible is hardly a sufficient reason for denouncing transactions which are not fraudulent." Etheridge *v.* Sperry, 139 U. S. 266, 278, 35 L. Ed. 171. See the title FRAUD AND DECEIT, ante, p. 439.

Presumption from retention of possession or benefit by grantor.—See ante, "Retention of Possession or Reservation of Benefits by Grantor," III, C, 9.

44. **Burden of proof on attacking creditor.**—Crawford *v.* Neal, 144 U. S. 585, 595, 36 L. Ed. 552; Allen *v.* Smith, 129 U. S. 465, 32 L. Ed. 732; Rio Grande R. Co. *v.* Vinet, 132 U. S. 565, 33 L. Ed. 438; Shauer *v.* Alterton, 151 U. S. 607, 625, 38 L. Ed. 286.

And if the evidence was equally balanced upon the point of good faith and honesty, the charge must fail, and mere knowledge on the part of the creditor that his purchase would deprive other creditors of their debts would not make the sale fraudulent. Shauer *v.* Alterton, 151 U. S. 607, 625, 38 L. Ed. 286.

Allegations of fraud which are positively denied, and neither proved by testimony, nor circumstances, may be put out of the case. Sexton *v.* Wheaton, 8 Wheat. 229, 238, 5 L. Ed. 603.

Where the bill alleges, as a principal ground of relief, fraud in fact, in the inception of the conveyance sought to be set aside, this being denied by the answers, it is incumbent that fraud in fact should be proved by the complainants. United States Bank *v.* Lee, 13 Pet. 107, 110, 10 L. Ed. 81.

Where the whole question of fraud was submitted to the jury, it is incumbent on the plaintiff in error, if he would support this exception, to show some defect in the deed itself, which makes it absolutely void as to creditors, whatever may be the fairness of intent with which it was executed. Harris *v.* DeWolf, 4 Pet. 147, 150, 7 L. Ed. 811. See the title FRAUD AND DECEIT, ante, p. 440.

See, also, ante, "Mutuality of Fraudu-

shifted by showing a fraudulent intent on grantor's part, coupled with circumstances of suspicion.[45]

Of Payment of Consideration Stated.—Proof of the payment of the consideration stated in the deed, was vital, in order to uphold a deed in other respects surrounded with suspicion.[46]

Of Notice of Fraudulent Intent.—See ante, "Intent in General," III, C, 1.

2. ADMISSIBILITY—a. *Showing Knowledge or Intent of Parties.*—Where it was charged that a sale by a bankrupt was made in contemplation of insolvency and was fraudulent as to creditors, and that grantee had reasonable cause to believe such to be the fact, it was perfectly competent to show what had been the business dealings between the parties before the sale in question, and therefore to show a prior valid sale from the bankrupt grantor to the same party, connected with evidence tending to show a secret agreement by which the vendor was reinvested with an interest in the goods sold. It clearly tended to show that grantor was trying to cover up his property from his creditors and that grantee was aiding him to do it.[47]

Evidence of Indebtedness When Voluntary Deed Was Given.—Where

lent Intent, or Notice, Essential," III, C, 1, b.

When possession changed under Kansas statute.—Under the Kansas statutes, where the sale is followed by an actual and continued change of possession the vendee is not obliged, in order to maintain his right of possession, to prove both the payment of a sufficient consideration and the exercise of good faith upon his part. His title, where such possession is shown, will be protected, unless it is successfully impeached by some one who has the right to question its validity. The party who asserts that the title did not pass as against him must make such proof as will establish that proposition. If he does not, the presumption which the law indulges that the vendee has rightfully acquired possession will control the determination of the issue. Jones *v.* Simpson, 116 U. S. 609, 614, 29 L. Ed. 742.

Reservation of trust or benefit.—"If the facts of indebtedness and that the goods were sold in payment of such indebtedness at their reasonable fair value are established to the satisfaction of the jury, and if it be contended, in avoidance thereof, that the trade was simulated, that there was a secret trust or benefit reserved to the debtors, the burden was then on the contesting creditor to establish it." Bamberger *v.* Schoolfield, 160 U. S. 149, 163, 40 L. Ed. 374.

45. **Shifting the burden.**—"The burden is upon the attacking creditor, but where the fraudulent intent on the grantor's part is made out and the circumstances are suspicious, the purchaser must show that he has paid value, and if he does, it must then appear that the purchaser had notice of the fraud." Crawford *v.* Neal, 144 U. S. 585, 595, 36 L. Ed. 552.

"These are the principles applied by the supreme court of Oregon in passing upon the statute of that state. And this court accepts the construction given to such a state statute as controlling." Crawford *v.* Neal, 144 U. S. 585, 595, 36 L. Ed. 552; Peters *v.* Bain, 133 U. S. 670, 33 L. Ed. 696.

Where a creditor shows facts that raise a strong presumption of fraud in a conveyance made by his debtor, the history of which is necessarily known to the debtor only, the burden of proof lies on him to explain it, his estate being insolvent. Clements *v.* Moore, 6 Wall. 299, 18 L. Ed. 786.

As to validity of preference.—See ante, "Lawful in Absence of Statute," III, C, 8, a.

Effect of denial in answer.—See post, "Effect of Answer Denying Fraud," VI, F, 3, b.

Claim to property derived after origin of creditor's demand.—The adverse claimant of the property must prove the bona fides of his claim, if it is derived from the debtor after the origin of the creditor's demand, and where the garnishee produced notes signed by the judgment debtor, bearing date prior to the judgment, but did not prove their existence before the judgment in consideration, it was properly left to the jury to say whether there was fraud or collusion between the garnishee and the judgment debtor. Williams *v.* Hill, 19 How. 246, 247, 15 L. Ed. 570.

46. **Of payment of consideration stated.**—Callan *v.* Statham, 23 How. 477, 480, 16 L. Ed. 532; Crawford *v.* Neal, 144 U. S. 585, 595, 36 L. Ed. 552; McCoy *v.* Rhodes, 11 How. 131, 13 L. Ed. 634; Jones *v.* Simpson, 116 U. S. 609, 614, 29 L. Ed. 742.

Consideration for conveyance of right to public land entry.—See ante, "Fraudulent Entry of Public Lands," III, B, 3.

47. **Evidence tending to show intent.**—Rosenthal *v.* Walker, 111 U. S. 185, 192, 28 L. Ed. 395.

Where the evidence tended to show an intent on a debtor's part, at the time of the suing out of an attachment, to defraud his creditors by putting his property into the shape of notes and placing them beyond their reach, proof of his

a voluntary deed is impeached as fraudulent, evidence of judgments against the grantor is admissible, as proof (among other facts) that he was indebted at the time of making the deed, although the grantee was not a party to the suits on which the judgments were obtained.[48] And for a similar reason evidence of ability to pay all claims at such time, is admissible.[49]

b. *Parol Evidence Generally.*—See the title PAROL EVIDENCE. Parol evidence is inadmissible to enlarge the estate of the grantee against the plain words of

acts of a similar nature, occurring immediately after the attachment writ issued, would have been admissible if in causal relation with what the whole evidence showed was one transaction. Eames *v.* Kaiser, 142 U. S. 488, 492, 35 L. Ed. 1090.

As to evidence of other frauds generally, see the title EVIDENCE, vol. 5, p. 1019.

If the particular indebtedness to the debtor was turned into notes, and the notes were converted into money before the attachment issued, or simultaneously, that fact sustained the charge of the conversion of the property into money, and with the other evidence justified the inference that this was for the purpose of placing it beyond the reach of his creditors. Eames *v.* Kaiser, 142 U. S. 488, 491, 35 L. Ed. 1090. See the title ATTACHMENT AND GARNISHMENT, vol. 2, p. 672.

"Of course, this would not be so as to independent and isolated action after the issue of the writ, but when happening in immediate connection with what preceded, and as part of one whole, the evidence would be admissible." Eames *v.* Kaiser, 142 U. S. 488, 492, 35 L. Ed. 1090.

Statement made to commercial agency.—In an action for damages brought in one of the courts of the Territory of Dakota to recover damages for the alleged unlawful taking by the defendant A. of a certain stock of merchandise, where the defendant justified the taking under attachments in favor of creditors of the former owner S., who had sold to the plaintiff by an alleged fraudulent conveyance, which came to his hands as sheriff of he county, the court did not err in allowing the defendant to read, in evidence, the confidential business statement made by S. to a commercial agency. That statement, the bill of exceptions recites, concealed the alleged liability of S. to his brother, the plaintiff then existing, although not shown to have been brought to the knowledge of the plaintiff or of any of the creditors of S. The answer to the question why should such concealment have been made has some, though perhaps very slight, bearing upon the inquiry whether S. was in fact, indebted to his brother to the full extent claimed by the latter. Shauer *v.* Alterton, 151 U. S. 607, 608, 617, 38 L. Ed. 286.

48. Evidence of indebtedness when voluntary deed was given.—Hinde *v.* Longworth, 11 Wheat. 199, 6 L. Ed. 454.

"The consideration expressed in the deed from Doyle, the elder, to his son, is natural love and affection, and the judgments were introduced to show that the grantor was in debt, at the time of giving the deed, which, as was contended, would render it void as against creditors. This was, therefore, necessarily an inquiry into matters to which the grantee in the deed was not a party. It was certainly competent for the defendant to show that the grantor was indebted, at the time he made the conveyance; this was a necessary step towards establishing the fraud; and if these judgments conduced to prove that fact, they could not be shut out as incompetent evidence. The extent and effect of the evidence was matter for the jury. If the evidence ought to have been excluded, because Doyle, the younger, was not a party to the judgments, the same objection would have lain against the proof of his being in debt to others in any manner whatever; that would have been equally an inquiry into matters to which the grantee in the deed was not a party. There was, therefore, no objection to the evidence on this ground." Hinde *v.* Longworth, 11 Wheat. 199, 210, 6 L. Ed. 454.

"But copies of the accounts upon which the judgments were founded are spread upon the record, by which it appears, that the cause of action arose before the date of the deed. If these accounts did not properly form a part of the record, according to the course and practice of the court where the judgments were entered, a specific objection should have been made to their being received in evidence, which would have led to the inquiry, whether they properly formed a part of the record; but as the question is now presented to this court, we cannot say, that these accounts are to be stricken out of the record. They may be looked to, for the purpose of showing that Doyle, the elder, was in debt at the date of the deed; but whether to an extent which would avoid the deed, must depend on circumstances which are not to be inquired into by this court." Hinde *v.* Longworth, 11 Wheat. 199, 211, 6 L. Ed. 454.

49. Evidence tending to show solvency.—Evidence offered for the double purpose of showing that the grantee was a creditor of his father, and that by reason thereof, although the consideration in the deed purported to be natural love and affection, it could not be considered as given with intention to defraud creditors; and also to rebut the evidence of fraud in

the deed, and to show that the beneficial interest was in him, and that the deed was so framed to shield the property from his creditors.[50]

c. *Declarations and Admissions.*—See the title DECLARATIONS AND ADMISSIONS, vol. 5, pp. 219, et seq.; 222, et seq.; 227, 228.

Of Grantor.—The admissions of the grantor in a deed while he held the legal title, being contrary to his interest, are competent evidence against him and those claiming under him, where he said the object of the conveyance to him was to protect the property against a creditor,[51] or declarations or admissions of grantor after the conveyance, made in the presence of grantee or his agent and acquiesced in by him.[52] And though made after the conveyance, in grantee's

fact, and to show the character and situation of grantor, in point of property, at the time he executed the deed in question, if admissible for either of the purposes above stated, was erroneously rejected. That the evidence was proper for the latter purpose, cannot be questioned. The charge against the grantor was, that he was guilty of fraud in fact, in making the deed to his son; that it was done for the express purposes of defrauding his creditors; and it was proper evidence, therefore, to rebut this allegation, to show that the grantor had the means of paying his debts, independent of the property conveyed to his son. Whether the evidence would have made out that fact to the satisfaction of the jury, is not for this court to inquire. If it conduced to make out that fact, it should have been submitted to the consideration of the jury. Hinde *v.* Longworth, 11 Wheat. 199, 212, 6 L. Ed. 454.

The evidence offered to show that grantor was indebted to his son to an amount equal to the value of the property conveyed to him, was declared also to be for the purpose of repelling the presumption of fraud in fact, and to show that there could have been no such intention to defraud his creditors, by putting his property out of their reach, without receiving any real and adequate consideration for it, and was admissible for that purpose, but not to vary or alter the terms of the deed, even by showing the existence of a valuable consideration instead of the expressed consideration of love and affection. That was not its purpose. It was to meet and repel the presumption of fraud which was attempted to be raised against the deed, by reason of such extrinsic circumstances. The evidence which had been admitted to show the fraud, and that which was offered to rebut it, related to collateral and independent facts unconnected with the deed, and could not, therefore, in any manner, vary or alter its terms. Hinde *v.* Longworth, 11 Wheat. 199, 213, 6 L. Ed. 454.

50. Parol evidence.—Where there was a deed of land to a debtor in trust which conveyed to him a naked legal title, he took under it no interest that could be seized and sold by the marshal upon a fi. fa.; and the purchaser at such sale could not maintain an action of ejectment under the marshal's deed. And where he offered evidence to prove that the trusts in the deed were fraudulent, and that the debtor purchased the land and procured the deed in this form in order to hinder and defraud his creditors, and this proof was offered to show that the debtor had a beneficial interest in the property, liable to be seized and sold for the payment of his debts, it was held that this parol evidence could not be introduced to enlarge or change the legal estate of the grantee against the plain words of the instrument. Smith *v.* McCann, 24 How. 398, 16 L. Ed. 714.

If the evidence were admissible, the fraudulent character of the trusts, as against his creditors, could not enlarge his legal interest beyond the terms of the deed. Although the debtor may have paid the purchase money, that circumstance did not establish a resulting trust in his favor. The lessors of the plaintiff had a plain and ample remedy in chancery, where all the parties interested could be brought before the court. Smith *v.* McCann, 24 How. 398, 16 L. Ed. 714.

In the case of Remington *v.* Linthicum, 14 Pet. 84, 10 L. Ed. 364, relied on by the plaintiff, the evidence was offered, not to change the estate limited in the grant, but to show that the grant was fraudulent, and utterly void, and conveyed no interest whatever to the grantee named in it. The party offering the evidence did not claim under that deed, but against it. And if, in this case, the evidence was offered for a like purpose, and the deed proved to be fraudulent and void, it would defeat the plaintiff's action instead of supporting it. Smith *v.* McCann, 24 How. 398, 406, 16 L. Ed. 714.

Parol proof of former issue on plea of former adjudication.—See the title RES ADJUDICATA.

51. Admissions against interest of grantor.—Baker *v.* Humphrey, 101 U. S. 494, 499, 25 L. Ed. 1065.

52. Acquiescence of grantee.—The objection that grantors after they had parted with their interests in the property, could not, by their own confessions, or statements of the nature of the transaction, defeat the title they had transferred, is inapplicable to a conversation in the presence of one of the grantee firm, where the bill of exceptions states that he concurred in all that was said. It was therefore admissible against him and his

absence, they may still be admissible to disprove the answer of the grantor, he being a party to the bill.[53]

Of Grantee.—And testimony relating to what a grantee himself, one of the defendants, said, and tending to show his own recognition of the fact that he had been a controlling spirit in the attachment proceedings, is admissible.[54]

d. *Res Gestæ.*—The grantee's acts and doings may be admissible evidence as part of the res gestæ.[55]

e. *Negative and Circumstantial Evidence.*—See the title FRAUD AND DECEIT, ante, pp. 441, 442.

3. WEIGHT AND SUFFICIENCY—a. *Amount of Evidence Necessary.*—A bare suspicion of fraud or unfairness is insufficient.[56]

partners as a statement which he agreed to at the time of the conversion, and which he should have contradicted if it were untrue. Klein *v.* Hoffheimer, 132 U. S. 367, 374, 33 L. Ed. 373.

But mere statements by the grantor, in the absence of the grantee, tending to show that he entertained a strong dislike for the attaching creditor and was disposed to obstruct the collection of his judgment, are not sufficient to show fraud, even on the part of the grantor, but having been made in the absence of grantee, and long after the date of the conveyance, they were clearly incompetent as against the latter. Gottlieb *v.* Thatcher, 151 U. S. 271, 279, 38 L. Ed. 157.

The declarations or acknowledgments of the debtor will not be received to support the title of a garnishee who claims against the attaching creditor, nor the recitals in a deed or mortgage executed by debtor nor admissions made by him at the time of its execution. Nor is the consideration of a note in favor of the claimant shown by the production of the note itself. "The objection to such evidence is said to be, that it can be manufactured by one indebted, and by that means a creditor might be defeated; for, in most cases, it would not be practicable for him to prove a negative, or disprove the statement made by his debtor." Williams *v.* Hill, 19 How. 246, 251, 15 L. Ed. 570.

53. To disprove grantor's answer.—Venable *v.* United States Bank, 2 Pet. 107, 119, 7 L. Ed. 364.

There is also testimony in the case, from several witnesses, of the confessions of the grantor, as to the object of the deeds, and of subsequent acts of control over the estate, to some extent, from which unfavorable inferences have been deduced at the argument against the validity of the deeds. It has been said at the bar, that these confessions and acts, being subsequent to the execution of the deeds, ought not to be permitted to prejudice the title of grantee, and are not evidence to bind him. It is true that neither the acts nor confessions of a grantor, under such circumstances, are admissible to defeat the title of the grantee. But they are certainly admissible, to disprove the answer of the grantor, when he is a party to the bill. If they discredit his answer, they withdraw from the case all the influence, which his concurrence in the statement of the grantee would otherwise have; and to this extent, they have a bearing upon the whole merits of the case; but not beyond it. Upon examination of these confessions, they certainly exhibit some misgivings on the part of the grantor, and some proof that the sale of the estate was to defeat the debt due by him to the attacking creditor. The acts of control by grantor over the estate are more equivocal; and but for his subsequent liberal participation in all the produce of the estate, would perhaps, of themselves, not be very significant. As the case is, they cannot but have some weight. Venable *v.* United States Bank, 2 Pet. 107, 119, 7 L. Ed. 364.

54. Of grantee.—Klein *v.* Hoffheimer, 132 U. S. 367, 375, 33 L. Ed. 373.

55. Grantee's acts as part of res gestæ.—It was held in Klein *v.* Hoffheimer, 132 U. S. 367, 372, 33 L. Ed. 373, that a transfer or assignment of notes and accounts by an insolvent firm to a creditor was a part of the transaction by which the whole property of the insolvent firm was appropriated during the twelve or fifteen hours within which the matter was completed. The short time consumed in the whole transaction, the active interference of the grantee in all its stages and in securing priority for certain friends of his, and of the debtor in the attachments, levied after the execution of the transfer, and the fact that the whole property of the insolvent debtors was intended to go to certain individuals to the exclusion of others, by consent of the parties engaged, constituted one transaction, in which grantee's acts and doings were part of the res gestæ, and as such admissible evidence.

56. Amount of evidence necessary.—Rio Grande R. Co. *v.* Vinet, 132 U. S. 565, 33 L. Ed. 438. See the title FRAUD AND DECEIT, ante, p. 442.

Conveyances held not fraudulent.—The fact that a member of an indebted firm covered his homestead with a mortgage, which was used to raise money by the firm of which he was a member to pay its debts, is surely not a transaction that should be branded as a fraud upon creditors of the firm. Rio Grande R. Co. *v.* Vinet, 132 U. S. 565, 571, 33 L. Ed. 438

It was held in Adams *v.* Collier, 122 U.

b. *Effect of Answer Denying Fraud.*—On a bill to set aside as fraudulent a conveyance of lands, where the answers of the defendants have denied all fraud, those answers are entitled to stand, unless they are overcome by the testimony of two witnesses, or of one witness and circumstances.[57] And where the several answers of the grantor and the other defendants contain a full and explicit denial of all the charges contained in the bill, tending in the least manner

S. 382, 390, 30 L. Ed. 1207, that upon the merits of the case the evidence was satisfactory that the conveyance of 1863 was not made with any intent to hinder or defraud the creditors of the grantor. The latter was, at that time, in such condition, as to property, that he could, without injustice to creditors, make a gift of these lands to his children. The transaction was in good faith, and was not a mere device to hinder and defraud creditors. The deed was promptly delivered by the grantor to one for all of the grantees. The possession of the lands by the father, at times, subsequent to the execution and delivery of the deed, and his control of them apparently for his own benefit, is satisfactorily explained by witnesses. See Warren *v.* Moody, 122 U. S. 132, 30 L. Ed. 1108.

It was held in Peters *v.* Bain, 133 U. S. 670, 692, 33 L. Ed. 696, that the circuit court was right in finding "no evidence whatever of any actual fraudulent intent on the part of the firm, or either of the partners, to hinder and delay their creditors."

It was held in White *v.* Cotzhausen, 129 U. S. 329, 344, 32 L. Ed. 677, that the finding of the circuit court that the conveyances, bill of sale, confession of judgment and transfers in question were made without adequate consideration, and with intent to hinder, delay and defraud the appellee, and upon these grounds giving the attacking creditor a prior right in the distribution of the property, was erroneous.

Conveyances held fraudulent.—In a suit by an assignee in bankruptcy to set aside an assignment by a partner of partnership property in the trust for his wife and children, it was held that such transfer—which was within six months before the filing of the petition in bankruptcy—was made in contemplation of the insolvency; and according to the weight of evidence the transferees, at that time, not only had reasonable cause to believe that transferrer was acting in contemplation of insolvency, but that such transfer was made with a view to prevent the moneys due on the policies from coming into the hands of an assignee in bankruptcy. Vetterlein *v.* Barnes, 124 U. S. 169, 171, 31 L. Ed. 400.

It was held in Harrell *v.* Beall, 17 Wall. 590, 591, 21 L. Ed. 692, a suit to set aside an alleged fraudulent sale by an insolvent bankrupt brought by the assignee, that the sale to E. was a barefaced fraud, and that if the appellee did not know it when he purchased of E. it was because he intentionally shut his eyes to the truth, and that he had such notice and information as made it his duty to inquire further, and that the slightest effort by him in that direction would have discovered the whole fraud.

It was held in McRea *v.* Branch Bank, 19 How. 376, 377, 15 L. Ed. 688, that the sale was in fraud of creditors, and especially of the bank. Without detailing the evidence, is enough to say, that the removal of the property from Alabama by debtor, leaving the judgment of the bank unsatisfied, his insolvency, the relation between the parties, their subsequent residence together, the manner in which the property was held and managed, are causes of every grave suspicion. The bill charges, that if this property was conveyed to her, "it was so conveyed with intent and for the purpose of hindering, delaying, and defrauding the creditors of the said John D. Bracy." The answer of vendee does not deny this allegation. The charge in the bill, that the sale was fraudulent as to creditors, is made out in proof.

In Venable *v.* United States Bank, 2 Pet. 107, 112, 7 L. Ed. 364, which was the case of a person, upon the eve of a decree being rendered against him for a large sum of money, which it is admitted would go far to his ruin, making conveyances of his whole property, real and personal, to his brother in law, for an asserted consideration equal to its full value, which did not appear from the evidence to have been actually paid, the conveyance was set aside for fraud. The court said: "Upon the whole, without going more at large into the case, the circumstances are such, that it appears to us these deeds were not bona fide and for a valuable consideration, and therefore they were properly set aside by the circuit court. Looking to the nature of the transaction, the assumed considerations, the relation and circumstances of the parties, the impending decree, the sweeping extent of the deeds, the nondisclosure, on the face of them, of the real considerations, the objects of the collateral and secret contract, the very great doubt as to what was due to the children, and the ambiguous explanations of the parties; we think the presumptions are so strong against the validity of the deeds, that they ought not to be supported." Venable *v.* United States Bank, 2 Pet. 107, 120, 7 L. Ed. 364.

57. Effect of answer denying fraud.—Venable *v.* United States Bank, 2 Pet. 107, 112, 7 L. Ed. 364.

Where an allegation of fraud is denied

to sustain the allegations of fraud or collusion, or any secret or unfair transactions between them, or either of them, and grantor, and there is no proof offered to sustain these allegations, they may, therefore, be dismissed, as wholly unsupported.[58] But the answer must be specific in its denial, not general, and must meet the charges of the bill with a positive negation,[59] and must not be discrepant with one another, if more than one, or with the deeds.[60]

c. *Questions for Jury.*—Fraud or no fraud is generally a question of fact to

in the answer and not sustained by proof, the bill pro tanto must be dismissed. McCoy *v.* Rhodes, 11 How. 131, 13 L. Ed. 634. See the title FRAUD AND DECEIT, ante, p. 444.

On a question of fact arising upon a bill to set aside conveyances as made in fraud of creditors, though there was ground of suspicion, weight was properly given to an answer positively denying the facts and fraud charged; this answer being supported by the positive testimony of a witness, who, though not a defendant in the case, was a principal actor in the transactions charged to be fraudulent, the court saying (Miller, J. dissenting): "His testimony upon this point, and which constitutes the main issue in the case, is full and explicit in the denial of any participation, directly or indirectly, in the transaction. The evidence relied on on the other side to overcome the answers of the defendants, and the testimony of this witness, is circumstantial and argumentative." Parker *v.* Phetteplace, 1 Wall. 684, 689, 17 L. Ed. 675.

In a suit to set aside a conveyance as being made for the purpose of hindering, delaying, and defrauding creditors of an alleged insolvent grantor, and without consideration, the answer denied all the allegations of fraud, stated that the purchase was without any knowledge or notice on the part of the grantee that any fraud was intended, and that a fair consideration was paid. This was borne out by the testimony of the grantee, as a witness for the complainant, and there was no testimony of any inadequacy of the consideration. The grantee took possession, through his agents, soon afterwards, and continuously paid taxes thereafter. The allegation of insolvency was not supported by the testimony, but it was shown that every debt that grantor owed at the time of the conveyance was well secured. It was held that, the testimony of the grantee not having been contradicted in any substantial or material respect, it established that the purchase of the property in question was free from fraud, and that the testimony as a whole fell far short of establishing the allegation of a fraudulent purpose in the conveyance. Gottlieb *v.* Thatcher, 151 U. S. 271, 38 L. Ed. 157.

58. Same.—Tompkins *v.* Wheeler, 16 Pet. 106, 115, 10 L. Ed. 903, where the court said: "That this assignment was a bona fide transaction between Wheeler and his preferred creditors, is clearly established by the proofs. Every allegation in the bill, suggesting fraud or collusion, is fully met and denied by the several answers, and is wholly unsupported by any proofs." Tompkins *v.* Wheeler, 16 Pet. 106, 118, 10 L. Ed. 903. See, also, Norton *v.* Hood, 124 U. S. 20, 31 L. Ed. 364.

And it is proper to dismiss a bill filed to set aside as fraudulent an assignment for creditors, where the respondents deny the fraud charged upon their oaths, as responsively to the charge made by the complainants as that can be done, and the latter have not sustained their charge by any proof whatever. Livermore *v.* Jenckes, 21 How. 126, 146, 16 L. Ed. 55.

59. Must be specific and positive, not general.—Doss *v.* Tyack, 14 How. 287, 14 L. Ed. 428. Where it is true that the answers of the respondents denied fraud in the abstract, but they admitted all the facts and circumstances necessary to constitute it in the concrete, the general denial of the answer, only showed that the definition of fraud was much narrower, in the estimation of the respondents, than in that of courts of law and equity. In this case, a verdict was wholly unnecessary, to inform the conscience of the chancellor; and, the verdict being perfectly correct, the court very properly refused to set it aside, on any representation from jurors thus obtained.

A chancellor does not need a verdict to inform his conscience, when the answer denies fraud in the abstract, whilst it admits all the facts and circumstances necessary to constitute it, in the concrete. Doss *v.* Tyack, 14 How. 297, 14 L. Ed. 428.

Though the failure of the answer to meet this charge in the bill, that the purpose of the sale was to conceal the property from creditors, does not operate as a technical confession of its truth, it does lay a foundation for the belief that if the defendant could have truly denied it, she would not have foregone the decided advantage of such denial in an answer which puts the complainant on proof of the contested fact by more than one witness. McRea *v.* Branch Bank, 19 How. 376, 378, 15 L. Ed. 688.

60. Discrepancies may be fatal.—Clements *v.* Moore, 6 Wall. 299, 18 L. Ed. 786. In this case, three answers in chancery denying allegations made in a bill, of fraud on creditors by an admitted conveyance of real property on the part of an insolvent debtor to his wife through a third person, held not to disprove the allega-

be determined by all the circumstances of the case,[61] or at least a mixed question of law and fact.[62] And so with the question of the existence of a fraudulent intent,[63] or knowledge or notice of fraud.[64]

tions; the answers being discrepant in striking particulars from each other, and, as respected the consideration, with the deeds themselves; no proof being given of the mode of payment by the third person (who, it was set up, had purchased the property from the husband for himself, and afterwards sold it to the wife on payment from her separate property) nor any proof beyond the answers of her husband and herself and a previous statement of the husband, then arranging the transaction, that the wife ever had any separate property.

61. In general.—Humes *v.* Scruggs, 94 U. S. 22, 28, 24 L. Ed. 51; Warner *v.* Norton, 20 How. 448, 15 L. Ed. 950.

"Fraud is always a question of fact to be determined by the court or jury upon a careful scrutiny of the evidence before it." Smith *v.* Vodges, 92 U. S. 183, 184, 23 L. Ed. 481.

62. Mixed law and fact.—Whether a sale of goods was fraudulent as against the plaintiffs seeking to set it aside, is not a pure question of law, but a question either of fact or of mixed law and fact. Jewell *v.* Knight, 123 U. S. 426, 434, 31 L. Ed. 190.

A question, whether or not certain conveyances were fraudulent, was properly submitted to the jury. Fraud is often a mixed question of law and fact, and the jury can be instructed upon matters of law. McLaughlin *v.* Bank, 7 How. 220, 228, 12 L. Ed. 675. And see the title FRAUD AND DECEIT, ante, p. 394.

63. Fraudulent intent.—Jones *v.* Simpson, 116 U. S. 609, 612, 614, 29 L. Ed. 742.

Where an insolvent debtor assigns to a creditor with full knowledge of the insolvency, certain notes and accounts due said debtor, in full payment and satisfaction of such creditor's debt, which transfer was afterwards attacked as collusive and fraudulent as to other creditors by garnishee proceedings against such transferee, it was for the jury to say, on the issue so made, upon the evidence and under proper instructions, whether such fraudulent intent to hinder, delay and defeat other creditors existed. Klein *v.* Hoffheimer, 132 U. S. 367, 372, 33 L. Ed. 373.

So, also, if the transferee was liable at all, the question as to the value of the uncollected bills so transferred, and whether such value, with what had been actually received thereon, was sufficient to pay the attacking creditors debts, was one for the jury likewise. Klein *v.* Hoffheimer, 132 U. S. 367, 379, 33 L. Ed. 373.

64. Knowledge or notice of fraud.—Where chattel mortgages are attacked by creditors on the ground that the mortgagees were affected with notice that the property had been obtained by fraudulent representation from these creditors by the mortgagor, it was held that the facts that V., the agent of the mortgagees, was a lawyer of long standing and considerable practice, and, as already stated, was the son-in-law of one of the mortgagors; that one of the deeds was to his wife, and was withheld from record for several months, and until a day or two after the chattel mortgage was made; that he could scarcely have failed to know that other deeds had been made to the wives of the mortgagors, which were also withheld from record; that these men were merchants who were constantly buying and replenishing their stock and stood in need of credit; and that he was himself one of the creditors secured by the mortgage—for a debt, too, which had been already partially paid—were sufficent evidence to open to the the jury the question of his connection with the scheme to execute this mortgage for the purpose of defrauding their unsecured creditors. The very fact that one of these deeds was withheld from record for three years and a half, another for eight months and another for about six months was, unexplained, sufficient to indicate that they were withheld for no good purpose. Browning *v.* De Ford, 178 U. S. 196, 199, 44 L. Ed. 1033.

While evidence was lacking of a direct participation by V. in these plans to defraud the creditors, his intimate connection with the family and the fact that the mortgage was given, partially at least, to secure him for his liability as surety for the firm, was not too remote to justify the court in laying the whole matter of his connection with the fraudulent scheme before the jury, and as he was acting as agent and attorney for the other secured creditors, they were equally chargeable with himself. Browning *v.* De Ford, 178 U. S. 196, 200, 44 L. Ed. 1033. See the title CHATTEL MORTGAGES, vol. 3, p. 736, et seq.

It was held in Sonnentheil *v.* Moerlein Brewing Co., 172 U. S. 401, 413, 43 L. Ed. 492, that while there was nothing in the evidence which proved either direct knowledge of the fraud in the preferred creditors, or positive knowledge of facts which put them upon inquiry, there was a strong probability of such knowledge, and under the peculiar cicumstances of the case it was not error to submit this question to the jury and the charge of the court was correct in this particular.

As to effect of retention of possession or benefit by grantor.—See ante, "Retention of Possession or Reservation of Benefits by Grantor," III, C, 9.

d. *Grantor's Declarations.*—As to grantor's declarations, expressions of hope of recovery indulged in by a person reduced to poverty by large losses must be taken with many grains of allowance, and those testified to here as indicative of the retention of an actual interest in the property fall short of overcoming the explicit evidence to the contrary.[65]

G. Instructions.—Intent, Validity and Question of Fact.—Where a sheriff was sued for taking goods under an attachment, which goods had been previously assigned under circumstances which were alleged to be fraudulent, it was proper for the court to charge the jury, "that if they believed, from the evidence, that the sale was made for the purpose of hindering, delaying, or defrauding creditors, it was invalid as against the defendant; and that whether the sale was or was not fraudulent was a question of fact, to be determined by the jury under all the circumstances of the case; that if the sale were secret, and no means taken to apprise the public of it, these were facts which threw suspicion upon the transaction, but did not make the sale fraudulent in law as against the defendant.[66]

H. Decree, and Measure of Relief Afforded—1. DECREE ENTERED ON VERDICT AS CONCLUSION OF LAW THEREON.—If a case presented by a creditor's bill is tried like a common-law case, that is to say, by a jury, and a decree is entered on the verdict as a mere conclusion of law upon the facts found, and not as the result of the chancellor's own judgment, though of his judgment aided by the finding, it is error.[67]

2. PERSONAL DECREE.—**For Rents and Profits against Wife.**—Although a conveyance by a debtor (a bankrupt) to his wife is set aside as fraudulent, a personal decree against her for the rents, issues and profits, and the use and occupation of the premises, is erroneous.[68]

For Damages.—There cannot be a decree for damages in equity.[69]

65. **Grantor's declarations.**—Crawford *v.* Neal, 144 U. S. 585, 598, 36 L. Ed. 552.

66. **Intent, validity and question of fact.**—Warner *v.* Norton, 20 How. 448, 15 L. Ed. 950.

Intent to delay, preference, secret benefit to grantor and fictitious debt.—An instruction that: "An intent upon the part of the debtor to delay his creditors in the collection of their debts was as much within the statute as if the intent had been to cheat or defraud; that while a debtor, in failing circumstances, was at liberty, acting in good faith and openly, to prefer some creditors over others, he could not, as against those not paid, reserve to himself a secret trust in any transfer; that a creditor, thus favored by the debtor, will not be permitted to enjoy the preference given him if he seeks, by the transaction, to cover or protect the remainder of the debtor's property so that it could not be applied to the payment of his honest debts; and that if a creditor seeks to appropriate the debtor's property for a debt, any material part of which was knowingly fictitious, the whole transaction would be held as tainted with fraud and void as to other creditors," was held in Shauer *v.* Alterton, 151 U. S. 607, 619, 38 L. Ed. 286, to be as favorable to the grantee as he could ask.

As it nowhere appears that the court instructed the jury that they might not, in reaching a determination upon the bona fides of the sale, and the question whether a secret benefit was reserved in his favor, consider such facts as the subsequent employment of vendor and the sale thereafter to his wife, but as a matter of fact, the portions of the general charge of the court set forth in the record make it clear that the question of reservation of a secret benefit to vendor in the sale was paticularly called to the attention of the jury, as necessary to be considered by them in arriving at a conclusion as to the validity of the transfer, it cannot be said that the charges in question had a tendency to cause the jury to regard the fact of such employment and the sale to the wife as not important to be weighed by them in passing upon the bona fides of the sale. Bamberger *v.* Schoolfield, 160 U. S. 149, 165, 40 L. Ed. 374.

Relationship.—See ante, "Brothers," III, C, 4, a.

67. **Decree entered on verdict as conclusion of law thereon.**—Dunphy *v.* Kleinsmith, 11 Wall 610, 20 L. Ed. 223. See, also, ante, "As to Parties," V, B.

68. **For rents and profits against wife.**—Clark *v.* Beecher, 154 U. S. 631, 24 L. Ed. 705, citing Phipps *v.* Sedgwick, 95 U. S. 3, 24 L. Ed. 391; Trust Co. *v.* Sedgwick, 97 U. S. 304, 24 L. Ed. 954. See ante "Personal Liability of Grantee," V, B, 3.

69. **For damages.**—"In an equitable proceeding of this kind, a decree in the nature of a judgment for damages cannot be rendered against the defendant who is alleged to have taken a fraudulent assignment of the property. The decree against him must be a decree for an account. He

3. Sale and Distribution.- **Power to Decree Sale and Force of Decree.**—When chancery has full jurisdiction as to both persons and property, and decrees that a master of the court sell and convey real estate, the subject of a bill before it, a sale and conveyance in conformity to such decree, is as effectual to convey the title as the deed of a sheriff, made pursuant to execution on a judgment at law. The defendant whose property is sold need not join in the deed.[70]

Claim of Homestead.—A party entitled to a homestead reservation under the laws of Illinois—whose property, in which it is, a court of chancery has ordered in general terms to be sold, to satisfy a creditor whom he had attempted to defraud by a secret conveyance of it—must set up his right, if at all, before the property is thus sold. He cannot set it up collaterally after the sale, and so defeat an ejectment brought by a purchaser to put him out of possession.[71]

Distribution.—It is well settled, where a deed is set aside as void as to existing creditors, that all the creditors, prior and subsequent, share in the fund pro rata. In this case it was set aside as voluntary.[72] And it has been held that complaining creditors who first file a bill to set aside a conveyance as fraudulent have no preference thereby over the other creditors.[73]

Effect of Seeking a Preference.—And where a creditor seeks to secure an illegal preference for a bona fide debt, but unsuccessfully, it will not be forfeited or postponed to the last, but will share pro rata, where there is no actual fraud shown, in the distribution of the proceeds of such property among the creditors.[74] But it is strongly intimated by the court here, in reversing the de-

must be called to account for just what property has come into his hands, and no more; and he will be entitled, under ordinary circumstances, to a rebate for the amount that was justly and honestly his due. The mode of taking such an account is well known in equity proceedings. The defendant is to exhibit an account either in his answer or in the master's office, and if it is not satisfactory to the complainant, it may be surcharged or falsified; and, as the account is finally found to stand, so will the responsibility of the defendant be. But if the complainant wishes to make him answerable in damages, either for the waste of the property or for its disposal by the original proprietor by aid of the wrongful complicity of the defendant, he must sue for damages in an action at law." Dunphy *v.* Kleinsmith, 11 Wall. 610, 615, 20 L. Ed. 223.

Conclusiveness of judgment.—As to conclusiveness of judgment, see the title RES ADJUDICATA.

70. Power to decree sale and force of decree.—Miller *v.* Sherry, 2 Wall. 237, 17 L. Ed. 827.

71. Claim of homestead.—Miller *v.* Sherry, 2 Wall. 237, 17 L. Ed. 827. See the title HOMESTEAD EXEMPTIONS.

72. Pro rata distribution.—Kehr *v.* Smith, 20 Wall. 31, 36, 22 L. Ed. 313.

73. Same.—Where creditors, who were so upon simple contract debts, filed a bill in chancery to set aside a deed made by the debtor as being fraudulent against creditors, and other creditors came in as parties complainants, the court below was right in ordering a pro rata distribution amongst all the creditors, none of them having a judgment or other lien at law. Day *v.* Washburn, 24 How. 352, 16 L. Ed. 712.

"The court of chancery does not give any specific lien to a creditor at large, against his debtor, further than he has acquired at law; for, as he did not trust the debtor on the faith of such lien, it would be unjust to give him a preference over other creditors, and thus defeat a pro rata distribution, which equity favors, unless prevented by the rules of law. It is only when he has obtained a judgment and execution in seeking to subject the property of his debtor in the hands of third persons, or to reach property not accessible to an execution, that a legal preference is acquired, which a court of chancery will enforce." Day *v.* Washburn, 24 How. 352, 355, 16 L. Ed. 712.

74. Preference unsuccessfully sought.—United States Rubber Co. *v.* American Oak Leather Co., 181 U. S. 434, 45 L. Ed. 938, where the court said: "There is a wide difference between the case of a fraud ab initio, such, for instance, as a scheme to enforce a false or pretended indebtedness, so as to remove the assets of an alleged debtor from the reach of his bona fide creditors, and the case of an attempt by bona fide creditors to secure preferences for themselves but using methods forbidden by statute or by the policy of law. In the former case, undoubtedly, a court of equity will refuse to permit the guilty parties to derive any profit or advantage from the fraudulent arrangement. In the latter case a court of equity will not declare a forfeiture of

cision of the circuit court of appeals, which had denied the illegally preferred creditors the right to participate until the other creditors had been paid in full, that if there had been fraud in fact shown, instead of mere constructive fraud, the decision would have been different, and the right to so participate pro rata would have been denied.[75]

Equitable Lien.—But an equitable lien upon a specific fund by assignment or pledge will be enforced.[76]

I. Laches and Limitations.—See the titles LACHES; LIMITATIONS OF ACTIONS AND ADVERSE POSSESSION.

just debts, or, by postponing them till all other creditors are satisfied, practically confiscate them, but will, while defeating the attempt to obtain a forbidden preference, leave such creditors to use and enjoy the same rights and remedies possessed by other creditors."

The case of White *v.* Cotzhausen, 129 U. S. 329, 32 L. Ed. 677, arose under the voluntary assignment act of the state of Illinois, and it was held that creditors who had attempted to secure an illegal preference of their debts by means of a conveyance to them of the property of their debtor when insolvent, to the exclusion of other creditors, were not thereby debarred, under the operation of the statute, from participating in a distribution, under that act, of all the debtor's property, including that illegally conveyed to them. The circuit court held that such illegally preferred creditors should be postponed in the distribution. United States Rubber Co. *v.* American Oak Leather Co., 181 U. S. 434, 452, 45 L. Ed. 938. See, also, Means *v.* Dowd, 128 U. S. 273, 32 L. Ed. 429, to the same effect; Demsey *v.* Kleinsmith, 11 Wall. 610, 615, 20 L. Ed. 223, set out ante, under "Personal Decree," VI, H, 2.

75. When actual fraud is shown.—United States Rubber Co. *v.* American Oak Leather Co., 181 U. S. 434, 448, et seq. 45 L. Ed. 938.

The court said that the allegations of the bill, if satisfactorily sustained by evidence, would have justified the conclusion that the transactions between debtor and the preferred defendants constituted, not an agreement for the purpose of securing bona fide creditors, but a conspiracy to hinder, delay and defraud the unsecured creditors of the debtor. But, as already stated, and as found by the master and the circuit court, these incriminating allegations were not sustained, and the conclusion of the master, of the circuit court and of the dissenting justice of the circuit court of appeals, was that no fraud upon the general creditors was intended or actually carried into effect. United States Rubber Co. *v.* American Oak Leather Co., 181 U. S. 434, 450, 45 L. Ed. 938.

Quoting Mr. Justice Brown, in his dissenting opinion in the circuit court of appeals, the court said: "Upon the whole it does not seem to me that such a case of fraud is made out as authorizes the court to postpone the claims of the preferred creditors to those of the general creditors, and thereby practically to confiscate them; and there is no sound reason for departing from the general rule laid down in the supreme court in White *v.* Cotzhausen, 129 U. S. 329, 32 L. Ed. 677, and in Streeter *v.* Jefferson County Bank, 147 U. S. 36, 37 L. Ed. 68, wherein the preferred creditors were permitted, after their security had been set aside, to stand upon an equality with the general creditors." United States Rubber Co. *v.* American Oak Leather Co., 181 U. S. 434, 451, 45 L. Ed. 938.

In Streeter *v.* Jefferson County Bank, 147 U. S. 36, 37 L. Ed. 68, it was held that where a creditor of a bankrupt caused execution to be levied, before the bankruptcy, on goods of the bankrupt to satisfy the debt, and the levy was afterwards set aside as an illegal preference within the purview of the bankrupt act, in consequence of knowledge of the debtor's condition by the plaintiff's attorney, that the creditor was not thereby precluded from proving his debt against the bankrupt. Here there was an express finding that there was no actual fraud. United States Rubber Co. *v.* American Oak Leather Co., 181 U. S. 434, 452, 45 L. Ed. 938.

It is not actual fraud to seek to obtain a preference, which is adjudged to be an illegal one. United States Rubber Co. *v.* American Oak Leather Co., 181 U. S. 434, 452, 45 L. Ed. 938; White *v.* Cotzhausen, 129 U. S. 329, 32 L. Ed. 677; Means *v.* Dowd, 128 U. S. 273, 32 L. Ed. 429; Streeter *v.* Jefferson County Bank, 147 U. S. 36, 46, 37 L. Ed. 68. Nor is it actual fraud to pursue a legal remedy which may be efficacious, especially where no action of the debtor gives the creditor the obnoxious preference. Streeter *v.* Jefferson County Bank, 147 U. S. 36, 47, 37 L. Ed. 68.

76. Equitable lien by assignment or pledge.—Day *v.* Washburn, 24 How. 352, 356, 16 L. Ed. 712. "It is true, where a specific fund has been assigned or pledged for the benefit of creditors, and it is necessary to go into a court of chancery to make a distribution among them, the equitable lien of each creditor upon the fund lays a sufficient foundation for the interposition of the court. It will enforce this equitable lien thus arising out of the

FRAUDULENTLY.—See KNOWINGLY.

FRAUDULENT REPRESENTATIONS.—See the title FRAUD AND DECEIT.

FREEDMEN.—See note 1.

FREEDOM OF SPEECH AND OF THE PRESS.—See the title CONSTITUTIONAL LAW, vol. 4, p. 466.

FREE FROM PARTICULAR AVERAGE.—See the title MARINE INSURANCE.

FREEHOLD ESTATES.—See the title ESTATES, vol. 5, p. 905.

FREE INHABITANT.—See note 2.

FREELY.—See note 3.

FREEMEN.—See note 4.

FREE NAVIGATION.—See the title NAVIGABLE WATERS, and references there given. See note 5.

FREE ON BOARD.—See note 6.

FREE PASS.—See the title CARRIERS, vol. 3, p. 567.

FREIGHT.—See the titles CARRIERS, vol. 3, p. 614; SHIPS AND SHIPPING. And see TOLL. See note 7.

assignment or pledge for the benefit of the creditors, in the exercise of its own appropriate jurisdiction. But in all these cases, chancery, upon its own principles, distributes the fund pro rata among all the creditors, unless preference is given in the pledge or assignment of the fund."

"The objection that the demands of the appellants had not been reduced to judgment and execution before filing the bill, would have been fatal to the relief sought, if taken in time by the defendants. It was waived, however, both as respected the appellants and the other cocomplainants; and, as the court was left unembarrassed by the objection, it was right in proceeding to dispose of the property and effects of the debtor, and to make the proper application of them; and, as we have seen neither of the creditors had acquired a preference at law, the application in chancery, upon its own principles, was a ratable distribution among all the creditors as decreed by the court below." Day *v.* Washburn, 24 How. 352, 356, 16 L. Ed. 712.

Liability for consideration paid.—See ante, "Personal Liability of Grantee," V, B, 3.

1. **Freedmen.**—According to the civil law, freedmen are those who have been manumitted from just servitude. Dred Scott *v.* Sandford, 19 How. 393, 479, 15 L. Ed. 691.

2. **Free inhabitant.**—See Dred Scott *v.* Sandford, 19 How. 393, 418, 15 L. Ed. 691.

3. **Freely.**—"The fair deduction is, that the words, 'freely to be possessed,' etc., are too uncertain, of themselves, to raise a fee, but they may be aided by other circumstances. * * * Upon the whole, upon the most careful examination, we cannot find a sufficient warrant in the words of this will to pass a fee to the wife." Wright *v.* Page, 10 Wheat. 204, 241, 6 L. Ed. 303. See the title WILLS.

Mr. Justice Le Blanc added, that the words used were not inconsistent with a life estate only; and he distinguished between them and the words, "**freely** to be disposed of," admitting that the latter would pass a fee. Wright *v.* Page, 10 Wheat. 204, 243, 6 L. Ed. 303.

Acknowledgment.—See the title ACKNOWLEDGMENT, vol. 1, pp. 83, 89.

4. **Freemen.**—"It is a fundamental principle of the common law of England, that the term **freemen** of the kingdom, includes 'all persons,' ecclesiastical and temporal, incorporate, politique or natural; it is a part of their Magna Charta and is incorporated into our institutions." Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 483b, 9 L. Ed. 773. See, also, Respublica *v.* Betsey, 1 Dall. 469, 470, 1 L. Ed. 227.

5. **Free navigation.**—"By **free navigation** is not meant a navigation entirely clear of obstructions. In the sense in which these terms are used by European jurists, the navigation of a river is **free**, when it is not entirely interrupted, and not embarrassed by oppressive duties exacted by riparian states. In this country, the navigation of a river is deemed to be **free**, when it is kept open for vessels cleared of such physical obstructions as would retard their passage beyond what is required for the necessary transit over the stream, and is exempt from exactions and delays other than for the enforcement of quarantine and health laws; and such occasional tolls as may be levied to meet the expenses of improving its navigation." Bridge Co. *v.* United States, 105 U. S. 470, 496, 26 L. Ed. 1143.

6. **Free on board.**—The term "**free on board** the steamer at Neenah" in a contract was held to mean that the vendor should deliver the flour on board the steamer without charge to the vendee. Nash *v.* Towne, 5 Wall. 689, 699, 18 L. Ed. 527.

7. **Freight.**—"By the law maritime the word **freight** is used to denote not the

FRENCH SPOLIATION CLAIM.—See the title UNITED STATES.

FRIENDLY SUITS.—As to what constitutes an amicable action, see AMICABLE ACTION, vol. 1, p. 311. As to bringing fictitious suits, see the titles APPEAL AND ERROR, vol. 2, pp. 293, 300; CONTEMPT, vol. 4, p. 537.

FRIEND OF THE COURT.—See the title APPEAL AND ERROR, vol. 2, p. 273.

FRIVOLOUS APPEAL.—See the title APPEAL AND ERROR, vol. 2, p. 289.

thing carried, but the compensation for the carriage of it." The Main *v.* Williams, 152 U. S. 122, 129, 38 L. Ed. 381.

"There is no reason, however, for giving to the word freight a narrow or technical definition. The fares of the passengers are as much within the reason of the rule as the freight upon the cargo." The Main *v.* Williams, 152 U. S. 122, 131, 38 L. Ed. 381.

"In this country, as early as 1801, it was said by Judge Peters in the case of the Brig Cynthia, 1 Pet. Adm. 203, 206: 'I think the force and true meaning of freight has been misconceived. It is a technical expression. It does not always imply that it is the naulum, merces, or fare, for the transportation of goods. It is applied to all rewards, hire, or compensation, paid for the use of ships; either for an entire voyage, one divided into sections, or engaged by the month, or any period. It is also called freight (and it is to be determined on the like legal principles) in the case of passengers, transported in vessels, for compensation. In Saxon, from which much of the English language is derived, it is called fracht, whether it be a compensation for transportation in ships by sea, or carriage by land, either of goods or persons, in gross, or detail.'" The Main *v.* Williams, 152 U. S. 122, 129, 38 L. Ed. 381.

"While many of the lexicographers, such as Webster, Worcester, and the Imperial Dictionary, still define freight as the sum paid by a party hiring a ship or part of a ship, or for the carriage of goods, in the Century Dictionary it is said to be, in a more general sense, the price paid for the use of a ship, including the transportation of passengers. Similar definitions are given in the law dictionaries of Burrill, Bouvier, and Anderson." The Main *v.* Williams, 152 U. S. 122, 130, 38 L. Ed. 381.

In The Main *v.* Williams, 152 U. S. 122, 130, 38 L. Ed. 381, the court says: "Thus in Flint *v.* Flemyng, 1 B. & Ad. 45, which was an action upon an insurance policy upon freight, it was held that plaintiff could recover freight upon his own goods, Lord Tenterden holding that the word 'freight,' as used in policies of insurance, imported the benefit derived from the employment of a ship. So, in Brown *v.* Harris, 2 Gray 359, the supreme court of Massachusetts, holding that passage money, paid in advance, might be recovered back, upon the breaking up of the voyage, observed that the rule was well settled as to freight for the carriage of goods; that if freight be paid in advance, and the goods not carried for any event, not imputable to the shipper, it is to be repaid, unless there be a special agreement to the contrary. The court further observed: 'Passage money and freight are governed by the same rules. Indeed, freight, in its more extensive sense, is applied to all compensation for the use of ships, including transportation of passengers.'"

Freight advanced.—In Sansom *v.* Ball, 4 Dall. 459, 1 L. Ed. 908, an action on a policy of insurance declared to be "on freight advanced," the court says: "The plaintiff advanced a sum of money to the owners of the ship, in consideration of which they gave him a right to fill up three-eights of the tonnage of the ship, for that voyage, with goods, either his own or the property of others. It is called in the policy "freight advanced," an expression well calculated to show its meaning."

Freight pending—Freight for the voyage.—Section 4283 of the United States Revised Statutes provides that the liability of the owner of any vessel, for loss of property shipped on a vessel, shall not exceed the amount or value of the interest of such owner in such vessel, and her freight then pending. And § 4284 provides that loss is suffered by the several owners on the same voyage, and the whole value of the vessel and her freight for the voyage is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel in proportion to their respective losses. In the case of The Main *v.* Williams, 152 U. S. 122, 131, 38 L. Ed. 381, the court, in construing the meaning of the above sections, said: "The words 'freight pending,' in § 4283, or 'freight for the voyage,' § 4284; were copied from the English statute, George II, which, in turn, had taken them from the Marine Ordinance of 1681, in prior continental acts; but in both cases they were evidently intended to represent the earnings of the voyage, whether from the carriage of passengers or merchandise. If these words were used instead of the words 'freight for the voyage' it would probably more accurately express the intent of the legislature." See the title SHIPS AND SHIPPING.

FROG.—See note 1.
FROM.—See note 2.

1. Frog.—A frog, in railroad parlance, is a section of a rail, or of several rails combined, at a point where two railways cross, or at the point of a switch from a line to a siding or to another line, and its function is to enable a car or train to be turned from one track to another. In a blocked frog the point of space between the rails, at the point where the car is switched from one track to another, is filled with wood or other material, so that the foot will not be held. There is a form of cast iron frog, in which the space between the rails at the apex of the frog is filled with cast iron. Southern Pacific Co. *v.* Seley, 152 U. S. 145, 150, 38 L. Ed. 391. See, generally, the titles NEGLIGENCE; RAILROADS.

2. Exclusive or inclusive.—See, generally, the title TIME.

In Taylor *v.* Brown, 147 U. S. 640, 643, 37 L. Ed. 313, the court said: "In Matthews *v.* Zane, 7 Wheat. 164, 211, 5 L. Ed. 425, Mr. Chief Justice Marshall remarked that it was the known rule 'that a statute for the commencement of which no time is fixed, commences from its date;' and in Arnold *v.* United States, 9 Cranch 104, 120, 3 L. Ed. 671, in which it was held that a statute providing that it should take effect 'from and after the passing of this act' took effect immediately, Mr. Justice Story said that 'it is a general rule that when the computation is to be made from an act done, the day on which the act is done is to be included.' But this cannot be said to be a universal rule either in England or this country. * * * While it is desirable that there should be a fixed and certain rule upon this subject, it must be conceded that the rule which excludes the terminus a quo is not absolute, but that it may be included when necessary to give effect to the obvious intention. This was the view entertained by Lord Mansfield who ruled in Pugh *v.* Duke of Leeds, 2 Cowp. 714, that 'the sense of the word from must always depend upon the context and subject matter, whether it shall be construed inclusive or exclusive of the terminus a quo.' * * * It may also be observed that, as to the general doctrine that the law does not allow of fractions of a day, it is settled that when substantial justice requires it courts may ascertain the precise time when a statute is approved or an act done." See, also, Griffith *v.* Bogart, 18 How. 158, 163, 15 L. Ed. 307. And see the title STATUTES.

In Lapeyre *v.* United States, 17 Wall. 191, 198, 21 L. Ed. 606, the court says: "Where the language employed is 'from and after the passing of this act,' the same result follows. The act becomes effectual upon the day of its date. In such cases it is operative from the first moment of that day. Fractions of the day are not recognized. An inquiry involving that subject is inadmissible."

In Best *v.* Polk, 18 Wall. 112, 119, 21 L. Ed. 805, it was held that an officer commissioned to hold office during the term of four years from the 2d of March, 1845, is in office on the 2d of March, 1849. That the word from always excludes the day of date.

"Authority to construct a railroad or turnpike from A. to B., or beginning at A. and running to B., is held to confer authority to commence the road at some point within A., and to end it at some point within B. The words from, 'to,' and 'at,' are taken inclusively, according to the subject matter." Union Pacific R. Co. *v.* Hall, 91 U. S. 343, 348, 23 L. Ed. 428.

Remainder.—Adverbs of time—as where, there, after, from, etc.—in a devise of a remainder, are construed to relate merely to the time of the enjoyment of the state, and not the time of the vesting in interest. Poor *v.* Considine, 6 Wall. 475, 18 L. Ed. 869. See, generally, the title REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS.

Sale.—An agreement to take from two to six hundred tons of certain articles, is an agreement to accept any amount between those limits. Wheeler *v.* New Brunswick, etc., R. Co., 115 U. S. 29, 37, 29 L. Ed. 341.

From and after.—A statute as to certain transactions "from and after" a subsequent named date does not affect a transaction after the passage of the act, but prior to such subsequent date. Wood *v.* Owings, 1 Cranch 239, 251, 2 L. Ed. 94.

From any port.—Section 1 of the Harter Act renders void, contracts made for release of ship owners of vessels, "transporting merchandise or property from or between ports of the United States and foreign ports," from liability for loss or damage to merchandise occasioned by negligence; § 3 provides that if the owner of "any vessel transporting merchandise or property to or from any port in the United States" shall exercise due diligence as to the equipment and safety of the vessel, he shall not be responsible for loss resulting from errors or faults in the navigation or management of the vessel. In the case of Knott *v.* Botany Mills, 179 U. S. 69, 72, 75, 45 L. Ed. 90, the court, in referring to the 3rd section, said: "It is true that the words of that section are not exactly the same in this respect, being 'any vessel transporting merchandise or property to or from any port in the United States,' whereas the corresponding words in the first section are 'any vessel transporting merchandise or prop-

FRUIT.—The dictionaries define the word "fruit" as the seed of plants, or that part of plants which contains the seed, and especially the juicy, pulpy products of certain plants, covering and containing the seed.[1]

FUERO.—A fuero (forum), under the Spanish law, is a use and custom combined, and has the force of law.[2]

FUGITIVE FROM JUSTICE.—See the title EXTRADITION, ante, p. 215.

FUGITIVE SLAVE LAW.—See the title SLAVERY AND INVOLUNTARY SERVITUDE.

FULL CARGO.—See note 3.

FULL COMPENSATION.—See note 4.

FULL FAITH AND CREDIT.—See the titles APPEAL AND ERROR, vol. 1 p. 650; FOREIGN JUDGMENTS, RECORDS AND JUDICIAL PROCEEDINGS.

erty from or between ports of the United States and foreign ports.' But the two phrases, as applied to the subject matter, are precisely equivalent, and are both equally applicable to a foreign voyage that ends, and to one that begins, in this country. In their usual and natural meaning, the words 'from any port in the United States' include all voyages, whether domestic or foreign, which begin in this country; the words 'to any port in the United States' includes all voyages, whether domestic or foreign, which end in this country; and the words 'between ports of the United States and foreign ports' include all foreign voyages which either begin or end here. The words of the third section, 'to or from any port in the United States' express in the simplest and most direct form the intention to include voyages hither as well as voyages hence. And we find insuperable difficulty in the way of giving a different meaning to the words of the first section, 'from or between ports of the United States and foreign ports.' The words 'from ports of the United States' would of themselves be sufficient to cover all voyages which begin here, whether they end in a domestic or in a foreign port." See the title SHIPS AND SHIPPING.

From such date.—See the title ARMY AND NAVY, vol. 2, p. 494. And see United States *v.* Moore, 95 U. S. 760, 24 L. Ed. 588.

From the parent.—See the title DESCENT AND DISTRIBUTION, vol. 5, p. 342.

From time to time.—See Railroad Co. *v.* Trimble, 10 Wall. 367, 378, 19 L. Ed. 948.

1. **Fruit.**—Nix *v.* Hedden, 149 U. S. 304, 306, 37 L. Ed. 745.

The definitions given by dictionaries have no tendency to show that tomatoes are fruit, as distinguished from "vegetables," in common speech, or within the meaning of the Tariff Act of 1883, which provides for certain duties on vegetables. Nix *v.* Hedden, 149 U. S. 304, 306, 37 L. Ed. 745.

2. Strother *v.* Lucas, 12 Pet. 410, 446, 9 L. Ed. 1137.

3. **Full cargo.**—A charter party stipulated that a vessel should receive a **full cargo** of general merchandise, and not exceeding a certain number of passengers and there was covenant for a specific amount to be received. It was held what was a **full cargo** under all the circumstances, and how deeply she could be loaded with safety to the passengers, was a question which could be solved only by experienced shipmasters. That what was a **full cargo** for the ship to carry with safety was not a fact which could be settled by any rule of law or mathematical computation, and the court must necessarily rely upon the opinions of those who have experience, skill, and judgment, in such matters. Ogden *v.* Parsons, 23 How. 167, 170, 16 L. Ed. 410. See, generally, the title SHIPS AND SHIPPING.

4. **Full compensation.**—A sum appropriated by congress, "in **full compensation**" for services of a federal officer, bars recovery in the court of claims of an additional amount; though by a prior statute his salary be fixed at a larger amount than the sum so appropriated. In construing the act, the court said: "We cannot adopt the view of appellee unless we eliminate from the statute the words 'in **full compensation**,' which congress, abandoning the long-used form of the appropriation acts has, ex industria, inserted. Our duty is to give them effect. When congress has said that the sum appropriated shall be in **full compensation** of the services of the appellee, we cannot say that it shall not be in **full compensation**, and allow him a greater sum." United States *v.* Fisher, 109 U. S. 143, 146, 27 L. Ed. 885. See, also, United States *v.* Mitchell, 109 U. S. 146, 27 L. Ed. 887.

But a statute fixing the annual salary of a public officer at a named sum, without limitation as to time, should not be deemed abrogated or suspended by subsequent enactments which merely appropriated a less amount for the services of that officer for particular fiscal years, and which contained no words that expressly or by clear implication modified or repealed the previous law. United States *v.* Langston, 118 U. S. 389, 394, 30 L. Ed. 164. See, generally, the title PUBLIC OFFICERS.

FULLY.—See As, vol. 2, p. 545. See, also, Seybert *v.* Pittsburg, 1 Wall. 272, 273, 17 L. Ed. 553.

FULLY ADMINISTERED.—See the title EXECUTORS AND ADMINISTRATORS, ante, p. 119.

FUNDING ACTS.—See the titles IMPAIRMENT OF OBLIGATION OF CONTRACTS; MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.

FUNDS AND DEPOSITS IN COURT.—See the title PAYMENT INTO COURT.

FUNDS IN HANDS.—See BALANCE, vol. 2, p. 791.

FUR.—See note 1.

FURLOUGH.—See the title ARMY AND NAVY, vol. 2, p. 494.

FURTHER PROOF.—See the title ADMIRALTY, vol. 1, p. 193.

FURTHER TAX.—See ANY, vol. 1, p. 330.

FUTURE ADVANCES.—See the titles CHATTEL MORTGAGES, vol. 3, pp. 706, 755; MORTGAGES AND DEEDS OF TRUST.

FUTURE OR EXPECTANT INTERESTS.—See the title ESTOPPEL, vol. 5, p. 932.

FUTURES.—See the title GAMBLING CONTRACTS, and references given.

GAINS.—See note 2.

GAMBLING CONTRACTS.

BY CLAUDE R. YARDLEY.

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CROSS REFERENCES.

See the titles ILLEGAL CONTRACTS; LOTTERIES; RESTRAINT OF TRADE.

As to the constitutionality of statutes forbidding dealing in futures, see the title CONSTITUTIONAL LAW, vol. 4, p. 378. As to the recovery by the original payee on a note the consideration of which was given in furtherance of a gambling transaction, see the title BILLS, NOTES AND CHECKS, vol. 3, p. 272. As to the construction of state statutes relating to gambling contracts by federal courts,

1. **Fur.**—As to whether goat skins fall within the description of "dressed furs on the skin" in the Tariff Act of March 3, 1883, see Seeberger *v.* Schlesinger, 152 U. S. 581, 584, 38 L. Ed. 560. See, also, the title REVENUE LAWS.

2. **Gains.**—The advance in the value of personal property during a series of years does not constitute the gains, profits, or income of any one particular year of the series, within the meaning of the revenue laws, although the entire amount of the advance be at one time turned into money by a sale of the property. Gray *v.* Darlington, 15 Wall. 63, 21 L. Ed. 45. And see the title REVENUE LAWS. And see, generally, PROFITS.

see the titles COURTS, vol. 4, p. 1072; STATUTES. As to all questions relating to gambling as a crime, see the title GAMING.

I. Definitions.

Gambling Contract.—A gambling contract or wager is a contract by which two parties or more agree that a certain sum of money or other thing shall be paid or delivered to one of them on the happening or not happening of an uncertain event.[1]

Bucket Shop.—A "bucket shop," has been defined as "an establishment, nominally for the transaction of a stock exchange business, or business of a similar character, but really for the registration of bets, or wagers, usually for small amounts, on the rise or fall of the prices of stocks, grain, oil, etc., there being no transfer or delivery of the stock or commodities nominally dealt in."[2]

Option Contracts.—Option contracts have been defined as contracts in which there was no obligation upon the part of the persons concerned, either to buy or sell.[3]

II. Validity.

A. In General.—At common law all gambling contracts were void.[4] And generally, in this country, all wagering contracts are held to be illegal and void as against public policy.[5]

B. Unaffected by Form.—The form in which a contract is made will not give validity to it, if it is a gambling contract.[6]

C. Contracts for Future Delivery.—It is well settled that contracts for the future delivery of merchandise or tangible property are not void, whether such property is in existence in the hands of the seller, or to be subsequently acquired.[7] And the fact that it is the practice of persons making sales for future

1. **Gambling contract.**—Bouv. Law Dict.

2. **Bucket shop.**—Gatewood *v.* North Carolina, 203 U. S. 531, 51 L. Ed. 305. See the title GAMING.

3. **Options.**—Clews *v.* Jamieson, 182 U. S. 461, 495, 45 L. Ed. 1183.

4. **Validity at common law.**—Booth *v.* Illinois, 184 U. S. 425, 427, 46 L. Ed. 623.

5. **Against public policy.**—Irwin *v.* Williar, 110 U. S. 499, 510, 28 L. Ed. 225.

"To take cases where opinion has moved in the opposite direction, wagers may be declared illegal without the aid of statute, or lotteries forbidden by express enactment, although at an earlier day they were thought pardonable at least." Otis *v.* Parker, 187 U. S. 606, 609, 47 L. Ed. 323.

6. **Unaffected by form.**—Embrey *v.* Jemison, 131 U. S. 336, 345, 33 L. Ed. 172; Irwin *v.* Williar, 110 U. S. 499, 510, 28 L. Ed. 225.

"It makes no difference that a debt or wager is made to assume the form of a contract. Gambling is none the less such because it is carried on in the form or guise of legitimate trade." Embrey *v.* Jemison, 131 U. S. 336, 345, 33 L. Ed. 172. See, also, Irwin *v.* Williar, 110 U. S. 499, 510, 28 L. Ed. 225.

7. **May be valid.**—Bibb *v.* Allen, 149 U. S. 481, 493, 37 L. Ed. 817.

Property which seller anticipates purchasing.—"A trader has a right to sell, to deliver at some future time, that which he then has not, but which he expects to go into the market and buy; and the parties may agree mutually that there need not be a present delivery, but that such delivery may take place at some other time. Such future delivery contracts, however, must be in good faith; there must be an intention to make an actual sale and delivery of the article dealt in." Hansen *v.* Boyd, 161 U. S. 397, 406, 40 L. Ed. 746.

Dependent upon intentions of parties.—"The validity of an option contract depends upon the mutual intention of the parties thereto, and if a sale or purchase of actual wheat for future delivery is intended, it is valid. If the contract is lawful, the putting up of margins to cover losses which might accrue from fluctuations in prices in final settlement of the transactions, according to the rules and usages of the board of trade of the city of Chicago, is entirely proper and legitimate." Hansen *v.* Boyd, 161 U. S. 397, 406, 40 L. Ed. 746.

Sales in modern markets.—"Of course, in a modern market contracts are not confined to sales for immediate delivery. People will endeavor to forecast the future and to make agreements according to their prophecy. Speculation of this kind by competent men is the self-adjustment of society to the probable. Its value is well known as a means of avoiding or mitigating catastrophes, equalizing prices and providing for periods of want. It is true that the success of the strong induces imitation by the weak, and that incompetent persons bring themselves to ruin by undertaking to speculate in their

delivery to settle the same by setting off one sale against another, will not render it invalid.[8] If, however, at the time of entering into a contract for a sale of personal property for future delivery it be contemplated by both parties that at the time fixed for delivery the purchaser shall merely receive or pay the difference between the contract and the market price, the transaction is a wager, and nothing more.[9] And a state may by statute provide that all contracts for the

turn. But legislatures and courts generally have recognized that the natural evolutions of a complex society are to be touched only with a very cautious hand, and that such coarse attempts at a remedy for the waste incident to every social function as a simple prohibition and laws to stop its being are harmful and vain. This court has upheld sales of stock for future delivery and the substitution of parties provided for by the rules of the Chicago Stock Exchange. Clews *v.* Jamieson, 182 U. S. 461, 45 L. Ed. 1183." Board of Trade *v.* Christie Grain, etc., Co., 198 U. S. 236, 247, 49 L. Ed. 1031.

Sales on account.—Where there was direction by one person to another to sell a certain named stock for "the account," it was held that such a direction presumed that the intention was to actually deliver the stock on the next delivery day which was the last day of the month, and such a contract would be legal, although, at the time of the sale the seller did not own any of the stock, especially in view of the fact that the laws of the state in which the transaction was made, as well as the rules of the exchange under which it was conducted, made any contracts entered into, without any intention of future delivery, illegal. Clews *v.* Jamieson, 182 U. S. 461, 43, 45 L. Ed. 1183.

8. **Setting off sales against each other.**—Board of Trade *v.* Christie Grain, etc., Co., 198 U. S. 236, 247, 49 L. Ed. 1031; Irwin *v.* Williar, 110 U. S. 499, 28 L. Ed. 225.

The practice called ring settlement reached by a comparison of books among the clerks of the members buying and selling in the pit, and picking out a series of transactions which begins and ends with dealings which can be set against each other by eliminating those between—as, if A has sold B five thousand bushels of May wheat, and B has sold the same amount to C, and C to D and D to A, and by substituting D for B by novation, A's sale can be set against his purchase, on simply paying the difference in price, is not illegal and does not render contracts for future delivery void. Board of Trade *v.* Christie Grain, etc., Co., 198 U. S. 236, 247, 49 L. Ed. 1031.

9. **Speculation on rise and fall of market.**—Bibb *v.* Allen, 149 U. S. 481, 492, 37 L. Ed. 817; Pearce *v.* Rice, 142 U. S. 28, 40, 35 L. Ed. 925; Irwin *v.* Williar, 110 U. S. 499, 28 L. Ed. 225.

No intention to deliver goods.—"Where an optional contract for the sale of property is made, and there is no intention on the one side to sell or deliver the property, or on the other to buy or take it, but merely that the difference should be paid according to the fluctuation in market values, the contract would be a wager within the statute." Embrey *v.* Jemison, 131 U. S. 336, 345, 33 L. Ed. 172.

Purchases on margin may be gambling.—There is no doubt that purchases on margin may be and frequently are used as a means of gambling for a great gain or a loss of all one has. Otis *v.* Parker, 187 U. S. 606, 610, 47 L. Ed. 323.

Dealing in cotton futures.—Money was advanced by the plaintiff's firm solely for the purpose of carrying "cotton futures," for which he or they contracted. Neither party contemplated the purchase or delivery in fact of cotton, and it was understood that any settlement, in respect to such purchases, should be exclusively upon the basis of one party paying to the other only "the difference between the contract price and the market price of said cotton futures, according to the fluctuations in the market." It was held, that this was a wagering contract, under the guise of a contract of sale. Embrey *v.* Jemison, 131 U. S. 336, 343, 33 L. Ed. 172.

Option contracts.—"Agreements for the future delivery of grain, or any other commodity, are not prohibited by the common law, nor by any statute of the state, nor by any policy adopted for the protection of the public. What the law does prohibit, and what is deemed detrimental to the general welfare, is speculating in differences in market values. The alleged contracts for August and September come within this definition. No grain was ever bought and paid for, nor do we think it was ever expected any would be called for, nor that any would have been delivered had demand been made. What were these but 'optional contracts,' in the most objectionable sense; that is, the seller had the privilege of delivering or not delivering, and the buyer the privilege of calling or not calling for the grain, just as they chose. On the maturity of the contracts, they were to be filled by adjusting the differences in the market values. Being in the nature of gambling transactions, the law will tolerate no such contracts." Clews *v.* Jamieson, 182 U. S. 461, 490, 45 L. Ed. 1183.

Enforcible and unenforcible contracts.—Where there were dealings between two parties in regard to grain, it was held that if it was the intention of both parties that

sale of grain or other commodities or shares of the capital stock of any corporation, on margin, or to be delivered at a future date, shall be void.[10]

D. Validity of Obligation Given for Losses.—An obligation will be enforced, though indirectly connected with a gambling transaction, if it is supported by an independent consideration, so that the plaintiff does not require the aid of the illegal transaction to make out his case.[11] And a state may provide that an obligation given for money lost at gambling shall be valid.[12] But it may also provide, that any obligation entered into the consideration for which is money or property to be used in the furtherance of gambling transactions, shall be void and of no effect.[13]

III. Rights of Parties.

A. Principals.—The rights of the parties as to the enforcement of gambling contracts, depends to some extent upon their intention at the time the contract was made. Where both parties understood that the contract was to be a mere wager, as for example, a speculation on the rise and fall of the market, neither party can enforce it.[14] But where the transaction is legitimate on its face, one party cannot avoid it by claiming that it was a gambling contract where the proof

the transactions were to be merely options to buy or sell at a future day, they were gambling contracts and without effect, but if such dealings were contracts by which grain was to be absolutely delivered, the only option being the time when delivery should be made, the contract would be one which could be enforced either at law or in equity. White *v.* Barber, 123 U. S. 392, 420, 31 L. Ed. 243.

10. Statutory prohibition.—Otis *v.* Parker, 187 U. S. 606, 47 L. Ed. 323; Booth *v.* Illinois, 184 U. S. 425, 46 L. Ed. 623; Pearce *v.* Rice, 142 U. S. 28, 35, 35 L. Ed. 925.

A provision in the constitution of the state of California declared, "that all contracts for the sale of shares of the capital stock of any corporation or association, on margin, or to be delivered in the future, shall be void and any money paid on such contracts may be recovered by parties paying it, by suit in any court of competent jurisdiction." It was held, that the prohibition in this clause of sales on margin did not violate the 14th amendment to the constitution of the United States. Otis *v.* Parker, 187 U. S. 606, 47 L. Ed. 323.

The statute of the state of Illinois made it illegal for one to contract to have or give to himself or another the option to buy or sell at a future time any grain or other commodities or stock of any railroad or other company, and made all such contracts void, and prescribed a penalty against any person engaged in the transaction of this character. It was held, that the state had a right to declare such contracts illegal. Booth *v.* Illinois, 184 U. S. 425, 46 L. Ed. 623.

"The supreme court of Illinois, in that case, observed that at common law all gambling contracts were void, and that an agreement for the sale of property was a mere wager or gambling contract and void, if made with the understanding of the parties that no property was to be delivered or accepted but could be satisfied by an adjustment simply on the basis of the difference between the contract and the market price. It said: 'It must be presumed that the object of the legislature was to declare that unlawful which theretofore had been lawful. Prior to this act it was lawful to have or give an option to sell or buy, at a future time, grain or other commodity. Such contracts were neither void nor voidable at the common law. The statute makes them unlawful or void in Illinois.'" Booth *v.* Illinois, 184 U. S. 425, 427, 46 L. Ed. 623.

11. When enforcible.—Armstrong *v.* American Exchange Nat. Bank, 133 U. S. 433, 469, 33 L. Ed. 747.

Where losses have been made in a gambling transaction a person who lends money to the loser with which to pay the debt can recover the loan, notwithstanding his knowledge of the fact that the money was to be so used. Armstrong *v.* American Exchange Nat. Bank, 133 U. S. 433, 468, 33 L. Ed. 747.

12. May be declared valid.—Craig *v.* Missouri, 4 Pet. 410, 459, 7 L. Ed. 903.

13. May be declared void.—Pearce *v.* Rice, 142 U. S. 28, 35, 35 L. Ed. 925; Lloyd *v.* Preston, 146 U. S. 630, 643, 36 L. Ed. 1111; Armstrong *v.* American Exchange Nat. Bank, 133 U. S. 433, 470, 33 L. Ed. 747.

14. Guilty knowledge of both parties.—Roundtree *v.* Smith, 108 U. S. 269, 276, 27 L. Ed. 722; Irwin *v.* Williar, 110 U. S. 499, 508, 28 L. Ed. 225; Bibb *v.* Allen, 149 U. S. 481, 492, 37 L. Ed. 817; Higgins *v.* McCrea, 116 U. S. 671, 675, 29 L. Ed. 764.

In order to invalidate a contract as a wagering one, both parties must intend that instead of the delivery of the article there shall be a mere payment of the dif-

shows that the other party did not so understand it, but believed it to be a valid agreement.[15] Where a party is sued upon a contract which one party alleges to be a gambling transaction, the party alleging the illegality of the contract cannot recover upon a counterclaim from the other party who had no intention to enter into a gambling transaction.[16]

B. Agents.—The rights and liabilities of brokers or other agents in regard to gambling transactions depends, to a certain extent, upon their knowledge as to the illegality of the transaction, and to the extent in which they participate in the illegal part of it.[17] If they have no knowledge that it was the intention of their principals to enter into a wagering or gambling contract, they are entitled to recover, not only their commission, but any sums of money which they have advanced to carry out purposes for their principals.[18] And while brokers or

ference between the contract and the market price. Pearce *v.* Rice, 142 U. S. 28, 35 L. Ed. 925; Clews *v.* Jamieson, 182 U. S. 461, 489, 45 L. Ed. 1183; Roundtree *v.* Smith, 108 U. S. 269, 276, 27 L. Ed. 722; Irwin *v.* Williar, 110 U. S. 499, 508, 28 L. Ed. 225.

15. Intention of one party will not invalidate.—Irwin *v.* Williar, 110 U. S. 499, 508, 28 L. Ed. 225; Higgins *v.* McCrea, 116 U. S. 671, 675, 29 L. Ed. 764; Roundtree *v.* Smith, 108 U. S. 269, 276, 27 L. Ed. 722; Bibb *v.* Allen, 149 U. S. 481, 492, 37 L. Ed. 817.

"The evidence of the defendant on this point was that he gave the instructions to buy. He says: 'I could not say that I had any understanding on the subject of the nature and character of the board of trade deals, whether the property was to be actually delivered or whether it was to be settled for.' It is obvious, therefore, that so far as plaintiff, one of the parties to all these contracts, which he now impeaches, is concerned, they were not gambling contracts, and that he had no understanding or agreement, expressed or implied, that they were bets upon the future price of the article." Roundtree *v.* Smith, 108 U. S. 269, 275, 27 L. Ed. 722.

16. Guilty party cannot recover on counterclaim.—Higgins *v.* McCrea, 116 U. S. 671, 678, 29 L. Ed. 764. See, generally, the title SET-OFF, RECOUPMENT AND COUNTERCLAIM.

An action was brought to recover an amount of money expended for the purchase of certain commodities as agent for another party and the Chicago exchange. The person against whom the action was brought set up a defense that the contract was a gambling transaction and therefore void, and they also filed a counterclaim asking for the recovery of certain moneys which they had paid to the plaintiff. The proof did not show it was the intention of the plaintiff when entering into the contract that it should be a gambling transaction, and it was held by the court that the defendant who alleged the contract to be illegal could not recover on the counterclaim against the innocent plaintiff. The court in this case said: "Upon the case made by his counterclaim, the defendant was not entitled to recover, and the fact that the plaintiffs were innocent of any unlawful purpose did not enure to the benefit of the defendant, who confessed that the money which he sought to recover had been paid by him to promote an illegal and criminal venture." Higgins *v.* McCrea, 116 U. S. 671, 686, 29 L. Ed. 764.

17. Dependent upon intention of parties.—White *v.* Barber, 123 U. S. 392, 31 L. Ed. 243; Irwin *v.* Williar, 110 U. S. 499, 510, 28 L. Ed. 225; Bibb *v.* Allen, 149 U. S. 481, 499, 37 L. Ed. 817; Armstrong *v.* Toler, 11 Wheat. 258, 273, 6 L. Ed. 468; Embrey *v.* Jemison, 131 U. S. 336, 346, 33 L. Ed. 172; Higgins *v.* McCrea, 116 U. S. 671, 686, 29 L. Ed. 764; Gatewood *v.* North Carolina, 203 U. S. 531, 542, 51 L. Ed. 305.

18. Innocent agent may recover commission and advances.—Bibb *v.* Allen, 149 U. S. 481, 499, 37 L. Ed. 817; Irwin *v.* Williar, 110 U. S. 499, 510, 28 L. Ed. 225; Embrey *v.* Jemison, 131 U. S. 336, 346, 33 L. Ed. 172.

"It is certainly true that a broker might negotiate such a contract without being privy to the illegal intent of the principal parties to it which renders it void, and in such a case, being innocent of any violation of law, and not suing to enforce an unlawful contract, has a meritorious ground for the recovery of compensation for services and advances." Embrey *v.* Jemison, 131 U. S. 336, 345, 33 L. Ed. 172.

A suit in equity was brought to recover a sum of money which the plaintiff alleged he had put into defendant's hands to be used by him in what were in effect gambling contracts, being sales of wheat which neither party intended should ever be delivered. The court held that the evidence indicated that such was not the defendant's intention and that as he did nothing to indicate he understood the transactions were to be illegal, and as the sales were unlawful, the plaintiff was not entitled to recover the money. White *v.* Barber, 123 U. S. 392, 31 L. Ed. 243.

A person who alleges that transactions between himself and another person were gambling contracts cannot recover money paid to such person as his agent where the person to whom it was paid did not understand that the contracts were of this

agents may be so connected with the illegality of a gambling transaction as to be affected by it, yet, where they are suing only for services performed or money advanced to their principals, they are not in the same position as a party who seeks to enforce the original illegal agreement.[19] But where a broker is privy to a gambling transaction and brings the parties together for the very purpose of entering into the illegal agreement, he is particeps criminis, and cannot recover for services rendered, or losses incurred by himself on behalf of either in forwarding the transaction.[20]

IV. Recovery of Losses.

A state may provide by statute that a person who has lost money in a gambling transaction may have a right of action to recover the amount.[21] While a state may always give a right of action to a loser to recover money lost in a gambling transaction, it need not limit the right of action to him alone, but may proceed further and allow an action to be brought by a common informer who may recover the money.[22] It is competent for a state in furtherance of a plan to suppress gambling to provide that, not only an action may be brought for the recovery of losses from the winner, but also to make the owner of the building, in which the loss was sustained, liable when he has knowledge that gambling is being carried on on his premises.[23]

V. Evidence.

A. Presumption and Burden of Proof.—The presumption is that all contracts are legal and valid, and where it is sought to set aside the contract valid upon its face upon the ground that it is a gambling transaction, the burden of proof is upon the party who seeks to establish the invalidity of the transaction.[24]

B. Competency.—Liability to Gamble When Intoxicated.—Evidence that a party when intoxicated was liable to indulge in gaming, is not admissible in an action upon promissory notes, the defense to which is that their consideration was money lost at play.[25]

C. Weight and Sufficiency.—Evidence of Similar Transactions.—Evidence that other transactions similar to the one entered into between two parties were gambling contracts, will not be sufficient to prove that parties to a contract which was regular upon its face intended to violate the law.[26]

Judgment against Winner.—In some states a judgment against the winner

character but supposed them to be legal and bona fide transactions. White *v.* Barber, 123 U. S. 392, 31 L. Ed. 243.

19. Not in same position as principal.—Roundtree *v.* Smith, 108 U. S. 269, 276, 27 L. Ed. 722; Irwin *v.* Williar, 110 U. S. 499, 509, 28 L. Ed. 225.

20. Where agent has knowledge of illegality of transaction.—Irwin *v.* Williar, 110 U. S. 499, 500, 28 L. Ed. 225.

21. Power of state to provide for recovery of losses.—Huntington *v.* Attrill, 146 U. S. 657, 667, 36 L. Ed. 1123; Marvin *v.* Trout, 199 U. S. 212, 224, 50 L. Ed. 151.

22. Common informer.—Marvin *v.* Trout, 199 U. S. 212, 224, 50 L. Ed. 151. See the title PENALTIES AND FORFEITURES.

A statute giving the right to recover back money lost at gaming, and, if the loser does not sue within a certain time, authorizing a qui tam action to be brought by any other person for threefold the amount, has been held to be remedial as to the loser, though penal as regards the suit by a common informer. Huntington *v.* Attrill, 146 U. S. 657, 667, 36 L. Ed. 1123.

23. From owner of building.—Marvin *v.* Trout, 199 U. S. 212, 224, 50 L. Ed. 151.

A statute of the state of Ohio provided that a recovery could be had of money lost at gambling, and it made a judgment for the recovery of money thus lost, a lien upon the property of the owner of the building in which the gambling was conducted, if it was conducted with his knowledge and consent. It was held, that this was a valid exercise of the police power of the state and did not deprive the owner of his property without due process of law. Marvin *v.* Trout, 199 U. S. 212, 224, 50 L. Ed. 151.

24. Burden of proving invalidity.—Bibb *v.* Allen, 149 U. S. 481, 492, 37 L. Ed. 817; Clews *v.* Jamieson, 182 U. S. 461, 490, 45 L. Ed. 1183; Irwin *v.* Williar, 110 U. S. 499, 500, 28 L. Ed. 225; Bank *v.* Dunn, 6 Pet. 51, 8 L. Ed. 316.

25. Liability to gamble.—Thompson *v.* Bowie, 4 Wall. 463, 18 L. Ed. 423.

26. Similar transactions.—Roundtree *v.* Smith, 108 U. S. 269, 276, 27 L. Ed. 722.

for the recovery of money lost at gaming, is conclusive evidence against the owner of the building in which the gambling took place.[27]

Knowledge of One Party Insufficient to Establish Invalidity.—The invalidity of a transaction regular upon its face is not established by proof that one of the parties to the transaction intended it to be a gambling or wager contract, but the evidence must establish the fact that both parties so intended it.[28]

GAME AND GAME LAWS.

CROSS REFERENCES.

See the titles ANIMALS, vol. 1, p. 316; FISH AND FISHERIES, ante, p. 291; INDIANS; OYSTERS; POLICE POWER; PUBLIC LANDS; STATES; TREATIES; UNITED STATES.

As to contracts made by the United States regulating the taking of seals, see the title UNITED STATES. As to all questions relating to taking or preservation of fish, see the title FISH AND FISHERIES, ante, p. 291. As to property in wild animals, see the title ANIMALS, vol. 1, p. 317.

Control and Regulation of Taking of Game.—A state has the unquestioned power to control and regulate the taking of game.[1]

Hunting by Indians within State's Limits.—See the title INDIANS.

Transportation beyond Limits of State Where Killed.—A state has the power to make it an offense to have in possession, for the purpose of transportation beyond the state, game birds which have been lawfully killed within the state during the open season, and a statute creating this offense does not violate the interstate commerce clause of the constitution of the United States.[2]

27. **Judgment against winner.**—Marvin *v.* Trout, 199 U. S. 212, 50 L. Ed. 151.

28. Roundtree *v.* Smith, 108 U. S. 269, 276, 27 L. Ed. 722; Bibb *v.* Allen, 149 U. S. 481, 492, 37 L. Ed. 817.

1. **Control and regulation.**—Greer *v.* Connecticut, 161 U. S. 519, 40 L. Ed. 793; Ward *v.* Race Horse, 163 U. S. 504, 507, 41 L. Ed. 244.

Preservation of game.—The preservation of game has always been treated as within the proper domain of the police power, and laws limiting the season within which birds and wild animals may be killed or exposed for sale, have been repeatedly upheld by the courts. Lawton *v.* Steele, 152 U. S. 133, 138, 38 L. Ed. 385.

"The preservation of such animals as are adapted to consumption as food or to any other useful purpose, is a matter of public interest; and it is within the police power of the state, as the representative of the people in their united sovereignty, to make such laws as will best preserve such game, and secure its beneficial use in the future to the citizens, and to that end it may adopt any reasonable regulations, not only as to time and manner in which such game may be taken and killed, but also imposing limitations upon the right of property in such game after it has been reduced to possession. Such limitations deprive no person of his property, because he who takes or kills game had no previous right of property in it, and when he acquires such right by reducing it to possession he does so subject to such conditions and limitations as the legislature has seen fit to impose." Greer *v.* Connecticut, 161 U. S. 519, 533, 40 L. Ed. 793.

2. **May forbid transportation from state.**—Greer *v.* Connecticut, 161 U. S. 519, 523, 40 L. Ed. 793.

GAMING.

CROSS REFERENCES.

See the titles EVIDENCE, vol. 5, p. 1004; GAMBLING CONTRACTS, ante, p. 537; GRAND JURY; HABEAS CORPUS; INFORMERS; PENALTIES AND FORFEITURES.

As to the right to attack the constitutionality of a statute prohibiting gaming upon the ground that it is unfairly construed or administered, see the title CONSTITUTIONAL LAW, vol. 4, p. 367.

Validity of Statutes Prohibiting Gaming.—The suppression of gambling is concededly within the police powers of a state, and legislation prohibiting it, or acts which may tend to or facilitate it, will not be interfered with by the court unless such legislation be a "clear, unmistakable infringement of rights secured by the fundamental law."[1] And it is competent for a state to prohibit gambling by a severe penalty.[2] And a state may declare that all contracts for options to sell or buy at a future time, or any attempt to influence the price of commodities by spreading false rumors, or to corner the market, shall be illegal and punishable as a criminal offense.[3]

Construction of Statutes Allowing Gaming.—Statutes which allow gaming are to be construed strictly.[4] And it has been held, that a special statute which allowed associations to be formed for the purpose of receiving subscriptions, and to sell and dispose of certificates of subscriptions which shall entitle the holders thereof to such prizes as may be awarded to them, did not authorize the keeping of tables for gaming contrary to the general laws of such state.[5]

GARDEN SEEDS.—See note 6.

GARNISHMENT.—See the title ATTACHMENT AND GARNISHMENT, vol. 2, p. 591.

1. **Right of state to prohibit.**—Booth *v.* Illinois, 184 U. S. 425, 429, 46 L. Ed. 623; Otis *v.* Parker, 187 U. S. 606, 47 L. Ed. 323; Ah Sin *v.* Wittman, 198 U. S. 500, 505, 49 L. Ed. 1142.

2. **May be prohibited by severe penalty.**—Craig *v.* Missouri, 4 Pet. 410, 459, 7 L. Ed. 903.

3. **May punish buying and selling of options.**—Booth *v.* Illinois, 184 U. S. 425, 426, 46 L. Ed. 623.

By § 130 of the criminal code of Illinois it is provided that "whoever contracts to have or give to himself or another the option to sell or buy, at a future time, any grain, or other commodity, stock of any railroad or other company; or gold, or forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market, or attempts to do so in relation to any of such commodities, shall be fined not less than ten dollars nor more than one thousand dollars, or confined in the county jail not exceeding one year, or both." Rev. Stat., Ill. Crim. Code (by Hurd, 1901), § 130. This provision was held constitutional. Booth *v.* Illinois, 184 U. S. 425, 426, 46 L. Ed. 623.

4. **Construed strictly.**—Aicardi *v.* State, 19 Wall. 636, 22 L. Ed. 215.

5. **Cannot be extended by implication.**—Aicardi *v.* State, 19 Wall. 635, 639, 22 L. Ed. 215.

6. **Garden seeds.**—See Ferry *v.* Livingston, 115 U. S. 542, 549, 29 L. Ed. 489. See, also, the title REVENUE LAWS.

GAS.

BY ERNEST P. STEINHAUER.

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CROSS REFERENCES.

As to imposing unusual and unnecessary restrictions upon a gas company, see the title CONSTITUTIONAL LAW, vol. 4, pp. 366, 372. As to power of municipal corporations to grant special or exclusive privileges, see the title CONSTITUTIONAL LAW, vol. 4, p. 410. As to special and exclusive franchises being inviolable, see the title CONSTITUTIONAL LAW, vol. 4, p. 424. As to vested rights and retrospective legislation, see the title CONSTITUTIONAL LAW, vol. 4, pp. 424, 425. As to exclusive franchise as a contract, see the title CORPORATIONS, vol. 4, p. 681. As to legality of agreements disabling gas company from performance of duties, see the title CORPORATIONS, vol. 4, p. 737. As to taking the property of a gas company without due process of law, see the title DUE PROCESS OF LAW, vol. 5, p. 499. As to scope of guarantee given by a gas company to the bonds of a municipal corporation, see the title GUARANTY. As to impairment of obligation of contract made with gas companies, see the title IMPAIRMENT OF OBLIGATION OF CONTRACTS. As to judicial notice of the way in which natural gas is conducted from gas well, see the title JUDICIAL NOTICE. As to construction of lease for purpose of boring for oil and gas, see the title MINES AND MINERALS. As to admittance of natural gas under the tariff, see the title REVENUE LAWS. As to taxation of gas under the internal revenue laws, see the title REVENUE LAWS. As to exemption from taxation because of legislative grant of privilege to construct and maintain a gas company in a municipality, see the title TAXATION.

I. Natural Gas.

A. Definition.—"The substance that is taken from the bosom of the earth and which burns brightly without any further labor put upon it, is properly designated as natural gas."[1]

B. Nature—1. AS A MINERAL.—Though gas is included by some authorities in the definition of a mineral,[2] there are many respects in which it differs from

1. **Definition.**—United States *v.* Buffalo Natural Gas Fuel Co., 172 U. S. 339, 340, 43 L. Ed. 469.

2. **Gas considered as a mineral.**—The word "minerals" in the mineralogical sense of the word almost invariably refers to solids and in the mineralogical definition gases would not be included, but there is a wider definition, which according to some authorities includes all the constitutents of the earth's crust, and which would include gases. If a scientific man wants to be precise he confines his use of the term "mineral" to a certain homogeneous substance, a chemical entity, having a definite composition, just as the mineralogist does. But nevertheless minerals are both solids and liquid, ac-

other minerals.[3]

2. Analogy between Animals Feræ Naturæ and Natural Gas.—While there is an analogy between animals feræ naturæ and the moving deposits of natural gas, there is no identity between them.[4]

C. Ownership.—Surface Proprietors.—The surface proprietors within the gas field all have the right to reduce to possession the gas beneath. They could not be absolutely deprived of this right which belongs to them without a taking of private property.[5]

D. Legislation to Prevent Waste of Natural Gas—Fourteenth Amendment.—Statutory provisions may be made for the prevention of waste of natural gas without conflicting with the fourteenth amendment.[6]

cording to most definitions, and some authorities include gases among minerals and others exclude them. United States v. Buffalo Natural Gas Fuel Co., 172 U. S. 339, 342, 43 L. Ed. 469.

3. "True it is that oil and gas, like other minerals, are situated beneath the surface of the earth, but except for this one point of similarity, in many other respects they greatly differ. They have no fixed situs under a particular portion of the earth's surface within the area where they obtain. They have the power, as it were, of self-transmission. No one owner of the surface of the earth, within the area beneath which the gas and oil move, can exercise his right to extract from the common reservoir, in which the supply is held, without, to an extent, diminishing the source of supply as to which all other owners of the surface must exercise their rights. The waste by one owner; caused by a reckless enjoyment of his right of striking the reservoir, at once, therefore, operates upon the other surface owners. Besides, whilst oil and gas are different in character, they are yet one, because they are unitedly held in the place of deposit." Ohio Oil Co. *v.* Indiana (No. 1.), 177 U. S. 190, 202, 44 L. Ed. 729.

4. **Analogy between animals feræ naturæ and natural gas.**—"Whilst there is an analogy between animals feræ naturæ and the moving deposits of oil and natural gas, there is not identity between them. Thus, the owner of land has the exclusive right on his property to reduce the game there found to possession, just as the owner of the soil has the exclusive right to reduce to possession the deposits of natural gas and oil found beneath the surface of his land. The owner of the soil cannot follow game when it passes from his property; so, also, the owner may not follow the natural gas when it shifts from beneath his own to the property of some one else within the gas field. It being true as to both animals feræ naturæ and gas and oil, therefore, that whilst the right to appropriate and become the owner exists, proprietorship does not take being until the particular subjects of the right become property by being reduced to actual possession. The identity, however, is for many reasons wanting. In things feræ naturæ all are endowed with the power of seeking to reduce a portion of the public property to the domain of private ownership by reducing them to possession. In the case of natural gas and oil no such right exists in the public. It is vested only in the owners in fee of the surface of the earth within the area of the gas field. This difference points at once to the distinction between the power which the lawmaker may exercise as to the two. In the one, as the public are the owners, every one may be absolutely prevented from seeking to reduce to possession. No divesting of private property, under such a condition, can be conceived because the public are the owners, and the enacting by the state of a law as to the public ownership is but the discharge of the governmental trust resting in the state as to property of that character." Ohio Oil Co. *v.* Indiana (No. 1), 177 U. S. 190, 209, 44 L. Ed. 729.

5. **Ownership.**—Ohio Oil Co. *v.* Indiana (No. 1), 177 U. S. 190, 209, 44 L. Ed. 729.

The rule of general law in the state of Indiana, is that although in virtue of his proprietorship the owner of the surface may bore wells for the purpose of extracting natural gas and oil, until these substances are actually reduced by him to possession, he has no title whatever to them as owner. That is, he has the exclusive right on his own land to seek to acquire them, but they do not become his property until the effort has resulted in dominion and control by actual possession. Ohio Oil Co. *v.* Indiana (No. 1), 177 U. S. 190, 208, 44 L. Ed. 729.

Petroleum gas is a substance of a peculiar character, and decisions in ordinary cases of mining, for coal and other minerals which have a fixed situs, cannot be applied to contracts concerning it without some qualifications. It belongs to the owner of the land, and is part of it, so long as the gas is on it or in it, or subject to his control, but when it escapes and goes into other land, or come under another's control, the title of the former owner is gone. If an adjoining owner drills his own land and taps a deposit of gas extending under his neighbor's field, so that it comes into his well, it becomes his property. Brown *v.* Spilman, 155 U. S. 665, 670, 39 L. Ed. 304.

6. **Legislation to prevent waste of**

II. Gas Companies.

A. Grant of Exclusive Privilege.—Municipal corporations constitute a part of the civil government of the state, and their streets are highways, which it is the province of government by appropriate means to render safe.[7] To that end the lighting of streets is a matter of which the public may assume control.[8] For these reasons, and the necessity of uniform regulations for the manufacture and distribution of gas for use by the community, a state may grant to a gas company the exclusive privilege of supplying gas.[9] Such legislation is not open to the objection that it is a monopoly;[10] and although the exclusive privilege may tend to injure the public if not properly regulated, it is none the less a contract,[11] and should not be impaired.[12] A grant of exclusive privilege does not obstruct the states in the exercise of the police power;[13] nor does it prevent a municipal corporation from buying stock in another gas company.[14]

natural gas—Fourteenth amendment.—The Indiana statute of March 4, 1893 (acts of 1893, ch. 36, p. 300), providing "that it shall be unlawful for any person, firm or corporation having possession or control of any natural gas or oil well, whether as a contractor, owner, lessee, agent or manager, to allow or permit the flow of gas or oil from any such well to escape into the open air, without being confined within such well or proper pipes or other safe receptacle, for a longer period than two (2) days next after gas or oil shall have been struck in such well; and thereafter all such gas or oil shall be safely and securely confined in such well, pipes or other safe and proper receptacles," does not take the private property of an owner without due process of law. Ohio Oil Co. *v.* Indiana (No. 1), 177 U. S. 190, 44 L. Ed. 729.

7. **Protection of public.**—New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650, 658, 29 L. Ed. 516. See the title STREETS AND HIGHWAYS.

8. **Public nature of supplying gas.**—New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650, 658, 29 L. Ed. 516.

"The manufacture and distribution of illuminating gas, by means of pipes or conduits placed, under legislative authority, in the street of a town or city, is a business of a public character. Under proper management, the business contributes very materially to the public convenience, while, in the absence of efficient supervision, it may disturb the comfort and endanger the health and property of the community. It also holds important relations to the public through the facilities furnished, by the lighting of streets with gas, for the detection and prevention of crime." New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650, 658, 29 L. Ed. 516. See, also, Gibbs *v.* Consolidated Gas Co., 130 U. S. 396, 408, 32 L. Ed. 979.

Public purpose.—"Authority for the position that the supplying of gas to a city and its people may become a public purpose is found in New Orleans *v.* Clark, 95 U. S. 644, 24 L. Ed. 521." New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650, 659, 29 L. Ed. 516.

9. **Grant of exclusive privilege.**—New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650, 653, 29 L. Ed. 516. See the title CONSTITUTIONAL LAW, vol. 4, p. 410.

10. **Is not a monopoly.**—"Legislation of that character is not liable to the objection that it is a mere monopoly, preventing citizens from engaging in an ordinary pursuit or business, open as of common right to all, upon terms of equality; for the right to dig up the streets and other public ways of New Orleans, and place therein pipes and mains for the distribution of gas for public and private use, is a franchise, the privilege of exercising which could only be granted by the state, or by the municipal government of that city acting under legislative authority. Dillon's Municipal Corp., 3d. Ed., § 691." New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650, 659, 29 L. Ed. 516. See, generally, the title MONOPOLIES AND CORPORATE TRUSTS.

11. **Is a contract.**—New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650, 671, 29 L. Ed. 516.

12. **Contract should not be impaired.**—Before the adoption of the present constitution of Louisiana the legislature had authority to grant to a private corporation an exclusive privilege of supplying gas to the city and people of New Orleans, and such grant constitutes a contract, the obligation of which cannot be impaired by a state law. New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650, 29 L. Ed. 516. See, generally, the title IMPAIRMENT OF OBLIGATION OF CONTRACTS. And see the title CONSTITUTIONAL LAW, vol. 4, p. 424.

13. **Does not obstruct police power.**—Because a state grants the exclusive privilege of furnishing gas to a city it cannot be said that such grant obstructs the state in the exercise of her power to provide for the public protection, health, and safety. New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650, 672, 29 L. Ed. 516. See, generally, the titles IMPAIRMENT OF OBLIGATION OF CONTRACTS; POLICE POWER.

14. **Does not prevent taking stock in**

B. Consolidation of Gas Companies.—Under a provision for the consolidation of two "now existing" corporations, two gas companies may consolidate although one of them may not be a full-pledged corporation.[15]

C. Paying for Removal of Pipes by City.—Where, in order to accommodate a system of drainage, it is necessary to move gas pipes, the gas company may be compelled to pay the expenses of such moving.[16]

D. Power to Fix Price at Which Companies to Sell Gas.—Unless prohibited by the constitution or by contract, the legislatures have the power to regulate the price at which gas is to be sold, by a gas company to a municipal corporation;[17] but the gas company may invoke the aid of the courts when the regulations amount to the taking of property without compensation.[18]

E. Duty of Gas Company to Repair Gas Boxes.—It is the duty of a gas company to repair the gas boxes, when they are parts of its necessary appliances and are placed in the sidewalk and used for the purpose of connecting the gas mains with the houses, and this duty is not affected by the circumstances that the cost of the labor and materials used in the construction of the boxes is paid by the owners of the houses.[19]

another company.—Memphis City *v.* Dean, 8 Wall. 64, 19 L. Ed. 326.

15. Consolidation of gas companies.—New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650, 656, 29 L. Ed. 516. See, generally, the title CORPORATIONS, vol. 4, p. 770.

Under the act of the general assembly of Louisiana, providing "that any two business and manufacturing corporations or companies now existing under general or special law, whose object and business are in general of the same nature may amalgamate, unite, and consolidate," a gas company given the exclusive privilege of supplying gas to the city of New Orleans, until April 1, 1875, may consolidate with another corporation that has been given the exclusive right from such date. New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650, 656, 29 L. Ed. 516.

16. Paying for removal of pipes by city.—New Orleans Gas Light Co. *v.* Drainage Commission, 197 U. S. 453, 49 L. Ed. 831.

In the case of New Orleans Gas Light Co. *v.* Drainage Commission, 197 U. S. 453, 49 L. Ed. 831, a gas company had acquired an exclusive right to supply gas to the city of New Orleans and its inhabitants through pipes and mains laid in the streets. In the exercise of that right it had laid its pipes in the streets. Subsequently a drainage commission, proceeding under statutory authority, devised a system of drainage for the city, and in the execution of its plans it became necessary to change the location in some places of the mains and pipes laid by the gas company. The contention of that company was that it could not be required, at its own cost, to shift its pipes and mains so as to accommodate the drainage system; that to require it to do so would be a taking of its property for public use without compensation, in violation of the constitution of the United States. This court said: "The gas company did not acquire any specific location in the streets; it was content with the general right to use them, and when it located its pipes it was at the risk that they might be, at some future time, disturbed, when the state might require, for a necessary public use, that changes in location be made. * * * There is nothing in the grant to the gas company, even if it could legally be done, undertaking to limit the right of the state to establish a system of drainage in the streets. We think whatever right the gas company acquired was subject, in so far as the location of its pipes was concerned, to such further regulations as might be required in the interest of the public health and welfare." Chicago, etc., R. Co. *v.* Illinois, 200 U. S. 561, 590, 50 L. Ed. 596.

17. Power to fix price at which companies to sell gas.—Spring Valley Water Works *v.* Schottler, 110 U. S. 347, 28 L. Ed. 173.

18. When regulations amount to taking property without compensation.—Where a gas company, at a former period, had violated the antitrust law of Illinois, but afterwards ceased such violation, it is not precluded from invoking the aid of the court to restrain the enforcement of an ordinance fixing the price of gas, when such rates amount to the taking of property without compensation. Peoria Gas, etc., Co. *v.* Peoria, 200 U. S. 48, 50 L. Ed. 365.

19. Duty of gas company to repair gas boxes.—Washington Gas Light Co. *v.* District of Columbia, 161 U. S. 316, 40 L. Ed. 712.

A municipal corporation has a cause of action against a gas company where it has been condemned to pay damages occasioned by a defective gas box, which it was the duty of the gas company to supervise and repair. Washington Gas Light Co. *v.* District of Columbia, 161 U. S. 316, 327, 40 L. Ed. 712.

GATES AT CROSSINGS.—See the title CROSSINGS, vol. 1, p. 152.
GENERAL AGENT.—See the title PRINCIPAL AND AGENT.
GENERAL APPEARANCE.—See the titles APPEAL AND ERROR, vol. 2, p. 172; APPEARANCES, vol. 2, p. 443.
GENERAL ASSIGNMENT.—See the title ASSIGNMENTS FOR BENEFIT OF CREDITORS, vol. 2, p. 601.
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GENERAL AVERAGE.

BY J. N. CLAYBROOK.

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CROSS REFERENCES.

See the titles ADMIRALTY, vol. 1, p. 119; BOTTOMRY AND RESPONDENTIA, vol. 3, p. 448; CARRIERS, vol. 3, p. 556; COLLISION, vol. 3, p. 870; MARINE INSURANCE; MARITIME LIENS; MASTERS OF VESSELS; SALVAGE; SHIPS AND SHIPPING; TOWAGE, TUGS AND TOWS.

As to admiralty jurisdiction over general average, see the title ADMIRALTY, vol. 1, p. 147. As to intervention in salvage case by shipowners claiming general average, see the title ADMIRALTY, vol. 1, p. 169, note 64. As to discharge of bottomry bond by adjusters of average who have paid it and taken an assignment to themselves, see the title BOTTOMRY AND RESPONDENTIA, vol. 3, p. 458. As to exemptions of particular average in policies of marine insurance, see the title MARINE INSURANCE.

I. Definitions.

General average denotes that contribution which is made by all who are parties to the same adventure towards a loss arising out of extraordinary sacrifices made, or extraordinary expenses incurred, by some of them, for the common benefit of ship and cargo.[1] The principle of the rule is that whatever is sacrificed voluntarily, for the common good, is to be recompensed by the common contribution of the property benefited thereby.[2]

1. General average defined.—McAndrews *v.* Thatcher, 3 Wall. 347, 370, 18 L. Ed. 155; Star of Hope, 9 Wall. 203, 228, 19 L. Ed. 638; Hobson *v.* Lord, 92 U. S. 397, 399, 23 L. Ed. 613; Fowler *v.* Rathbones, 12 Wall. 102, 114, 20 L. Ed. 281.

"General average contribution is defined to be a contribution by all the parties in a sea adventure to make good the loss sustained by one of their number on account of sacrifices voluntarily made of part of the ship or cargo to save the residue and the lives of those on board from an impending peril, or for extraordinary expenses necessarily incurred by one or more of the parties for the general benefit of all the interests embarked in the enterprise." Star of Hope, 9 Wall. 203, 228, 19 L. Ed. 638.

General average arises when a sacrifice of part has been made for the residue, or when money is expended, to preserve the whole. Sansom *v.* Ball, 4 Dall. 459, 1 L. Ed. 908.

"Where two or more parties are engaged in the same sea risk, and one of them, in a moment of imminent peril, makes a sacrifice to avoid the impending danger, or incurs extraordinary expenses to promote the safety of all the associated interests, common justice requires that the sacrifice so made, or the extraordinary expenses so incurred, shall be assessed upon all the interests which were so exposed to the impending peril, and which were saved, by those means, from the threatened danger, in proportion to the share of each in the joint adventure." Fowler *v.* Rathbones, 12 Wall. 102, 114, 20 L. Ed. 281; McAndrews *v.* Thatcher, 3 Wall. 347, 366, 18 L. Ed. 155; Star of Hope, 9 Wall. 203, 228, 19 L. Ed. 638; Ralli *v.* Troop, 157 U. S. 386, 395, 39 L. Ed. 742; Hobson *v.* Lord, 92 U. S. 397, 404, 23 L. Ed. 613.

It is the safety of the property and not the voyage which constitutes the foundation of general average. Columbian Ins. Co. *v.* Ashby, 13 Pet. 331, 10 L. Ed. 186.

Liability for average neither a contract or tort.—A claim for general average contribution neither arises out of contract or tort. The Eagle, 8 Wall. 15, 23, 19 L. Ed. 365; Ralli *v.* Troop, 157 U. S. 386, 403, 39 L. Ed. 742.

2. Principle of rule.—Columbian Ins. Co. *v.* Ashby, 13 Pet. 331, 343, 10 L. Ed. 186; McAndrews *v.* Thatcher, 3 Wall. 347, 367, 18 L. Ed. 155; Hobson *v.* Lord, 92 U. S. 397, 409, 23 L. Ed. 613; Ralli *v.* Troop, 157 U. S. 386, 395, 39 L. Ed. 742; Star of Hope, 9 Wall. 203, 231, 19 L. Ed. 638;

II. Origin and Nature.

The law of general average, coming down to us from remote antiquity, is derived from the law of Rhodes, through the law of Rome,[3] and is part of the maritime law, or law of the sea, as distinguished from the municipal law, or law of the land.[4] General average has its foundation in equity, and rests upon the doctrine, that whatever is sacrificed for the common benefit of the associated interests shall be made good by all the interests which were exposed to the common peril, and which were saved from the common danger by the sacrifice.[5]

III. Losses Giving Rise to General Average.

A. Classification of Losses.—Losses in a sea risk which give a claim to general average are usually divided into two great classes: (1) Those which arise from a sacrifice of part of the ship, or part of the cargo, purposely made to save the whole adventure from perishing. (2) Such as arise out of extraordinary expenses incurred, by one of the parties, in the course of the voyage, for the joint benefit of the ship and cargo.[6]

B. Sacrifice of Part of Adventure for Benefit of Whole—1. In General.—To constitute a general average loss the ship and cargo must have been placed in a common imminent peril; there must have been a voluntary sacrifice of property to avert that peril; and the attempt to avoid the imminent common peril must have been successful.[7]

Barnard *v.* Adams, 10 How. 270, 302, 13 L. Ed. 417.

3. Derived from Rhodian law.—Ralli *v.* Troop, 157 U. S. 386, 39 L. Ed. 742; The Irrawaddy, 171 U. S. 187, 189, 43 L. Ed. 130; McAndrews *v.* Thatcher, 3 Wall. 347, 366, 18 L. Ed. 155; Columbian Ins. Co. *v.* Ashby, 13 Pet. 331, 337, 10 L. Ed. 186.

Although the Rhodian law, in terms, made no provision for any case of general average, except for that of jettison of goods as the means of lightening the vessel, the rule, as there laid down, has never been understood as being confined to that particular case, but has always been regarded as a general regulation, applicable in all cases falling within the principle on which it is founded. McAndrews *v.* Thatcher, 3 Wall. 347, 366, 18 L. Ed. 155.

4. General average part of maritime law.—Ralli *v.* Troop, 157 U. S. 386, 393, 39 L. Ed. 742.

5. Equitable nature of general average.—Hobson *v.* Lord, 92 U. S. 397, 403, 23 L. Ed. 613; Sansom *v.* Ball, 4 Dall. 459, 1 L. Ed. 908; Star of Hope, 9 Wall. 203, 229, 19 L. Ed. 638; McAndrews *v.* Thatcher, 3 Wall. 347, 372, 18 L. Ed. 155; Barnard *v.* Adams, 10 How. 270, 302, 13 L. Ed. 417.

General average or general contribution is founded on principles of justice and sound policy. Sansom *v.* Ball, 4 Dall. 459, 1 L. Ed. 908.

The principle that "what is given for the general benefit of all shall be made good by the contribution of all," is recommended, not only by its equity, but also by its policy, because it encourages the owner to throw away his property without hesitation in time of need. Barnard *v.* Adams, 10 How. 270, 302, 13 L. Ed. 417; Star of Hope, 9 Wall. 203, 230, 19 L. Ed. 638; Hobson *v.* Lord, 92 U. S. 397, 405, 23 L. Ed. 613.

6. Classification of general average losses.—McAndrews *v.* Thatcher, 3 Wall. 347, 365, 18 L. Ed. 155; Star of Hope, 9 Wall. 203, 228, 19 L. Ed. 638; Fowler *v.* Rathbones, 12 Wall. 102, 114, 20 L. Ed. 281.

7. Elements of general average loss.—Barnard *v.* Adams, 10 How. 270, 302, 13 L. Ed. 417; Columbian Ins. Co. *v.* Ashby, 13 Pet. 331, 338, 10 L. Ed. 186; Ralli *v.* Troop, 157 U. S. 386, 394, 39 L. Ed. 742; McAndrews *v.* Thatcher, 3 Wall. 347, 370, 18 L. Ed. 155; Star of Hope, 9 Wall. 203, 19 L. Ed. 638.

"In order to constitute a case for general average, three things must concur: 1st. A common danger; a danger in which ship, cargo, and crew all participate; a danger imminent and apparently 'inevitable,' except by voluntarily incurring the loss of a portion of the whole to save the remainder. 2d. There must be a voluntary jettison, jactus, or casting away, of some portion of the joint concern for the purpose of avoiding this imminent peril, pericula imminent is evitandi causa, or, in other words, a transfer of the peril from the whole to a particular portion of the whole. 3d. This attempt to avoid the imminent common peril must be successful." Barnard *v.* Adams, 10 How. 270, 302, 13 L. Ed. 417; Ralli *v.* Troop, 157 U. S. 386, 394, 39 L. Ed. 742.

To constitute a general average loss, there must be a voluntary sacrifice of part of a maritime adventure, for the purpose, and with the effect, of saving the other parts of the adventure from an imminent

2. Necessity for Impending Peril.—In order to constitute a general average loss, the ship and cargo must have been in peril, and the sacrifice must have been made to save a part of the adventure, or extraordinary expenses, which became necessary in consequence of a common peril, must have been incurred for the joint benefit of the ship and cargo.[8]

3. Necessity for Sacrifice to Be Voluntary.—Undoubtedly the sacrifice must be voluntary and must have been intended as a means of saving the remaining property of the adventure, and the lives of those on board, and unless such was the purpose of the act it gives no claim for contribution.[9]

4. Absence of Negligence—a. *In General.*—In order to constitute a general average loss, it must appear that the loss was not due to the negligence of those in charge of the vessel,[10] and this is true even under the Harter Act.[11] Thus if a jettison of a cargo is rendered necessary by the negligence of those in charge of the ship, the cargo owners are not restricted to a claim for general average contribution,[12] and, on the other hand, if a ship is stranded by negligence, it cannot claim a general average contribution from the cargo.[13]

b. *Liability for Negligent Sacrifice.*—If the master does not exercise reason-

peril impending over the whole. Ralli *v.* Troop, 157 U. S. 386, 419, 39 L. Ed. 742.

8. Necessity for impending peril.—Hobson *v.* Lord, 92 U. S. 397, 23 L. Ed. 613; Star of Hope, 9 Wall. 203, 19 L. Ed. 638; Fowler *v.* Rathbornes, 12 Wall. 102, 114, 20 L. Ed. 281; McAndrews *v.* Thatcher, 3 Wall. 347, 370, 18 L. Ed. 155; Dupont De Nemours *v.* Vance, 19 How. 162, 15 L. Ed. 584; Barnard *v.* Adams, 10 How. 270, 303, 13 L. Ed. 417; Columbian Ins. Co. *v.* Ashby, 13 Pet. 331, 338, 10 L. Ed. 186; Ralli *v.* Troop, 157 U. S. 386, 394, 39 L. Ed. 742.

Sacrifices, where there is no peril, present no claim for contribution, but the greater and more imminent the peril the more meritorious the claim for such contribution, if the sacrifice was voluntary and contributed to save the associated interests from the impending danger to which the same were exposed. Hobson *v.* Lord, 92 U. S. 397, 400, 23 L. Ed. 613; Star of Hope, 9 Wall. 203, 229, 19 L. Ed. 638; Fowler *v.* Rathbones, 12 Wall. 102, 114, 20 L. Ed. 281; McAndrews *v.* Thatcher, 3 Wall. 347, 370, 18 L. Ed. 155.

No interest is liable to contribute for any general average or expenses incurred subsequently to its ceasing to be at risk, as no interest is compelled to contribute to the loss or expense unless it was benefited by the sacrifice. McAndrews *v.* Thatcher, 3 Wall. 347, 18 L. Ed. 155.

9. Necessity for sacrifice to be voluntary.—Star of Hope, 9 Wall. 203, 232, 19 L. Ed. 638; Sansom *v.* Ball, 4 Dall. 459, 1 L. Ed. 908; The J. P. Donaldson, 167 U. S. 599, 606, 42 L. Ed. 292; Ralli *v.* Troop, 157 U. S. 386, 403, 39 L. Ed. 742.

As a general rule the agency and consent of man must intervene to produce a general average. Sansom *v.* Ball, 4 Dall. 459, 1 L. Ed. 908.

Where salvage was decreed to recaptors it was held that the loss was one giving rise to general average. Sansom *v.* Ball, 4 Dall. 459, 1 L. Ed. 908.

"The distinction between voluntary and compulsory sacrifice is well illustrated by another case stated in the Pandects, recognized in the earliest English case on general average, and approved in all the books, in which money voluntarily paid by the master to ransom the ship and cargo from pirates is to be contributed for; but not so, as to goods or money forcibly taken by pirates. Dig. 14, 2, 1, 5; Hicks *v.* Palington (32 Eliz.) Moore, 297." Ralli *v.* Troop, 157 U. S. 386, 39 L. Ed. 742.

Injury to cargo by water leaking in.—Where no water enters the ship which reaches and damages the cargo, except what comes through holes cut in the bows by the ice previously to such a case of stranding, then the owners of the cargo are not entitled to be allowed anything for the damages to their cargo by water, by way of general average, or by way of reduction of the shipowner's claim. Fowler *v.* Rathbones, 12 Wall. 102, 20 L. Ed. 281.

10. Absence of negligence.—The Irrawaddy, 171 U. S. 187, 189, 43 L. Ed. 130; The Portsmouth, 9 Wall. 682, 19 L. Ed. 754.

11. Under Harter Act.—The Irrawaddy, 171 U. S. 187, 189, 43 L. Ed. 130 (where the ship was stranded by the negligence of those in charge of her, and it was held that the owner could not claim general average contribution from the cargo, for sacrifices subsequent to the stranding).

12. Jettison rendered necessary by negligence.—The Portsmouth, 9 Wall. 682, 19 L. Ed. 754.

Generally, as to the liability of a ship for loss due to a negligent jettison of the cargo, see the title SHIPS AND SHIPPING.

13. Ship stranded by negligence.—The Irrawaddy, 171 U. S. 187, 189, 43 L. Ed. 130.

Not only is the shipowner excluded from contribution by way of general average when the loss arises from the ship's fault, but he is legally responsible to the owner of the cargo for loss and

able skill and judgment and courage in sacrificing goods for the benefit of the adventure, the master and the owner of the ship are each liable to the owner of the goods sacrificed.[14]

5. Necessity for Intention to Destroy Property Cast Away.—It is not necessary that there should have been any intention to destroy the thing or things cast away, as no such intention is ever supposed to exist. On the contrary, it is sufficient that the property was selected to suffer the common peril in the place of the whole of the associated interests, that the remainder might be saved.[15]

6. Necessity of Saving Part of Adventure.—The sacrifice of part of a maritime adventure made for the safety of the whole must be successful in order to entitle the interests sacrificed to general average.[16]

7. Property for Benefit of Which Sacrifice May Be Made.—The law of general average is confined to those cases wherein a voluntary sacrifice is made of some portion of the ship or cargo for the benefit of the residue. The safety of any property, on land or water, not included in that adventure, can neither be an object of the sacrifice, nor a subject of the contribution.[17] The sacrifice of one ship for the safety of another does not give rise to any claim of general average.[18]

8. Who May Make Sacrifice.—The sacrifice must be made by someone specially charged with the control and safety of the adventure.[19] It cannot be made by a stranger,[20] nor by the public authorities.[21] The relations of the master of the vessel and its owners, as well as to the shippers of the cargo, are such that he is invested with the power to make a sacrifice of a part of the adventure for the benefit of the whole.[22] In cases admitting of delay sufficient for that purpose the master should, it seems, consult with the officers as to the

damages so occasioned. The Irrawaddy, 171 U. S. 187, 189, 43 L. Ed. 130.

14. Liability in case of improper sacrifice.—Ralli *v.* Troop, 157 U. S. 386, 400, 39 L. Ed. 742; Barnard *v.* Adams, 10 How. 270, 13 L. Ed. 417; Lawrence *v.* Minturn, 17 How. 100, 15 L. Ed. 58.

15. Necessity for intention to destroy property cast away.—Star of Hope, 9 Wall. 203, 232, 19 L. Ed. 638.

"The intention to destroy the jactus, or thing exposed to loss or damage for the benefit of the whole, makes no part of the hypothesis upon which the right of contribution is founded." Barnard *v.* Adams, 10 How. 270, 305, 13 L. Ed. 417.

16. Necessity of saving of property.—Ralli *v.* Troop, 157 U. S. 386, 419, 39 L. Ed. 742; The J. P. Donaldson, 167 U. S. 599, 602, 42 L. Ed. 292; Barnard *v.* Adams, 10 How. 270, 302, 13 L. Ed. 417; Columbian Ins. Co. *v.* Ashby, 13 Pet. 331, 338, 10 L. Ed. 186.

17. Property for benefit of which sacrifice may be made.—The J. P. Donaldson, 167 U. S. 599, 606, 42 L. Ed. 292; Ralli *v.* Troop, 157 U. S. 386, 403, 39 L. Ed. 742.

18. Sacrifice of one ship to save another.—The J. P. Donaldson, 167 U. S. 599, 602, 42 L. Ed. 292; Ralli *v.* Troop, 157 U. S. 386, 406, 39 L. Ed. 742.

Sacrifice of tow by tug.—A contribution in general average cannot be had against a steam tug for the casting off and abandonment, by her master, of her tow of barges, with the intention, and with the effect, of saving the tug. The J. P. Donaldson, 167 U. S. 599, 601, 42 L. Ed. 292.

19. Who may make sacrifice.—Ralli *v.* Troop, 157 U. S. 386, 419, 39 L. Ed. 742.

The sacrifice, whether of ship or of cargo, must be by the will and act of its owner, or of the master of the ship, or other person charged with the control and protection of the common adventure, and representing and acting for all the interests included in that adventure, and those interests only. Ralli *v.* Troop, 157 U. S. 386, 419, 39 L. Ed. 742.

20. Sacrifice by stranger.—Ralli *v.* Troop, 157 U. S. 386, 419, 39 L. Ed. 742.

A sacrifice of vessel or cargo by the act of a stranger to the adventure, although authorized by the municipal law to make the sacrifice for the protection of his own interests, or of those of the public, gives no right of contribution, either for or against those outside interests, or even as between the parties to the common adventure. Ralli *v.* Troop, 157 U. S. 386, 419, 39 L. Ed. 742.

21. Sacrifice by public authorities.—Ralli *v.* Troop, 157 U. S. 386, 419, 39 L. Ed. 742.

A loss of a vessel due to scuttling by the port authorities, in order to extinguish a fire, is not a general average loss. Ralli *v.* Troop, 157 U. S. 386, 420, 39 L. Ed. 742.

22. Power of master to make sacrifice.—Ralli *v.* Troop, 157 U. S. 386, 401, 39 L. Ed. 742; McAndrews *v.* Thatcher, 3 Wall. 347, 18 L. Ed. 155; Columbian Ins. Co. *v.* Ashby, 13 Pet. 331, 10 L. Ed. 186; Dupont De Nemours *v.* Vance, 19 How. 162, 15 L.

propriety of the sacrifice.[23] In case of the master's death, disability or absence, the mate, or other chief officer of the vessel may, no doubt, succeed to the authority of the master in this as in other respects.[24]

9. Separation of Ship and Cargo before Sacrifice.—The liability of a cargo to contribute, in general average, in favor of the ship, does not continue after the cargo has been completely separated from the vessel, so as to leave no community of interest remaining.[25]

Ed. 584; Barnard *v.* Adams, 10 How. 270, 13 L. Ed. 417; Star of Hope, 9 Wall. 203, 19 L. Ed. 638; The Valencia, 165 U. S. 264, 269, 41 L. Ed. 710; The J. P. Donaldson, 167 U. S. 599, 601, 42 L. Ed. 292.

Whether the master is considered as acting under an implied contract between the owners of the vessel and the shippers of the cargo, or as the agent of all from the necessity of the case, or as exercising a power and duty imposed upon him by the law as incident to his office—whatever may be considered the source of his authority—the power and the duty of determining what part of the common adventure shall be sacrificed for the safety of the rest, and when and how the sacrifice shall be made, appertain to the master of the vessel, magister navis, as the person intrusted with the command and the safety of the common adventure, and of all the interests comprised therein, for the benefit of all concerned, or to some one who, by the maritime law, acts under him, or succeeds to his authority. The J. P. Donaldson, 167 U. S. 599, 601, 42 L. Ed. 292; Ralli *v.* Troop, 157 U. S. 386, 400, 39 L. Ed. 742; The Valencia, 165 U. S. 264, 269, 41 L. Ed. 710.

"From the necessity of the case, the law imposes upon the master the duty, and clothes him with the power, to judge and determine at the time whether the circumstances of danger in such a case are or are not so great and pressing as to render a sacrifice of a portion of the associated interests indispensable for the common safety of the remainder. Standing upon the deck of the vessel, with a full knowledge of her strength and condition, and of the state of the elements which threaten a common destruction, he can best decide in the emergency what the necessities of the moment require to save the lives of those on board and the property intrusted to his care." Ralli *v.* Troop, 157 U. S. 386, 400, 39 L. Ed. 742; Star of Hope, 9 Wall. 203, 19 L. Ed. 638.

Consent of owner.—In former times when merchants voyaged with their wares, their consent was held necessary to a jettison; and the captain was also required to consult with his officers, or with some of his crew, then, perhaps, more nearly his equals than in later times. But, even then, the final decision rested with the captain; for, as Emerigon said: "The captain is master. He is obliged to take advice; but the law does not oblige him to submit himself blindly to that advice, if it is bad, or if, under the circumstances, it appears to be bad." Ralli *v.* Troop, 157 U. S. 386, 399, 39 L. Ed. 742.

At the present day, since voyages are longer, and merchants seldom go with their goods, there is the greater reason that upon the captain, selected for his skill and courage, and for his fitness to command the whole adventure, and to decide promptly and justly in cases of emergency, and better acquainted than any one else with the qualities and condition of the ship, and with the nature and stowage of her cargo, should rest the authority and the duty, in case of imminent peril, first taking such advice as he sees fit, to determine finally, so far as concerns the mutual relations of those interested in the maritime adventure, the time and the manner of sacrificing part of the adventure to secure the safety of the rest. Ralli *v.* Troop, 157 U. S. 386, 399, 39 L. Ed. 742.

23. Consultation with officers.—Columbian Ins. Co. *v.* Ashby, 13 Pet. 331, 343, 10 L. Ed. 186; Ralli *v.* Troop, 157 U. S. 386, 399, 39 L. Ed. 742.

"In the leading case of Columbian Ins. Co. *v.* Ashby, 13 Pet. 331, 343, 10 L. Ed. 186, this court, speaking by Mr. Justice Story, said: 'A consultation with the officers may be highly proper, in cases which admit of delay and deliberation, to repel the imputation of rashness and unnecessary standing by the master. But if the propriety and necessity of the act are otherwise sufficiently made out, there is an end of the substance of the objection. Indeed, in many, if not most, of the acts done on these melancholy occasions, there is little time for deliberation or consultation. What is to be done must often, in order to be successful, be done promptly and instantly by the master, upon his own judgment and responsibility.'" Ralli *v.* Troop, 157 U. S. 386, 399, 39 L. Ed. 742.

24. Death, disability or absence of master.—Ralli *v.* Troop, 157 U. S. 386, 401, 39 L. Ed. 742.

25. Where cargo and ship are separated. —McAndrews *v.* Thatcher, 3 Wall. 347, 18 L. Ed. 155.

A ship was stranded near her port of destination, and the underwriters upon her cargo sent an agent to assist the master in getting her off. The master and agent made all proper efforts to do this, for two days; when not succeeding at all, and the water increasing in the vessel, they began to discharge the cargo in lighters, still making efforts to save the ship. This discharge of the cargo occupied four days; by which time the whole of it was

10. Particular Sacrifices Giving Rise to General Average—a. *Loss or Damage to Ship*—(1) *In General.*—Loss or damage to a ship voluntarily made in the course of a voyage to save the residue of the adventure from an impending peril, is a proper subject of general average.[26]

(2) *Stranding*—(a) *Voluntary Stranding*—aa. *In General.*—The voluntary stranding of a ship in case of imminent peril, made in order to preserve the ship, cargo and crew, is a general average loss, entitling the shipowner to general average contribution from the cargo.[27] The fact that the ship is totally

taken off, and, with the exception of a very small fraction in the lower hold and not discovered, taken to the ship's agents, who subsequently delivered it to its consignees, they giving the usual average bond. By the time that the cargo was thus all got off, the vessel, not assisted by being lightened, was settling in the sand, with the tide ebbing and flowing through her as she lay. The agent considering her case hopeless, and the consignees of the ship having refused to authorize him to incur any further expense, now went away. On the next morning, and while the master was yet aboard, the underwriters on the vessel sent their agent, who got to work to float the vessel. Soon after the new agent came, the crew refused to do duty. The agent got new hands, and the crew went away. They were soon followed by the master, he leaving the vessel after the new agent had been in charge of her for four days. After six weeks' labor, and an expenditure of money somewhat exceeding her value when saved, the new agent succeeded in floating and rescuing the ship. The remnants of the cargo, in a damaged state, were delivered to its consignees. On a suit by the owners of the ship against the consignees of the cargo, for contribution in general average for the expenses incurred after the master went away; held, that the case was not one for contribution; there having been, as the court considered, no community of interest remaining between the ship and cargo, after the master, in the circumstances of the case, had left the ship. McAndrews *v.* Thatcher, 3 Wall. 347, 18 L. Ed. 155.

But the mere fact that the cargo is unladen, although it is done in part for the purpose of saving the goods, if it is also done for the purpose of lightening the vessel, and as a means of causing her to float, and of saving her from the common peril, will not necessarily divest the transaction of its character as an act performed for the joint benefit of the ship and cargo. McAndrews *v.* Thatcher, 3 Wall. 347, 370, 18 L. Ed. 155.

Where the whole adventure is saved by the master, as the agent of all concerned, the consignments of the cargo first unladed and stored in safety are not relieved from contributing towards the expenses of saving the residue, nor is the cargo, in that state of the case, relieved from contributing to the expenses of saving the ship, provided the ship and cargo were exposed to a common peril, and the whole adventure was saved by the master in his capacity as agent of all the interests, and by one continuous series of measures. McAndrews *v.* Thatcher, 3 Wall. 347, 371, 18 L. Ed. 155.

26. Loss or damage to ship in general.—McAndrews *v.* Thatcher, 3 Wall. 347, 18 L. Ed. 155; Hobson *v.* Lord, 92 U. S. 397, 23 L. Ed. 613; Star of Hope, 9 Wall. 203, 19 L. Ed. 638; Columbian Ins. Co. *v.* Ashby, 13 Pet. 331, 10 L. Ed. 186; Fowler *v.* Rathbones, 12 Wall. 102, 20 L. Ed. 281.

The doctrine applies where the ship is a total loss. Columbian Ins. Co. *v.* Ashby, 13 Pet. 331, 10 L. Ed. 186.

27. Voluntary stranding.—Columbian Ins. Co. *v.* Ashby, 13 Pet. 331, 10 L. Ed. 186; Star of Hope, 9 Wall. 203, 232, 19 L. Ed. 638; Barnard *v.* Adams, 10 How. 270, 13 L. Ed. 417; Fowler *v.* Rathbones, 12 Wall. 102, 20 L. Ed. 281; McAndrews *v.* Thatcher, 3 Wall. 347, 368, 18 L. Ed. 155; Allen *v.* Newberry, 21 How. 244, 247, 16 L. Ed. 110; Cutler *v.* Rae, 7 How. 729, 12 L. Ed. 890.

Where the ship is voluntarily run ashore to avoid capture, foundering, or shipwreck, and she is afterwards recovered so as to be able to perform her voyage, the loss resulting from the stranding is to be made good by general average contribution, as such a claim is clearly within the rule that whatever is sacrificed for the common benefit of the associated interests shall be made good by all the interests exposed to the common peril which were saved from the common danger by the sacrifice. Fowler *v.* Rathbones, 12 Wall. 102, 117, 20 L. Ed. 281; Star of Hope, 9 Wall. 203, 232, 19 L. Ed. 638; Columbian Ins. Co. *v.* Ashby, 13 Pet. 331, 10 L. Ed. 186.

It was a proper case for contribution in general average for the loss of a vessel where there was an imminent peril of being driven on a rocky and dangerous part of the coast, when the vessel would have been inevitably wrecked, with loss of ship, cargo, and crew, and this immediate peril was avoided by voluntarily stranding the vessel on a less rocky and dangerous part of the coast, whereby the cargo and crew were saved uninjured. Barnard *v.* Adams, 10 How. 270, 13 L. Ed. 417.

The brig Hope, with a cargo, bound, from Alexandria, in the District of Columbia, for Barbadoes, insured in Alexandria, was assailed, while standing down the Chesapeake Bay, by a storm, which

lost,[28] or that she is in a better condition after stranding than she would have been had she been wrecked or sunk,[29] does not affect the right of the owner to general average.

bb. *What Constitutes Voluntary Stranding.*—To constitute a voluntary stranding of a vessel it is not necessary that there should have been a previous intention to destroy or injure the vessel, nor is such intention supposed to exist; it is sufficient that the vessel was selected to suffer the common peril in the place of the whole of the associated interests, in order that the remainder might be saved.[30]

soon after blew almost to a hurricane; the vessel was steered towards a point in the shore, for safety, and was anchored in three fathoms water; the sails were furled, and all efforts were made, by using the cables and anchors, to prevent her going on shore; the gale increased, the brig broke adrift, and dragged three miles; the windlass was ripped up, the chain-cable parted, and the vessel commenced drifting again, the whole scope of both cables being paid out; the brig then brought up, below Craney Island, in two and a half fathoms water; where she thumped or struck on the shoals on a bank, and her head swinging round, brought her broadside to the sea. The master, finding no possible means of saving the vessel and cargo, and preserving the lives of the crew, slipped her cables, and ran her on shore, for the safety of the crew, and preservation of the vessel and cargo; the vessel was run far up on a bank, where, after the storm, she was left high and dry, and it was found impossible to get her off. The lives of all the persons were saved; the whole cargo, of the value of $5,335, insured for $4,920, was taken out safely, and the vessel, her tackle, etc., were sold for $256. Held, that the insurers of the cargo were liable for general average. Columbian Ins. Co. *v.* Ashby, 13 Pet. 331, 10 L. Ed. 186.

In a case of stranding the shipowners are entitled to recover in general average only those expenses which were caused by stranding the ship, not including any occasioned by damage to the ship through the swelling of the cargo (linseed, which water swells) caused by water which entered through the holes in the bows; but if the ship was also injured by such stranding and by lying on an uneven bottom, her owners are entitled to recover the expenses for repairing such injuries, by way of general average, and it is for the jury to determine from the evidence what such repairs amount to. Fowler *v.* Rathbones, 12 Wall. 102, 20 L. Ed. 281.

28. Ship a total loss.—Star of Hope, 9 Wall. 203, 232, 19 L. Ed. 638; Columbian Ins. Co. *v.* Ashby, 13 Pet. 331, 10 L. Ed. 186.

"It is settled law in this court that the case is one for general average, although the ship was totally lost, if the stranding was voluntary and was designed for the common safety, and it appears that the act of stranding resulted in saving the cargo." Star of Hope, 9 Wall. 203, 232, 19 L. Ed. 638; Columbian Ins. Co. *v.* Ashby, 13 Pet. 331, 10 L. Ed. 186.

29. Where stranding benefits ship.—Barnard *v.* Adams, 10 How. 270, 306, 13 L. Ed. 417.

30. What constitutes voluntary stranding.—Star of Hope, 9 Wall. 203, 19 L. Ed. 638.

Where a ship and cargo are exposed at a particular place to a common peril of sinking, and becoming submerged in deep water, and the expense of raising and saving them from that place would be greater than if stranded in shoal water, and the master, to save them from such increased expenses, runs the ship on flats near by and strands her in shoal water, and thereby increases the peril to the ship and diminishes the damages and expenses of saving her and the cargo, then there is a "voluntary stranding" within the meaning of the law, and a case entitling the owners of the vessel to recover, as general average, their just proportion of such damages and expenses. Fowler *v.* Rathbones, 12 Wall. 102, 20 L. Ed. 281.

The stranding is voluntary whenever the will of man does in some degree contribute thereto, though the existence of the particular reef or bank on which the vessel grounds was not before known to the master, and though he did not intend to strand the vessel thereon; provided it sufficiently appear that in making the exposure of the vessel he was aware that stranding was the chief risk incurred by him, and that it was not wholly unexpected by him. Star of Hope, 9 Wall. 203, 19 L. Ed. 638.

Where the reef where the vessel grounded was not visible at the time and was unknown to the master, but in undertaking to run into the bay the master knew that the chief risk he had to encounter was the stranding of the ship, and the precautions which he took to guard against that danger showed to the entire satisfaction of the court that the disaster was not altogether unexpected as it appeared that as the ship advanced the lead was constantly employed, showing eight fathoms at first, then seven, then six only, and so on, the depth continuing to diminish at each throw of the lead until the ship ground and remained fast, it was held that the stranding was a voluntary act. Star of Hope, 9 Wall. 203, 232, 19 L. Ed. 638.

(b) *Involuntary Stranding*—aa. *In General.*—In case of involuntary stranding where the ship and cargo are jointly exposed to a common peril, and are in imminent danger of being wholly lost, the expenses of saving the ship and cargo are a proper subject of joint and ratable contribution in general average by vessel, freight, and cargo, provided the vessel and cargo are saved by the same series of measures during the continuance of the common peril which created the joint necessity for the expenses.[31]

bb. *Under the Harter Act.*—The Harter Act does not entitle the owner of a vessel which has been stranded by the negligence of those in charge of her to general average, where, subsequently to the stranding, sacrifices are made in order to save the vessel and cargo.[32]

(3) *Cutting Away Masts and Spars.*—The cutting away of masts and spars to save the ship and cargo presents a case of general average.[33]

(4) *Scuttling Ship to Extinguish Fire.*—Whatever may be the rule as to the right of a shipowner to general average where the ship is voluntarily scuttled by the master and crew in order to extinguish a fire, it is settled that he is not entitled to general average contribution from the cargo, where the ship is scuttled by the port authorities.[34]

31. Involuntary stranding.—McAndrews *v.* Thatcher, 3 Wall. 347, 365, 18 L. Ed. 155.

If the ship is got off without discharging the cargo, or by discharging only a part of it, then the whole expense is general average, unless the vessel needs repairs; but if she needs repairs, those are particular average. McAndrews *v.* Thatcher, 3 Wall. 347, 367, 18 L. Ed. 155.

Although the stranded vessel may not float, as a consequence of the unloading of the goods, still she may be so lightened by the operation, that the usual appliances at hand may be amply sufficient to enable the master to rescue the vessel without much expense or delay, and put her in a condition to receive back the cargo and transport it to the port of destination; and, in the case supposed, it cannot be doubted that the expense of saving the vessel, as well as the expense of preserving and reloading the cargo, would be the proper subject of general contribution. McAndrews *v.* Thatcher, 3 Wall. 347, 368, 18 L. Ed. 155.

So, where the cargo consists of various consignments, and the vessel is stranded in the harbor of the port of destination, it will seldom or never happen that all the consignments will be delivered at the same time. On the contrary, some of necessity will be delivered before others; and yet, if the unlading of the cargo has the effect to make the vessel float, and the whole adventure is saved by one continued, unremitted operation, under the directions of the master, as the agent of all concerned, it would seem that the case was one falling directly within the equitable principle of general average, which requires that all the interests shall contribute for the expenses incurred to save the whole adventure from common peril. McAndrews *v.* Thatcher, 3 Wall. 347, 368, 18 L. Ed. 155.

32. Under the Harter Act.—The Irrawaddy, 171 U. S. 187, 43 L. Ed. 130.

Where the owner of the vessel has complied with all of the provisions of the Harter Act, and the vessel is stranded by the negligence of those in charge of her, and subsequently sacrifices are made in order to save the vessel and cargo, the owner of the ship is not entitled to general average contribution. The Irrawaddy, 171 U. S. 187, 43 L. Ed. 130.

It was not the intention of the Harter Act to allow a shipowner to share in the benefits of the general average contribution to meet loss occasioned by faults in the navigation and management of the ship. The Irrawaddy, 171 U. S. 187, 43 L. Ed. 130.

33. Cutting away masts and spars.—Ralli *v.* Troop, 157 U. S. 386, 393, 39 L. Ed. 742; Columbian Ins. Co. *v.* Ashby, 13 Pet. 331, 10 L. Ed. 186.

34. Scuttling ship to extinguish fire.—Ralli *v.* Troop, 157 U. S. 386, 420, 39 L. Ed. 742.

The part of the cargo removed before scuttling by port authorities, in order to extinguish fire, need not contribute to the loss sustained by the ship. Ralli *v.* Troop, 157 U. S. 386, 39 L. Ed. 742.

The destruction of a ship by the act of the municipal authorities of a port is not a voluntary sacrifice of part of a maritime adventure for the safety of the rest of that adventure, made, according to the maritime law, by the owners of vessel or cargo, or by the master as the agent and representative of both. It is a compulsory sacrifice, made by the paramount authority of public officers deriving their powers from the municipal law, and the municipal law only; and therefore neither gives any right of action, or of contribution, against the owners of property benefited by the sacrifice, but not included in the maritime adventure, nor yet any right of contribution as between the owners of the different interests included in that adventure. Ralli *v.* Troop, 157 U. S. 386, 420, 39 L. Ed. 742.

(5) *Money or Salvage Paid to Redeem Captured Ship.*—Money paid to redeem a captured ship and cargo,[35] or decreed to recaptors by way of salvage,[36] are subjects of general average.

b. *Loss or Damage to Cargo*—(1) *In General.*—Loss or damage to cargo voluntarily sustained in the course of the voyage to save the residue of the adventure from impending peril is a proper subject of general average.[37]

(2) *Jettison.*—Where a lawful jettison of cargo is made in order to lighten a ship, and the ship ultimately arrives at her destination in safety, the owner of the cargo jettisoned is entitled to general average contribution against the ship and the residue of the cargo,[38] for which he has a maritime lien.[39] The cargo owner's right to general average, in such case, is not affected by the fact that the cargo jettisoned had a better chance of being saved than if it had not been cast away.[40]

35. **Redemption of captured ship and cargo.**—Sansom *v.* Ball, 4 Dall. 459, 1 L. Ed. 908.

36. **Salvage paid to recaptors.**—Sansom *v.* Ball, 4 Dall. 459, 1 L. Ed. 908.

37. **Loss or damage to cargo in general.**—McAndrews *v.* Thatcher, 3 Wall. 347, 18 L. Ed. 155; Hobson *v.* Lord, 92 U. S. 397, 23 L. Ed. 613; Star of Hope, 9 Wall. 203, 19 L. Ed. 638.

38. **Jettison.**—Dupont De Nemours *v.* Vance, 19 How. 162, 15 L. Ed. 584; Sansom *v.* Ball, 4 Dall. 459, 1 L. Ed. 908; Columbian Ins. Co. *v.* Ashby, 13 Pet. 331, 10 L. Ed. 186; Ralli *v.* Troop, 157 U. S. 386, 39 L. Ed. 742; Star of Hope, 9 Wall. 203, 229, 19 L. Ed. 638; Bags of Linseed, 1 Black 108, 17 L. Ed. 35; Cutler *v.* Rae, 7 How. 729, 12 L. Ed. 890; Barnard *v.* Adams, 10 How. 270, 13 L. Ed. 417; Lawrence *v.* Minturn, 17 How. 100, 15 L. Ed. 58.

The authority to make a jettison of cargo is derived from the instant necessity, incapable of being provided for save by a sacrifice of part of what is committed to the master's care, and the presumed consent of the owners of all the subjects at risk, that the loss shall become a charge upon what is benefited by the sacrifice. Dupont De Nemours *v.* Vance, 19 How. 162, 170, 15 L. Ed. 584.

"Though the sacrifice of part of the cargo at sea cannot be considered a loan, it is a forced appropriation of it to the general benefit of those engaged in a common adventure, under a contract of affreightment; and such use of the property of one, for the benefit of others, creates a charge on what was thus saved, for what may fairly be termed the price of that safety. (Abbott on Shipping, part 4, ch 10, § 6.)" Dupont De Nemours *v.* Vance, 19 How. 162, 170, 15 L. Ed. 584.

Goods jettisoned from the deck are not paid for in general average, but contribute if not thrown over. The reason for this is that as such goods cannot but embarrass the working of the ship, the presumption is that they have been jettisoned before a full necessity for jettison of cargo arose, and only because they hindered and confused the manœuvres of the vessel. Lawrence *v.* Minturn, 17 How. 100, 113, 15 L. Ed. 58.

Liability of ship for negligence in making jettison.—See the title SHIPS AND SHIPPING.

Jettison as "peril of sea" in bill of lading.—See the title SHIPS AND SHIPPING.

39. **Owner of cargo has lien for average.**—Dupont De Nemours *v.* Vance, 19 How. 162, 15 L. Ed. 584.

As to admiralty jurisdiction of suits to enforce liens, see the title ADMIRALTY, vol. 1, p. 147.

"When a lawful jettison of cargo is made, and the vessel and its remaining cargo are thereby relieved from the impending peril, and ultimately arrive in the port of destination, though the shipper has not a lien on the vessel for the value of his merchandise jettisoned, he has a lien for that part of its value which the vessel and its freight are bound to contribute towards his indemnity for the sacrifice which has been made for the common benefit. And this lien on the vessel is a maritime lien, operating by the maritime law as a hypothecation of the vessel, and capable of being enforced by proceedings in rem." Dupont De Nemours *v.* Vance, 19 How. 162, 168, 15 L. Ed. 584.

40. **Where cargo jettisoned is safer than without jettison.**—Barnard *v.* Adams, 10 How. 270, 306, 13 L. Ed. 417.

If a cargo of cotton, about to be captured or sunk, be thrown overboard in part or in whole, and the ship thus saved, the fact that the cotton floated to the shore and was saved, and therefore was in a better condition by being cast away than if it had remained to be captured or sunk, cannot affect its right to contribution, though it may diminish its amount. The loss or damage arising from its assuming the peril, that the ship may escape, may be truly said to be the real "sacrifice," in the popular use of the phrase. Its value is not measured by its hopes of safety, for by the hypothesis it had none; but its right to contribution is founded on its voluntary assumption to run all the risk, or bear the brunt, that the remainder may be saved from the common peril.

(3) *Damage by Scuttling Ship to Extinguish Fire.*—When a ship is on fire, damage caused to goods in the hold by water, either poured down from above, or let in by scuttling the ship, by the master, or under his order and direction, for the purpose of saving ship and cargo, is a subject of general average.[41]

C. Extraordinary Expenses Due to Disaster—1. In General.—Extraordinary expenses incurred for the joint benefit of both ship and cargo, which became necessary in consequence of a common peril, are usually regarded as a proper subject of general average.[42]

2. Repairs.—Repairs necessary to remove the inability of a ship to proceed on her voyage are a proper subject of general average;[43] but expenses for repairs, beyond what is reasonably necessary for that purpose, are not to be contributed for, since it is the duty of the owners, except in case of disaster, to keep the ship in a seaworthy condition.[44]

3. Wages and Provisions of Master and Crew.—The wages and provisions of the master and crew of a vessel, which has sustained a general average loss, during the time the vessel is undergoing repairs, unless it appears that proper diligence was not used in making the repairs, are the proper subjects of general average.[45]

Barnard *v.* Adams, 10 How. 270, 306, 13 L. Ed. 417.

41. Damage by water let in to extinguish fire.—Ralli *v.* Troop, 157 U. S. 386, 411, 39 L. Ed. 742, citing Columbian Ins. Co. *v.* Ashby, 13 Pet. 331, 340, 10 L. Ed. 186.

42. Extraordinary expenses.—McAndrews *v.* Thatcher, 3 Wall. 347, 18 L. Ed. 155; Hobson *v.* Lord, 92 U. S. 397, 23 L. Ed. 613; Star of Hope, 9 Wall. 203, 228, 19 L. Ed. 638; Fowler *v.* Rathbones, 12 Wall. 102, 20 L. Ed. 281.

It is the duty of the master to continue the voyage, after stranding, if possible. Hence, he may employ other ships or vessels to assist him in getting off, and the expense of such employment is a proper subject of general average. McAndrews *v.* Thatcher, 3 Wall. 347, 18 L. Ed. 155.

"Temporary repairs of damages arising from extraordinary perils of the sea, made at some intermediate port, for the purpose of prosecuting the voyage, if the damage to the ship was of a character to disable her and to interrupt the voyage, are the proper object of general average. Phillips on Ins., 5th Ed., § 1300." Hobson *v.* Lord, 92 U. S. 397, 407, 23 L. Ed. 613.

43. Repairs necessary to enable ship to continue voyage.—Star of Hope, 9 Wall. 203, 19 L. Ed. 638; Hobson *v.* Lord, 92 U. S. 397, 23 L. Ed. 613; Fowler *v.* Rathbones, 12 Wall. 102, 117, 20 L. Ed. 281; Dupont De Nemours *v.* Vance, 19 How. 162, 15 L. Ed. 584.

Repairs cannot be made by the master unless he has means or credit; and if he has neither, and his situation is such that he cannot communicate with the owners, he may sell a part of the cargo for that purpose if it is necessary for him to do so in order to raise the means to make the repairs. Sacrifices made to raise such means are the subject of general average, and the rule is the same whether the sacrifice was made by a sale of a part of the cargo or by the payment of marine interest. Star of Hope, 9 Wall. 203, 19 L. Ed. 638.

"Where the disaster occurs in the course of the voyage, and the ship is disabled, the necessary expenses to refit her to go forward create an equity to support such a claim, just as strong as a sacrifice made to escape such a peril, if it appears that the cargo was saved, and that the expenses incurred enabled the master to prosecute the voyage to a successful termination. * * * McAndrews *v.* Thatcher, 3 Wall. 347, 367, 18 L. Ed. 155; Barnard *v.* Adams, 10 How. 270, 13 L. Ed. 417." Hobson *v.* Lord, 92 U. S. 397, 405, 23 L. Ed. 613.

44. Repairs not made necessary by disaster.—Star of Hope, 9 Wall. 203, 19 L. Ed. 638; Hobson *v.* Lord, 92 U. S. 397, 23 L. Ed. 613; Fowler *v.* Rathbones, 12 Wall. 102, 117, 20 L. Ed. 281; Dupont De Nemours *v.* Vance, 19 How. 162, 15 L. Ed. 584.

Necessary repairs for the ship, except to the extent that such repairs are required to replace such parts of the ship as were sacrificed to save the associated interests, or to refit the ship to enable her safely to resume the voyage, are not to be included as general average by the adjuster. Hobson *v.* Lord, 92 U. S. 397, 23 L. Ed. 613; Fowler *v.* Rathbones, 12 Wall. 102, 20 L. Ed. 281.

Repairs rendered necessary to the vessel by the ordinary perils of navigation, to enable her to prosecute her voyage to her port of destination, it is admitted, must be borne by the owners of the vessel. Fowler *v.* Rathbones, 12 Wall. 102, 117, 20 L. Ed. 281.

If the ship was in need of repairs before the disaster, such repairs are particular average. McAndrews *v.* Thatcher, 3 Wall. 347, 367, 18 L. Ed. 155.

45. Wages and provisions of master and crew.—Star of Hope, 9 Wall. 203, 236, 19 L. Ed. 638; Hobson *v.* Lord, 92 U. S. 397,

4. Port of Refuge Expenses.—Where a disaster occurs at sea, and the vessel bears away to a port of refuge, the extraordinary expenses subsequently incurred, including those of getting to the port of refuge as well as those incurred after arrival, are the proper subjects of general average.[46]

IV. Interests Liable to Contribute.

It is only those interests which are engaged in the common adventure, and which are saved by the sacrifice of a part for the benefit of the whole that are liable to make a general contribution.[47] If the ship is injured or lost, and the cargo saved, the cargo contributes to the ship,[48] and if the cargo is lost, and

23 L. Ed. 613; Barnard *v.* Adams, 10 How. 270, 13 L. Ed. 417.

In such case the wages and provisions of the officers and crew are general average, from the time the disaster occurs until the ship resumes her voyage. Hobson *v.* Lord, 92 U. S. 397, 407, 23 L. Ed. 613; Star of Hope, 9 Wall. 203, 236, 19 L. Ed. 638.

The wages and provisions of the officers and crew during the consequent and necessary interruption of the voyage, occasioned by the disaster, are a proper charge for such proportionate contribution, wholly irrespective of the question, whether the ship bore away for repairs to a port of refuge outside of the regular course of the port where the disaster occurred. Masters may well consult convenience and economy in selecting the port for making repairs; and if, in the particular case, the master exercises good judgment in making the selection, no interested party will have any right to complain. Hobson *v.* Lord, 92 U. S. 397, 407, 23 L. Ed. 613.

The crew are entitled to wages after the ship is stranded, while they are employed in the saving of the cargo. Barnard *v.* Adams, 10 How. 270, 13 L. Ed. 417.

A vessel bound to the United States, having loaded at one of the guano islands where clearances were not granted, was on her way to Callao for one, when she was badly injured by a collision with another vessel. Proceeding in distress to that, the nearest port, she came to anchor at the anchorage of vessels calling at that port for clearances. A survey revealed the fact that her damaged condition was such as to require her to be unladen and extensively repaired before prosecuting her voyage. She was, therefore, removed to a hulk nearer the pier, where most of her cargo was discharged, and thence to a dock for repairs. After they were finished, she was, with reasonable despatch, reloaded, and completed her voyage. Before the delivery of her cargo, the consignees gave an average bond, whereby they agreed to pay the owner of the ship their respective proportions of the expenses and charges incurred by him in consequence of such collision, as soon as the average should be adjusted conformably to law and the usages of the port of New York. Held, that as the services of her crew were necessary for her preservation and safety in hauling her to and from the hulk for unloading and reloading, and in moving her while in dock undergoing repairs, their wages and provisions, during the time they were so employed, were properly allowed in general average. Hobson *v.* Lord, 92 U. S. 397, 23 L. Ed. 613.

46. Port of refuge expenses.—Star of Hope, 9 Wall. 203, 236, 19 L. Ed. 638; Hobson *v.* Lord, 92 U. S. 397, 23 L. Ed. 613.

It seems that the bearing away of the ship marks the time from which to compute the extraordinary expenses incurred in refitting the ship to prosecute the voyage. Hobson *v.* Lord, 92 U. S. 397, 408, 23 L. Ed. 613; Star of Hope, 9 Wall. 203, 236, 19 L. Ed. 638.

Surveys, port charges, the hire of anchors, cables, boats, and other necessary apparatus, for temporary purposes in making the repairs, are all to be taken into the account as well as the expenses of unloading, warehousing, and reloading the cargo after the repairs are completed. Star of Hope, 9 Wall. 203, 236, 19 L. Ed. 638.

Towage and pumping expenses.—"Towing the ship into port, and extra expenses necessarily incurred in pumping to keep her afloat until the leaks can be stopped, are to be included in the adjustment." Star of Hope, 9 Wall. 203, 236, 19 L. Ed. 638.

Expenses of agent sent by owner to port of refuge to assist.—An adjustment of the amount paid for the services, board, traveling and incidental expenses of an agent sent by the owner of the ship, in good faith, to the port of refuge to advise and assist the master, for the benefit of the ship and cargo, is properly allowed as general average. Hobson *v.* Lord, 92 U. S. 397, 23 L. Ed. 613.

47. Interests liable to contribute.—Ralli *v.* Troop, 157 U. S. 386, 411, 39 L. Ed. 742; The J. P. Donaldson, 167 U. S. 599, 602, 42 L. Ed. 292.

48. Contribution by cargo.—Hobson *v.* Lord, 92 U. S. 397, 23 L. Ed. 613; Barnard *v.* Adams, 10 How. 270, 307, 13 L. Ed. 417; Dupont De Nemours *v.* Vance, 19 How. 162, 15 L. Ed. 584.

the ship,[49] and freight[50] saved, both contribute to the cargo. The interest of strangers is not liable to contribute.[51] No interest is liable to contribute for any general average or expenses incurred subsequently to its ceasing to be at risk.[52] Property belonging to the government is liable for general average contribution in all respects as private property.[53]

V. Interests or Persons Entitled to Contribution.

The interests of strangers to the adventure are not to be contributed for by general average.[54] If the ship is lost or damaged and the cargo saved, the ship is entitled to contribution from the cargo,[55] and the freight also is entitled to have contribution from the cargo.[56] And if the cargo is lost or damaged and the ship saved, the cargo is entitled to contribution from the ship and freight.[57]

VI. Lien for General Average.

Upon a voluntary sacrifice of a part of the adventure, and a consequent escape of the rest from imminent peril, the owner of the interests sacrificed has a maritime lien on those which are saved.[58] The lien of the shipowner upon the

49. Contribution by ship.—Hobson *v.* Lord, 92 U. S. 397, 411, 23 L. Ed. 613; Barnard *v.* Adams, 10 How. 270, 307, 13 L. Ed. 417; Dupont De Nemours *v.* Vance, 19 How. 162, 15 L. Ed. 584.

50. Contribution by freight.—Freight, equally with the ship and cargo, contributes to the payment of a general average loss. Jones *v.* Insurance Co., 4 Dall. 246, 248, 1 L. Ed. 819.

51. Interest of strangers does not contribute.—Ralli *v.* Troop, 157 U. S. 386, 411, 39 L. Ed. 742.

52. Interest not subject to peril or risk.—McAndrews *v.* Thatcher, 3 Wall. 347, 368, 18 L. Ed. 155.

53. Government property.—The Davis, 10 Wall. 15, 19, 19 L. Ed. 875.

54. Interests of stranger.—Ralli *v.* Troop, 157 U. S. 386, 411, 39 L. Ed. 742; The J. P. Donaldson, 167 U. S. 599, 602, 42 L. Ed. 292.

There can be no general average, unless there has been a voluntary and successful sacrifice of part of the maritime adventure made for the benefit of the whole adventure, and for no other purpose, and by order of the owners of all the interests included in the common adventure, or the authorized representative of all of them. The safety of any property, on land or water, not included in that adventure, can neither be an object of the sacrifice, nor a subject of the contribution. Ralli *v.* Troop, 157 U. S. 386, 403, 39 L. Ed. 742; The J. P. Donaldson, 167 U. S. 599, 602, 42 L. Ed. 292.

The sacrifice must be made solely for the benefit of the common adventure, and the interests of strangers to that adventure neither contribute nor are contributed for. Ralli *v.* Troop, 157 U. S. 386, 411, 39 L. Ed. 742.

55. Right of ship to contribution from cargo.—Dupont De Nemours *v.* Vance, 19 How. 162, 15 L. Ed. 584; Barnard *v.* Adams, 10 How. 270, 13 L. Ed. 417.

56. Right of freight to contribution.—Columbian Ins. Co. *v.* Ashby, 13 Pet. 331, 10 L. Ed. 186.

The freight of a vessel, totally lost, by being run on shore for her preservation and that of the crew and cargo, ought to be allowed to the owner of the vessel, as a subject of general average, the cargo of the vessel having been saved by the stranding. Columbian Ins. Co. *v.* Ashby, 13 Pet. 331, 10 L. Ed. 186.

57. Right of cargo to contribution.—Dupont De Nemours *v.* Vance, 19 How. 162, 15 L. Ed. 584; Jones *v.* Insurance Co., 4 Dall. 246, 248, 1 L. Ed. 819; Barnard *v.* Adams, 10 How. 270, 13 L. Ed. 417.

58. Lien.—Cutler *v.* Rae, 7 How. 729, 12 L. Ed. 890; Dupont De Nemours *v.* Vance, 19 How. 162, 15 L. Ed. 584; Ralli *v.* Troop, 157 U. S. 386, 400, 39 L. Ed. 742; Hobson *v.* Lord, 92 U. S. 397, 405, 23 L. Ed. 613; Bags of Linseed, 1 Black 108, 17 L. Ed. 35.

"Whatever may be the doctrine in the courts on the continent of Europe, where the civil law is established, it has been decided in this court that the maritime lien for a general average in a case of jettison, and the lien for freight, depend upon the possession of the goods, and arise from the right to retain them until the amount of the lien is paid. Cutler *v.* Rae, 7 How. 729, 12 L. Ed. 890; Dupont De Nemours *v.* Vance, 19 How. 162, 171, 15 L. Ed. 584." Bags of Linseed, 1 Black 108, 113, 17 L. Ed. 35.

The lien is reciprocal existing in favor of the vessel when a sacrifice is made of a part or the whole of its value, for preservation of the cargo, and in favor of the cargo when sacrifice is made of the cargo or a part thereof for the preservation of the vessel. Dupont De Nemours *v.* Vance, 19 How. 162, 169, 15 L. Ed. 584.

The owner of cargo jettisoned has a maritime lien on the vessel for the contributory share due from the vessel on an adjustment of the general average, which lien may be enforced by a proceeding in

cargo for general average contribution is, however, dependent upon possession of the goods and is lost when they are delivered to the owner or consignee.[59]

VII. Adjustment and Collection.

A. Adjustment—1. PLACE OF ADJUSTMENT.—The port of destination, or delivery of the cargo, is the port where the average is to be adjusted.[60]

2. VALUATION OF SHIP.—Strictly speaking, the rule, in valuing a ship for purposes of general average, is that her value incident to the injuries received controls, but as this requirement can seldom be met, her value at the port of departure with deductions for wear and tear, or her value at the port of her destination, is to be taken into consideration.[61] The valuation of the ship in a policy of insurance at the port of departure is competent evidence.[62]

3. VALUATION OF CARGO.—Where the cargo was taken out of the stranded vessel, placed in another one, and the voyage thus continued to the home port, the contribution should be assessed on the value of the cargo at the home port.[63]

4. EXPENSES OF ADJUSTMENT.—The expenses of an ex parte adjustment made by the charterers of a ship at the port of delivery are not chargeable in admiralty on the ship or freight, unless the results were adopted and used in the court below by the commissioner who stated the adjustment made under order of the court.[64]

B. Commissions for Collecting Average.—According to the usage and custom of merchants and average brokers, a commission of two and a half per cent is property allowed for the collection of general average.[65]

VIII. General Average Bonds.

Where the owners of the property saved by a general average sacrifice give bond for the release of their property, they are liable thereon for the amount allowed by the adjusters, with interest from the date of the adjustment.[66]

IX. Jurisdiction of Suits for General Average.

See the title ADMIRALTY, vol. 1, p. 147.

rem in the admiralty. Dupont De Nemours *v.* Vance, 19 How. 162, 15 L. Ed. 584.

59. Shipowner's lien dependent on possession.—Cutler *v.* Rae, 7 How. 729, 12 L. Ed. 890; Bags of Linseed, 1 Black 108, 113, 17 L. Ed. 35. See, also, Dupont De Nemours *v.* Vance, 19 How. 162, 15 L. Ed. 584.

Although the consignee is liable on an implied promise, there is no lien on the goods in his hands in favor of the shipowner. Cutler *v.* Rae, 7 How. 729, 731, 12 L. Ed. 890.

60. Place of adjustment.—Hobson *v.* Lord, 92 U. S. 397, 411, 23 L. Ed. 613.

61. Valuation of ship.—Star of Hope, 9 Wall. 203, 19 L. Ed. 638.

As a general rule, the value of the ship for contribution, where she has received no extraordinary injuries during the voyage, and has not been repaired on that account, is her value at the time of her arrival at the termination of the voyage, but if she met with damage before she arrived, by perils of the sea, and had been repaired, then the value to be assumed in the adjustment is her worth before such repairs were made. Star of Hope, 9 Wall. 203, 235, 19 L. Ed. 638.

62. Valuation in insurance policy.—Star of Hope, 9 Wall. 203, 19 L. Ed. 638.

63. Valuation of cargo.—Barnard *v.* Adams, 10 How. 270, 13 L. Ed. 417.

64. Expenses of adjustment.—Star of Hope, 9 Wall. 203, 19 L. Ed. 638.

65. Commission for collecting average.—Barnard *v.* Adams, 10 How. 270, 13 L. Ed. 417.

66. General average bond.—Where the owners of the cargo enter, after a case of stranding, into "an average bond" whereby they agree to pay as consignees of cargo, what should be found to be due from them on their share of the cargo, for general average losses and expenses arising out of the transaction, provided such losses and expenses should be stated and apportioned in accordance with the established usage and laws of New York in similar cases, by certain average adjusters named, then if in respect to the contributory value of freight, the adjustment, as made up by the average adjusters, is according to the usage and custom of New York, and no more has been allowed for damages to the ship than was attributable to the stranding, in that case the shipowners are entitled to the amount stated in the average adjustment to be due from the owners of the cargo as their general average contribution, with interest from the date of the adjustment. Fowler *v.* Rathbones, 12 Wall. 102, 20 L. Ed. 281.

GENERAL COURT.—The legislative body of Massachusetts is called the general court.[1]

GENERAL CUSTOM.—See the title USAGES AND CUSTOMS.

GENERAL DEPOSIT.—See the title BANKS AND BANKING, vol. 3, p. 9.

GENERAL ISSUE.—See, generally, the title PLEADING. See, also, the various particular titles.

GENERAL MANAGER.—See the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

GENERAL PURPOSES.—See note 2.

GENERAL TAXES.—See note 3.

GENERAL WARRANTY.—See the titles COVENANTS, vol. 5, p. 12; WARRANTY.

GENUINE.—See note 4.

GEOGRAPHICAL FACTS.—See the title JUDICIAL NOTICE.

GEORGIA.—See the titles ALIENS, vol. 2, p. 228; BOUNDARIES, vol. 3, p. 495; COMMON LAW, vol. 3, p. 963.

GIFT IN PAYMENT.—See note 5.

1. Loan Association *v.* Topeka, 20 Wall. 655, 666, 22 L. Ed. 455.

2. **General purposes.**—In the charter of a municipal corporation, the limiting of the power to borrow money on the credit of the city to general purposes limits it to the power to borrow money for ordinary governmental purposes, such as are generally carried out with revenues derived from taxation; and the presumption is that the grant of the power was intended to confer the right to borrow money in anticipation of the receipt of revenue taxes, and not to plunge the municipal corporation into a debt on which interest must be paid at the rate of ten per centum per annum, semiannually, for at least ten years. Brenham *v.* German American Bank, 144 U. S. 173, 182, 36 L. Ed. 390. See, generally, the titles MUNICIPAL CORPORATIONS; MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.

3. General taxes or taxes distinguished from special assessments. See Illinois Cent. R. Co. *v.* Decatur, 147 U. S. 190, 197, 37 L. Ed. 132. See, also, the titles SPECIAL ASSESSMENTS; TAXATION.

4. **Genuine.**—Where a citizen of one state sells to the citizen of another warrants issued on a country treasurer, a guaranty that they were "genuine and regularly issued" was held to import that the warrants were not, in a suit brought against the county, subject to any defense founded upon a want of legal form in the signatures or seals; and not merely that they were not forgeries, that they were not issued without consideration and that they were ordered by the proper officers. Smeltzer *v.* White, 92 U. S. 390, 23 L. Ed. 508. See the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.

5. **Gift in payment.**—"Giving in payment, as defined in the jurisprudence of Louisiana, is an act by which a debtor gives a thing to the creditor who is willing to receive it in payment of a sum which is due; and the decision is that it differs from the ordinary contract of sale in this, that the latter is perfect by the mere consent of the parties, even before the delivery, while the giving in payment is made only by delivery. Code 1824, arts. 2625, 2626. And the Code of 1870 employs the same exact words." Burbank *v.* Conrad, 96 U. S. 291, 308, 24 L. Ed. 731.

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F. Equitable Jurisdiction, 565.

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CROSS REFERENCES.

See the titles HUSBAND AND WIFE; PRINCIPAL AND AGENT; SLAVERY AND INVOLUNTARY SERVITUDE; TRUSTS AND TRUSTEES; WILLS.

I. Inter Vivos.

A. Motive for Gift.—The motive with which a gift is made, whether good or bad, does not affect its validity or the question of jurisdiction.[1]

B. Between Parent and Child.—In the case of a child's gift of its property to a parent, the circumstances attending the transaction should be vigilantly and carefully scrutinized by the court, in order to ascertain whether there has been undue influence in procuring it; but it cannot be deemed prima facie void; the presumption is in favor of its validity; and, in order to set it aside, the court must be satisfied that it was not the voluntary act of the donor.[2] The same rule as to the burden of proof applies with equal, if not greater force to the case of a gift from a parent to a child, even if the effect of the gift is to confer upon a child, with whom the parent makes his home and is in peculiarly close relations, a larger share of the parent's estate than will be received by other children or grandchildren.[3]

C. Between Husband and Wife.—The statute law of Arkansas has not changed the common-law rule, that a husband cannot legally make a gift to his wife during coverture.[4]

D. Louisiana Statutes.—By the Louisiana statutes a donation inter vivos is void if the donor reserves the usufruct of the land to himself, during his life.[5]

1. **Motive for gift.**—South Dakota *v.* North Carolina, 192 U. S. 286, 310, 48 L. Ed. 448.

2. **Between parent and child.**—Towson *v.* Moore, 173 U. S. 17, 24, 43 L. Ed. 593. See, generally, the titles PARENT AND CHILD; UNDUE INFLUENCE.

3. Towson *v.* Moore, 173 U. S. 17, 24, 43 L. Ed. 593.

The procuring of a paper, containing the unusual and suspicious declaration that the gift of certain bonds to a daughter was made "voluntarily, without suggestion from any one," together with long concealment of the paper from the relatives of the donor, is not evidence of an intent to back up a fraudulent transaction, where the reason for the execution of the paper was that, three or four years before, the mother of the plaintiff had made an unfounded charge that the daughter had by undue influence procured the insertion of certain legacies to herself and her sister in their father's will. Towson *v.* Moore, 173 U. S. 17, 25, 43 L. Ed. 593.

It is to be expected that a parent will favor the child who stands by him, and give to him, rather than to the other, his property; to defeat a conveyance under those circumstances, something more than the natural influence springing from such relationship must be shown. Mackall *v.* Mackall, 135 U. S. 167, 172, 34 L. Ed. 84.

4. **Between husband and wife.**—Kitchen *v.* Bedford, 13 Wall. 413, 20 L. Ed. 637. See, generally, the title HUSBAND AND WIFE.

5. **Louisiana statutes.**—Johnson *v.* Waters, 111 U. S. 640, 646, 28 L. Ed. 547.

"The Civil Code, article 1510, divides donations inter vivos into three kinds—the purely gratuitous; the onerous, which is burthened with charges; and the remunerative, of which the object is to recompense services rendered. By article

E. Delivery.—Certificate of Deposit.—"A certificate of deposit is a subsisting chose in action and represents the fund it describes, as in cases of notes, bonds, and other securities, so that a delivery of it, as a gift, constitutes an equitable assignment of the money for which it calls."[6]

Under Mississippi Statute.—Under the Mississippi statute of frauds, a parol contract of sale, void for nondelivery, cannot be valid as a gift, because nondelivery is as fatal to such a gift as to the agreement of sale.[7]

F. Equitable Jurisdiction.—In Case of Fraud.—A court of equity will interfere in a case of fraud.[8]

When Improvements Have Been Made—Statute of Frauds.—Equity protects a parol gift of land equally with a parol agreement to sell it, if accompanied by possession, and the donee, induced by the promise to give it, has made valuable improvements on the property.[9] And this is particularly true where the donor stipulates that the expenditures shall be made, and by doing this makes it the consideration or condition of the gift.[10]

II. Mortis Causa.

"A donatio mortis causa must be completely executed,[11] precisely as required in the case of gifts inter vivos, subject to be divested by the happening of any of the conditions subsequent,[12] that is, upon actual revocation by the donor, or

1513 it is declared that 'the rules peculiar to donations inter vivos do not apply to onerous and remunerative donations, except when the value of the object given exceeds by one-half that of the charges, or of the services.'" Johnson *v.* Waters, 111 U. S. 640, 648, 28 L. Ed. 547.

6. **Certificate of deposit.**—Basket *v.* Hassell, 107 U. S. 602, 614, 27 L. Ed. 500. See, generally, the title BANKS AND BANKING, vol. 3, p. 11.

7. **Under Mississippi statute.**—Mahan *v.* United States, 16 Wall. 143, 147, 21 L. Ed. 307. See, generally, the title FRAUDULENT AND VOLUNTARY CONVEYANCES, ante, p. 472.

8. **In case of fraud.**—"While a man in the full possession of his faculties and under no duress may give away his property, and equity will not recall the gift, yet it looks with careful scrutiny upon all transactions between trustee and beneficiary, and if it appears that the trustee has taken any advantage of the situation of the beneficiary, and has obtained from him, even for only the benefit of other beneficiaries, large property without a consideration, it will refuse to uphold the transaction thus accomplished." Adams *v.* Cowen, 177 U. S. 471, 484, 44 L. Ed. 851.

But a court of equity will not interfere between a donee of land, by deed, and a devisee under a will of the donor, in a case where there is no fraud. Viers *v.* Montgomery, 4 Cranch 177, 2 L. Ed. 587.

9. **When improvements have been made.**—Neale *v.* Neales, 9 Wall. 1, 19 L. Ed. 590.

A party who receives a parol gift of real estate, enters into possession and expends money in improvements thereon, presents equitable considerations which will uphold a decree establishing a subsequent conveyance as a confirmation of his equitable title. Mackall *v.* Mackall, 135 U. S. 167, 175, 34 L. Ed. 84.

10. Neale *v.* Neales, 9 Wall. 1, 19 L. Ed. 590.

The above principle applied in the case of an antenuptial parol promise, by a father, to give to a lady about to marry his son (an improvident person), a lot of ground, she promising at the time to lay out her own money in building a house upon it, for the benefit of herself and family; and where possession was delivered and the house was to be built, but the father refused to convey the lot. Neale *v.* Neales, 9 Wall. 1, 19 L. Ed. 590.

In case of an alleged contract, of this kind, by a father, reasonable certainty as to the fact and terms of it is all that equity requires. Neale *v.* Neales, 9 Wall. 1, 19 L. Ed. 590.

The breach of such a contract is not to be compensated by damages, nor is the purpose of the contract so answered. It is a case for specific performance. Neale *v.* Neales, 9 Wall. 1, 19 L. Ed. 590.

11. **Mortis causa.**—Basket *v.* Hassell, 107 U. S. 602, 610, 27 L. Ed. 500.

"If the gift does not take effect as an executed and complete transfer to the donee of possession and title, either legal or equitable, during the life of the donor, it is a testamentary disposition, good only if made and proved as a will." Basket *v.* Hassell, 107 U. S. 602, 610, 27 L. Ed. 500.

12. Basket *v.* Hassell, 107 U. S. 602, 610, 27 L. Ed. 500.

Certificate of deposit.—The delivery of a certificate of deposit, upon which there is an endorsement ordering the bank to pay the donee the money called for by the certificate, upon the death of the donor, cannot be valid as a donatio mortis causa. Basket *v.* Hassell, 107 U. S. 602, 615, 27 L. Ed. 500.

"It cannot be said that the condition in the indorsement, which forbade payment until the donor's death, was merely the

by the donor's surviving the apprehended peril,[13] or outliving the donee, or by the occurrence of a deficiency of assets necessary to pay the debts of the deceased donor. These conditions are the only qualifications that distinguish gifts mortis causa and inter vivos."[14]

GIFTS MORTIS CAUSA.—See the title GIFTS, ante, p. 564.

GIVING AWAY.—See, generally, the title INTOXICATING LIQUORS.

GLASS.—See note 1.

GLEBE LANDS.—See the title RELIGIOUS SOCIETIES.

GOOD.—As to certification of a check that it is good, see the title BANKS AND BANKING, vol. 3, p. 35.

GOOD CONSIDERATION.—Good consideration is equivalent to "valuable consideration." See Hodgson *v.* Butts, 3 Cranch 140, 2 L. Ed. 391. And see, generally, the title FRAUDS, STATUTE OF, ante, p. 451.

GOOD FAITH.—As to the holder of a negotiable instrument in good faith, see the title BILLS, NOTES AND CHECKS, vol. 3, p. 297. As to a claim of title to lands made in good faith, see the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION. As to improvements, see the titles EJECTMENT, vol. 5, p. 718; IMPROVEMENTS.

GOOD HEALTH.—See Connecticut Mut. Life Ins. Co. *v.* Union Trust Co., 112 U. S. 250, 28 L. Ed. 708. See, also, the title LIFE INSURANCE.

GOOD RIGHT TO CONVEY.—See the title COVENANTS, vol. 5, p. 13.

GOODS.—See ARTICLES, vol. 2, p. 545. See note 2.

GOODS SOLD AND DELIVERED.—See the title ASSUMPSIT, vol. 2, p. 650.

condition attached by the law to every such gift. Because the condition, which inheres in the gift mortis causa, is a subsequent condition, that the subject of the gift shall be returned if the gift fails by revocation; in the meantime the gift is executed, the title has vested, the dominion and control of the donor has passed to the donee. While here, the condition annexed by the donor to his gift is a condition precedent, which must happen before it becomes a gift, and, as the contingency contemplated is the donor's death, the gift cannot be executed in his lifetime, and, consequently, can never take effect." Basket *v.* Hassell, 107 U. S. 602, 616, 27 L. Ed. 500.

13. Basket *v.* Hassell, 107 U. S. 602, 610, 27 L. Ed. 500.

Civil code of Louisiana.—"Article 1455 of the civil code of Louisiana defines a donation mortis causa to be an act to take effect when the donor shall no longer exist." Johnson *v.* Waters, 111 U. S. 640, 646, 28 L. Ed. 547.

A donation to take effect at the death of the donor, so far as it is gratuitous, is a donation mortis causa, which by the civil code of Louisiana, article 1563, cannot be made otherwise than by will and testament. Johnson *v.* Waters, 111 U. S. 640, 646, 28 L. Ed. 547.

14. Basket *v.* Hassell, 107 U. S. 602, 610, 27 L. Ed. 500.

1. **Glass cut.**—See Binns *v.* Lawrence, 12 How. 9, 18, 13 L. Ed. 871.

2. **Goods.**—In Dobbins *v.* Erie County, 16 Pet. 435, 446, 10 L. Ed. 1022, the court says: "Taxes are never assessed, unless it be a capitation tax, upon persons, as persons, but upon them on account of their goods, and the profits made upon professions, trades and occupations. They are so imposed, because public revenue can only be supplied by assessments upon the goods of individuals—'comprehending under the word goods, all the estate and effects which every one hath, of whatsoever sort they be; taxes regard the persons of men, only because of their goods.'"

Money.—In Patton *v.* Brady, 184 U. S. 608, 613, 46 L. Ed. 713, the court said: "The term 'goods' is broad enough to include money." See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 23.

The words "goods, wares, and merchandise of whatever character," used in the act of 1862, undoubtedly have the same meaning as the words "goods and chattels, wares and merchandise," in the act of 1861, which provided that goods, wares and merchandise coming from a Confederate state should be forfeited. The word chattel, in its ordinary signification, includes every species of property which is not real estate or freehold, and the words goods, wares, and merchandise are undoubtedly used in this statute to express the same meaning. But if there could under ordinary circumstances be any doubt on this subject, it is a well-known fact, of which the federal supreme court can surely take cognizance, that in 1864 gold coin was an article of merchandise, and as such was bought and sold at fluctuating prices, and was the object of a large and active traffic. Gay's Gold, 13 Wall. 358, 362, 20 L. Ed. 606.

Choses in action.—In Planters' Bank *v.*

GOOD WILL.

CROSS REFERENCES.

See the titles CORPORATIONS, vol. 4, p. 621; PARTNERSHIP; PATENTS; TRADEMARKS, TRADENAMES AND UNFAIR COMPETITION.

Definitions.—Good will has been defined to be "the advantage or benefit, which is acquired by an establishment, beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessity, or even from ancient partialities or prejudices."[1]

Good Will as Property.—The good will of a business may have a value and in such cases it becomes property.[2]

Sale.—And may be bought and sold in connection with the business and as an incident to it.[3]

Where of Unsubstantial Nature.—But where the good will is of an unsubstantial or shadowy nature and there is no way of ascertaining its value, no compensation need be made for it where it is transferred from a partnership to a corporation.[4]

Sharp, 6 How. 301, 320, 12 L. Ed. 447, a case involving powers under a bank charter, the court said: "That promissory notes are to be regarded as either **goods**, chattels, or effects, within the sixth section of the charter, can hardly be questioned, when it includes these 'of what kind soever, nature, and quality.' This addition evidently meant to remove any doubt or restriction as to the meaning of those terms, as sometimes employed in connection with peculiar subjects, and to extend the description by them to every kind of personal property belonging to the bank. This construction would go no further than sometimes has been done in England, holding the words **goods** and chattels to include choses in action, as well as other personal property (12 Co. 1; 1 Atk. 1182), and by the word **goods** alone, in a bequest, it has been held that a bond will pass."

Goat hair goods.—See Arthur *v.* Butterfield, 125 U. S. 70, 72, 31 L. Ed. 643.

Goods of similar description.—See SIMILAR.

1. Defined.—Metropolitan Bank *v.* St. Louis Dispatch Co., 149 U. S. 436, 446, 37 L. Ed. 799.

"Good will was defined by Lord Eldon, in Cruttwell *v.* Lye, 17 Ves. 335, 346, to be 'nothing more than the probability that the old customers will resort to the old place;' but Vice Chancellor Wood, in Churton *v.* Douglas, Johnson, V. C. 174, 188, says it would be taking too narrow a view of what is there laid down by Lord Eldon, to confine it to that, but that it must mean every positive advantage that has been acquired by the old firm in the progress of its business, whether connected with the premises in which the business was previously carried on, or with the names of the late firm, or with any other matter carrying with it the benefit of the business." Menendez *v.* Holt, 128 U. S. 514, 521, 32 L. Ed. 526.

2. May become property.—Metropolitan Bank *v.* St. Louis Dispatch Co., 149 U. S. 436, 446, 37 L. Ed. 799; Camden *v.* Stuart, 144 U. S. 104, 115, 36 L. Ed. 363.

Undoubtedly, good will is in many cases a valuable thing, although there is difficulty in deciding accurately what is included under the term. It is tangible only as an incident, as connected with a going concern or business having locality or name, and is not susceptible of being disposed of independently. Metropolitan Bank *v.* St. Louis Dispatch Co., 149 U. S. 436, 446, 37 L. Ed. 799.

3. May be bought and sold.—Metropolitan Bank *v.* St. Louis Dispatch Co., 149 U. S. 436, 446, 37 L. Ed. 799; Camden *v.* Stuart, 144 U. S. 104, 115, 36 L. Ed. 363.

Good will of newspaper.—As applied to a newspaper, the good will usually attaches to its name rather than to the place of publication. The probability of the title continuing to attract custom in the way of circulation and advertising patronage, gives a value which may be protected and disposed of, and constitutes property. Metropolitan Bank *v.* St. Louis Dispatch Co., 149 U. S. 436, 446, 37 L. Ed. 799.

4. When of no value.—Camden *v.* Stuart, 144 U. S. 104, 115, 36 L. Ed. 363.

Right to Good Will.—While under some circumstances where a partnership is dissolved, each of the partners may be entitled to his portion of the good will, yet, where a partner retires from the firm and allows the other members to continue the business, the good will remains with the partners who continue the business.[5]

Use of Trademarks in Connection with Good Will.—And where the good will of a partnership passes to the partners continuing the business, the right to use the trademark of the firm may also pass as an incident to it.[6]

GOOD WORK.—See note 1.

GOODYEAR RUBBER.—See note 2.

GOVERN.—See note 3.

GOVERNMENT.—As to the dual nature of government, see the title CONSTITUTIONAL LAW, vol. 4, p. 91. See note 4.

5. Rights of partners.—Menendez *v.* Holt, 128 U. S. 514, 521, 32 L. Ed. 526; Brown Chemical Co. *v.* Meyer, 139 U. S. 540, 548, 35 L. Ed. 247.

6. Use of trademark.—Brown Chemical Co. *v.* Meyer, 139 U. S. 540, 548, 35 L. Ed. 247. See, generally, the title TRADEMARKS, TRADENAMES AND UNFAIR COMPETITION.

1. Good work.—Where under a contract of sale of machinery for a mill, the vendor was to set it up and put it in complete operation in the vendee's mill, notice given by the vendee to the vendor "to put the mill in repair so as to do good work," or he would do so himself, was sufficient to cover all alterations necessary to accomplish that end. Stillwell Mfg. Co. *v.* Phelps, 130 U. S. 520, 527, 32 L. Ed. 1035. See the title SALES.

2. Goodyear rubber.—Goodyear rubber is a term descriptive of well-known classes of goods produced by the process known as Goodyear's invention, and being thus descriptive of a class of goods, cannot be exclusively appropriated by any one. Goodyear India Rubber, etc., Co. *v.* Goodyear Rubber Co., 128 U. S. 598, 602, 32 L. Ed. 535. See, generally, the title TRADEMARKS, TRADENAMES AND UNFAIR COMPETITION.

3. Govern.—The power to govern implies the power to ordain and establish suitable police regulations; and that, it has often been decided, authorizes municipal corporations to prohibit the use of locomotives in the public streets, when such action does not interfere with vested rights. Railroad Co. *v.* Richmond, 96 U. S. 521, 528, 24 L. Ed. 734. See the title POLICE POWER.

4. Government.—A statute authorizing the consolidation of one railroad company with another provided that the new corporation should, "for its government be entitled to all the rights and privileges, and subject to all the restrictions and liabilities conferred and imposed" upon the other company. In construing the statute the court said: "We cannot believe that the phrase 'for its government' in the consolidating act was intended as a new limitation on the power and privileges of the new corporation. The natural meaning of the word government in such a connection is regulation and control, and we think it was used in that sense here." Tennessee *v.* Whitworth, 117 U. S. 139, 149, 29 L. Ed. 833.

Government de facto.—See DE FACTO GOVERNMENT, vol. 5, p. 283. And see the title STATES.

Government of the state.—The distinction between the government of a state and the state itself is important, and should be observed. In common speech and common apprehension they are usually regarded as identical; and as ordinarily the acts of the government are the acts of the state, because within the limits of its delegation of power, the government of the state is generally confounded with the state itself, and often the former is meant when the latter is mentioned. The state itself is an ideal person, intangible, invisible, immutable. The government is an agent, and, within the sphere of the agency, a perfect representative; but outside of that, it is a lawless usurpation. The constitution of the state is the limit of the authority of its government, and both government and state are subject to the supremacy of the constitution of the United States, and of the laws made in pursuance thereof. Virginia Coupon Cases, 114 U. S. 270, 290, 29 L. Ed. 185.

Government office.—See OFFICE.

GOVERNOR.

CROSS REFERENCES.

See the titles INTERNATIONAL LAW; MANDAMUS; PARTIES; PUBLIC LANDS; STATES; SUMMONS AND PROCESS.

As to appeal from state court questioning the eligibility of governor under the naturalization law, see the title APPEAL AND ERROR, vol. 1, p. 664. As to power of governor to authorize the prosecution of a suit, see the title ATTORNEY AND CLIENT, vol. 2, p. 710. As to power of governor to appoint clerk of mayor's court, see the title CLERKS OF COURT, vol. 3, p. 850. As to considering a state a party to the record, where the governor of the state is sued, see the titles COURTS, vol. 4, p. 906; STATES. As to suspension of railroad commissioner by governor being due process of law, see the title DUE PROCESS OF LAW, vol. 5, p. 499. As to duty of governor in extradition proceedings, see the title EXTRADITION, ante, p. 215. As to presumption of regularity of act of governor in establishing a quarantine regulation, see the title HEALTH. As to impairment of obligation of contract made by governor, see the title IMPAIRMENT OF OBLIGATION OF CONTRACTS. As to duty, by statute in some states, of the governor with reference to allowing municipal aid, see the title MUNICIPAL, STATE, COUNTY AND FEDERAL AID. As to power of governor to stay an execution of a sentence of death, see the title PARDON. As to time of execution of a death sentence depending on warrant of governor, see the title SENTENCE AND PUNISHMENT. As to signing bills by governor, see the title STATUTES. As to pardon by governor restoring competency of witness, see the title WITNESSES.

Definition.—A governor of a state is a mere executive officer.[1]

A governor's authority is very narrowly limited by the constitution of his state.[2]

Liability.—The assumption, with or without the sanction of the board of public works of the District of Columbia, by the governor of the district of any liability in regard to the improvements of the market grounds, which were within the province of the legislature, was ultra vires, and no liability incurs.[3]

GRACE, DAYS OF.—See DAYS OF GRACE, vol. 5, p. 198.

GRADE.—See note 4.

GRADE CROSSINGS.—See the titles CROSSINGS, vol. 5, p. 148; DUE PROCESS OF LAW, vol. 5, p. 583; POLICE POWER.

GRADUATES.—As to graduates of the naval academy, see the title ARMY AND NAVY, vol. 2, p. 527.

GRAIN OF WHEAT.—See note 5.

1. **Governor is a mere executive officer.**—Chisholm *v.* Georgia, 2 Dall. 419, 446, 1 L. Ed. 440.

2. **Authority limited by constitution.**—Chisholm *v.* Georgia, 2 Dall. 419, 446, 1 L. Ed. 440.

His general authority is very narrowly limited by the constitution of the state; with no undefined or disputable prerogatives; without power to effect any of the public money, but as he is authorized under the constitution, or by a particular law; having no color to represent the sovereignty of the state, so as to bind it in any manner, to its prejudice, unless specially authorized thereto. And therefore all who contract with him, do it at their own peril, and are bound to see that he has strict authority for any contract he makes. Chisholm *v.* Georgia, 2 Dall. 419, 446, 1 L. Ed. 440.

3. **Liability of governor.**—Washington Market Co. *v.* District of Columbia, 172 U. S. 361, 370, 43 L. Ed. 478.

4. **Graded.**—In Smith *v.* Washington, 20 How. 135, 138, 15 L. Ed. 858, an action for reducing the level of a street, the court said: "Hills must be cut down and hollows filled up, or in other words, the road must be **graded** or 'reduced to a certain degree of ascent or descent;' which is the proper definition of the word 'to grade.'" See the title STREETS AND HIGHWAYS.

5. See Downton *v.* Yeager Milling Co., 108 U. S. 466, 469, 27 L. Ed. 789.

GRAND JURY.

BY T. B. BENSON.

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I. Definition.

A grand jury is a body known to the common law, to which is committed the duty of inquiring whether there be probable cause to believe the defendant guilty of the offense charged.[1] A grand juror is a "juryman" and a "juror," and is drawn and summoned.[2] The words, "juryman" and "jurors," include a grand juror as well as a petit juror, under § 5 of the act of March 22, 1882, forbidding Mormons to act as "jurymen or talesmen."[3]

II. Origin and History.

The institution of the grand jury is of very ancient origin in the history of England, and was an important barrier against persecution by the king.[4] It was, at the time of the settlement of this country, an informing and accusing tribunal only, without whose previous action no person charged with a felony could, except in certain special cases, be put upon his trial.[5]

III. Qualifications.

A. Effect of State Law in Federal Courts.—Grand jurors to serve in the federal courts must have the same qualifications as are required by the highest court of the state in which such court is sitting, subject to the provisions made by acts of congress.[6] The same rule applies to grand jurors in a federal court

1. **Definition.**—Beavers *v.* Henkel, 194 U. S. 73, 84, 48 L. Ed. 882.

2. **Grand juror is juryman.**—The use of the words "drawn or summoned as a juryman or talesman," in the act of March 22, 1882, and of the words "appearing or offered as a juror or talesman," does not have the effect of confining the meaning of "juror" to "petit juror," on the view that the ordinary meaning of "talesman" refers to a petit juror. Clawson *v.* United States, 114 U. S. 477, 483, 29 L. Ed. 179. See post, "Summoning and Impaneling," V. And see the title JURY.

3. **Within act excluding Mormons.**—Clawson *v.* United States, 114 U. S. 477, 483, 29 L. Ed. 179.

4. **England.**—Ex parte Bain, 121 U. S. 1, 11, 30 L. Ed. 849.

For a long period a grand jury's powers were not clearly defined; and it would seem from the account of commentators on the laws of that country that it was at first a body which not only accused, but which also tried, public offenders. Ex parte Bain, 121 U. S. 1, 11, 30 L. Ed. 849; Hale *v.* Henkel, 201 U. S. 43, 59, 50 L. Ed. 652.

Under the ancient English system the most valuable function of the grand jury was not only to examine into the commission of crimes, but to stand between the prosecutor and the accused, and to determine whether the charge was founded upon credible testimony or was dictated by malice or personal ill-will. Hale *v.* Henkel, 201 U. S. 43, 59, 50 L. Ed. 652.

5. **In America—Protection against unfounded prosecutions.**—Justice Field in 2 Sawyer, 667 said: "In this country, from the popular character of our institutions, there has seldom been any contest between the government and the citizen which required the existence of the grand jury as a protection against oppressive action of the government. Yet the institution was adopted in this country, and is continued from considerations similar to those which give to it its chief value in England, and is designed as a means, not only of bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from the government, or be prompted by partisan passion or private enmity. No person shall be required, according to the fundamental law of the country, except in the cases mentioned, to answer for any of the higher crimes unless this body, consisting of not less than sixteen nor more than twenty-three good and lawful men, selected from the body of the district, shall declare, upon careful deliberation, under the solemnity of an oath, that there is good reason for his accusation and trial." Ex parte Bain, 121 U. S. 1, 11, 30 L. Ed. 849.

In Hawaiian Islands.—Hawaii *v.* Mankichi, 190 U. S. 197, 47 L. Ed. 1016.

6. **Qualifications of jurors of state.**—Rodriguez *v.* United States, 198 U. S. 156,

sitting in Porto Rico.[7]

B. When to Exist.—It is not decided whether a grand juror who was disqualified by the act of Porto Rico of April 1, 1901, but summoned before such act took effect, is competent to sit.[8]

C. Religious or Conscientious Beliefs—1. AGAINST TAKING OATH.—A person who has conscientious scruples against taking an oath is not disqualified. Such person will be affirmed.[9]

2. BELIEF IN MORMONISM.—By an act of congress, adherents to a belief in Mormonism are disqualified to sit as grand jurors.[10]

D. Qualifications of Electors.—The qualifications of the grand jurors under the civil code of Alabama are not in law dependent upon the presence of the requisite qualifications of electors, and no want or invalidity of the conditions attached to the qualification to vote in a grand juror can, of itself, affect the validity of their finding.[11]

E. Alienage.—This subject is treated elsewhere.[12]

F. Race, Color, etc.—This subject is treated elsewhere.[13]

G. Loyalty.—By an English statute, persons outlawed or who had fled to a sanctuary for treason or felony, were disqualified as grand jurors.[14] An act of Congress disqualified persons who had voluntarily taken part against the Union in the Civil War.[15]

H. Interest in Prosecution.—The fact that the grand jurors were citizens of the town, for defrauding which the defendant was indicted, cannot be set up as a disqualification in motion in arrest of judgment.[16]

I. In Porto Rico.—The qualifications of grand jurors are regulated in Porto Rico by local statute.[17]

162, 49 L. Ed. 994. See Crowley *v.* United States, 194 U. S. 461, 48 L. Ed. 1075; Miles *v.* United States, 103 U. S. 304, 26 L. Ed. 481. See the title COURTS, vol. 4, pp. 1091, 1142.

7. **In federal court in Porto Rico.**—As the Porto Rican statutes contain no provisions relating to the selection, drawing or impaneling of grand jurors, it was the duty of the district court of the United States for Porto Rico in criminal prosecutions for crimes against the United States, to keep in view § 800 of the Revised Statutes, which provides: "Jurors to serve in the courts of the United States, in each state respectively, shall have the same qualifications, subject to the provisions hereinafter contained, * * * as jurors of the highest court of law in such state may have," etc. Rodriguez *v.* United States, 198 U. S. 156, 162, 49 L. Ed. 994. See post, "In Porto Rico," III, I. And see the title APPEAL AND ERROR, vol. 1, p. 807.

8. **When to exist.**—Crowley *v.* United States, 194 U. S. 461, 48 L. Ed. 1075. See post, "Effect of Disqualification," III, E.

9. **Scruples against taking oath.**—Bram *v.* United States, 168 U. S. 532, 567, 42 L. Ed. 568. See Rev. Stat., § 1025.

10. **Mormon adherents.**—Miles *v.* United States, 103 U. S. 304, 310, 26 L. Ed. 481.

Section 5 of the act of Congress of March 22, 1882, 22 Stat. 30, provides: "That in any prosecution for bigamy, polygamy, or unlawful cohabitation, under any statute of the United States, it shall be sufficient cause of challenge, to any person drawn or summoned as a juryman or talesman, * * * that he believes it right for a man to have more than one living and undivorced wife at the same time." As the person challenged and excluded answered, when questioned on oath, that he believed it right for a man to have more than one undivorced wife living at the same time, he was properly excluded under § 5 of the act of March 22, 1882. Clawson *v.* United States, 114 U. S. 477, 482, 29 L. Ed. 179. See ante, "Definition," I.

11. **Qualifications of electors.**—Rogers *v.* Alabama, 192 U. S. 226, 230, 48 L. Ed. 417.

12. **Aliens.**—See the title ALIENS, vol. 1, p. 219.

13. **Race, color, etc.**—See the title CIVIL RIGHTS, vol. 3, p. 831.

14. **Loyalty—In England.**—United States *v.* Gale, 109 U. S. 65, 27 L. Ed. 857. See Statute of 11th Henry IV. See post, "Motion in Arrest of Judgment," III, L, 1, d.

15. **In United States.**—United States *v.* Gale, 109 U. S. 65, 67, 27 L. Ed. 857. See Rev. Stat., § 820.

16. Brown *v.* Massachusetts, 144 U. S. 573, 579, 36 L. Ed. 546; Baldwin *v.* Kansas, 129 U. S. 52, 32 L. Ed. 640.

17. **In Porto Rico.**—Crowley *v.* United States, 194 U. S. 461, 48 L. Ed. 1075. See ante, "Effect of State Law in Federal Courts," III, A.

J. Presumption of Qualification.—If an indictment is valid on its face, it will be presumed to have been found by qualified grand jurors.[18]

K. Effect of Presence of Disqualified Jurors on Panel.—A disqualified juror placed upon the panel may be supposed injuriously to affect the whole panel.[19]

L. Objections Because of Disqualification of Jurors—1. How Made—a. *Challenge.*—A disqualified juror may be removed by challenge.[20]

b. *Plea in Abatement of Indictment.*—The proper mode of making objection to the personnel of the grand jury when the matter does not appear of record, is by plea in abatement.[21] Such a plea must be pleaded with strict exactness,[22] and at an early stage of the prosecution.[23]

c. *Motion to Quash Indictment.*—"In this country a motion to quash the indictment may be made instead of pleading specially in abatement.[24]

d. *Motion in Arrest of Judgment.*—The disqualification of a grand juror, not

18. Presumption of qualification.—Greene *v.* Henkel, 183 U. S. 249, 261, 46 L. Ed. 177. See the title INDICTMENTS, INFORMATIONS, PRESENTMENTS AND COMPLAINTS.

19. Effect of presence of disqualified juror.—United States *v.* Gale, 109 U. S. 65, 70, 27 L. Ed. 857.

Under act of Porto Rico of April 1, 1901.—The disqualifications prescribed by this act are matters of substance and not of mere form, not tending to the prejudice of the accused. Crowley *v.* United States, 194 U. S. 461, 48 L. Ed. 1075.

20. Objections—Challenge.—Carter *v.* Texas, 177 U. S. 442, 447, 44 L. Ed. 839.

The action of a trial court in indorsing upon a challenge to the grand jury the words "filed subject to argument on face of papers," and upon a motion for subpœna duces tecum the words "filed subject to orders," cannot be objected to as having denied the accused due process of law where it further appears that such action on the part of the court merely signified that the court withheld immediate action on the motions and that the hearing of the challenge was subsequently proceeded in, and that evidence was adduced by both the state and the accused. Murray *v.* Louisiana, 163 U. S. 101, 106, 41 L. Ed. 87.

21. Plea in abatement.—Agnew *v.* United States, 165 U. S. 36, 44, 41 L. Ed. 624. See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 34.

In Virginia.—"One of the earliest cases in this country in which the question arose was that of Commonwealth *v.* Cherry, 2 Va. Cas. 20, decided in 1815. It was there held that if a grand juror was disqualified, the indictment or presentment, after being found could be avoided by plea in abatement. With rare exceptions this rule is recognized and followed in the different states." Crowley *v.* United States, 194 U. S. 461, 470, 48 L. Ed. 1075.

It has always been the practice in Florida to make all objections to the competency of grand jurors not appearing of record by plea in abatement of, and not by motion to quash, the indictment. Tarrance *v.* Florida, 188 U. S. 519, 523, 47 L. Ed. 572.

Under § 820, Rev. Stat.—United States *v.* Gale, 109 U. S. 65, 69, 27 L. Ed. 857.

Outlawry under English statute.—United States *v.* Gale, 109 U. S. 65, 68, 27 L. Ed. 857.

Plea and supplemental plea in abatement.—Bram *v.* United States, 168 U. S. 532, 566, 42 L. Ed. 568.

Pleading over.—United States *v.* Gale, 109 U. S. 65, 67, 27 L. Ed. 857.

22. Pleaded with strictness.—Agnew *v.* United States, 165 U. S. 36, 44, 41 L. Ed. 624. See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 34.

23. Time allowed to plead.—See post, "Time of Making," III, L, 2. And see the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 34.

Before pleading in bar.—United States *v.* Gale, 109 U. S. 65, 69, 27 L. Ed. 857; Carter *v.* Texas, 177 U. S. 442, 447, 44 L. Ed. 839.

Before arraignment.—Crowley *v.* United States, 194 U. S. 461, 48 L. Ed. 1075.

Before trial.—United States *v.* Gale, 109 U. S. 65, 69, 27 L. Ed. 857.

After return of indictment.—Crowley *v.* United States, 194 U. S. 461, 469, 48 L. Ed. 1075.

24. Motion to quash indictment.—United States *v.* Gale, 109 U. S. 65, 67, 27 L. Ed. 857; Agnew *v.* United States, 165 U. S. 36, 44, 41 L. Ed. 624; In re Wood, 140 U. S. 278, 35 L. Ed. 505.

Under Florida practice.—Tarrance *v.* Florida, 188 U. S. 519, 523, 47 L. Ed. 572.

Outlawry under English statute.—United States *v.* Gale, 109 U. S. 65, 68, 27 L. Ed. 857.

Before pleading in bar.—Carter *v.* Texas, 177 U. S. 442, 447, 44 L. Ed. 839; United States *v.* Gale, 109 U. S. 65, 67, 27 L. Ed. 857.

Evidence on motion.—Carter *v.* Texas, 177 U. S. 442, 447, 44 L. Ed. 839.

appearing on the face of the record, cannot be raised on motion in arrest of judgment.[25] And, even where appearing of record, it seems that the objection cannot be made in this manner,[26] in the absence of a statute rendering the indictment void.[27] Such a statute was that of 11 Henry IV.[28]

e. *Suggestion of Amicus Curiæ.*—Under an English statute, making an indictment void if found by grand jurors who had been outlawed, it was held that objection thereto may be made by the suggestion of amicus curiæ, if the matter appeared of record.[29]

2. Time of Making.—An objection to the qualification of a grand juror must be made at the early stages of the prosecution.[30]

3. Waiver of.—If the objection to the qualification of a grand juror is not made in the proper way,[31] and at the proper time,[32] it is waived, whether the disqualification appears of record or by averments.[33]

25. **Motion in arrest of judgment.**—Brown *v.* Massachusetts, 144 U. S. 573, 579, 36 L. Ed. 546; United States *v.* Gale, 109 U. S. 65, 68, 27 L. Ed. 857.

In Massachusetts, as elsewhere, the errors suggested could not be availed of by motion in arrest of judgment, unless appearing on the face of the record. Brown *v.* Massachusetts, 144 U. S. 573, 579, 36 L. Ed. 546.

26. **Disqualification appearing of record.**—"But even if it should appear upon the record as a proper part thereof, the fact of pleading to the merits and going to trial without taking the objection would also appear, and would amount in law to a waiver of the irregularity." United States *v.* Gale, 109 U. S. 65, 69, 27 L. Ed. 857.

27. **In absence of statute.**—Where no statute makes the proceedings void, the objection should be taken in limine. United States *v.* Gale, 109 U. S. 65, 69, 27 L. Ed. 857.

28. **"By an English statute passed in the 11th year of Henry IV,** it was declared that indictments made by persons not returned by the sheriff, or by persons nominated to him, or who were outlawed or had fled to sanctuary for treason or felony, should be void, revoked and annulled. On this statute it was held that if any such persons were on a grand jury which found an indictment, it made the whole void, and if the matter appeared on the record, or in the proceedings of the same court, advantage might be taken of it on motion in arrest of judgment, * * * but if it did not appear on the record of the cause, or in the records of the same court, the better opinion was that it could only be pleaded in abatement, or raised by motion to quash." United States *v.* Gale, 109 U. S. 65, 68, 27 L. Ed. 857.

Not such federal statute.—"We have no inexorable statute making the whole proceeding void for any such irregularities." United States *v.* Gale, 109 U. S. 65, 67, 27 L. Ed. 857.

29. **Suggestion of amicus curiæ.**—United States *v.* Gale, 109 U. S. 65, 68, 27 L. Ed. 857.

30. **Time of making.**—See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 34. And see, ante, "Plea in Abatement of Indictment," III, L, 1, b.

Before trial.—In Bacon's Abridgement it is said that no exception against an indictor is allowable, unless the party takes it before trial. United States *v.* Gale, 109 U. S. 65, 68, 27 L. Ed. 857.

After return of indictment.—"Can such an objection be made, as was done here by plea in abatement after the return of the indictment? Upon this point the authorities are not in harmony." Crowley *v.* United States, 194 U. S. 461, 469, 48 L. Ed. 1075.

After return but before arraignment.—An objection to the qualifications of the grand jurors made three days after the indictment was returned and before arraignment and as soon as the accused learned of the facts upon which the objection was based, was made and in due time, where the accused was not in court when the grand jurors were selected and the grand jury impaneled, and, so far as appears from the record, was not aware that his case would be taken up by the grand jury. Crowley *v.* United States, 194 U. S. 461, 474, 48 L. Ed. 1075.

Before arraignment.—Crowley *v.* United States, 194 U. S. 461, 48 L. Ed. 1075.

Before pleading in bar.—This objection must be made before pleading in bar. United States *v.* Gale, 109 U. S. 65, 72, 27 L. Ed. 857; Carter *v.* Texas, 177 U. S. 442, 447, 44 L. Ed. 839.

After verdict too late.—United States *v.* Gale, 109 U. S. 65, 69, 27 L. Ed. 857.

Under Porto Rican practice.—Crowley *v.* United States, 194 U. S. 461, 48 L. Ed. 1075.

31. **Waiver of objections.**—See ante, "How Made," III, L, 1.

32. See ante, "Time of Making," III, L, 2.

33. United States *v.* Gale, 109 U. S. 65, 74, 27 L. Ed. 857. See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 41.

IV. Exemptions.

The right to be exempted from grand jury service in the federal courts is controlled by the local state law.[34]

V. Summoning and Impaneling.

A. Proceedings Are Part of Prosecution.—Proceedings to impanel a grand jury are a part of the prosecution.[35]

B. Statutory Provision.—The act of congress of June 30, 1879, 21 Stat. 43, c. 52, provides that grand jurors, to serve in the courts of the United States, "shall be publicly drawn from a box containing, at the time of each drawing, the names of not less than three hundred persons, possessing the qualifications prescribed in § 800 of the Revised Statutes, which names shall have been placed therein by the clerk of such court and a commissioner, to be appointed by the judge thereof, which commissioner shall be a citizen of good standing, residing in the district in which such court is held, and a well-known member of the principal political party in the district in which the court is held opposing that to which the clerk may belong, the clerk and said commissioner each to place one name in said box alternatively, without reference to party affiliations, until the whole number required shall be placed therein, * * * and all juries to serve in courts after the passage of this act shall be drawn in conformity herewith."[36]

C. By Whom Summoned and Impaneled.—No grand jury shall be summoned to attend any circuit or district court, unless one of the judges of such circuit court, or the judge of such district, in his own discretion, or upon a notification by the district attorney that such jury will be needed, orders a venire to issue therefor.[37] After it has been summoned, the clerk may impanel the grand jury.[38]

D. Swearing or Affirming.—It is left to the discretion of the officer administering the oath or affirmation to determine whether or not the juror has conscientious scruples against taking an oath and to permit him to affirm instead of making oath.[39] The officer administering oath or affirmation on the voir dire of a grand juror is not entitled to compensation therefor.[40]

E. Exclusion of Certain Qualified Persons.—The accused cannot complain merely because certain good and qualified persons were not summoned and impaneled on the grand jury.[41]

F. Excusing Grand Jurors.—In excusing grand jurors, the federal courts

34. Exemptions.—Pointer *v.* United States, 151 U. S. 396, 407, 38 L. Ed. 208. See the title COURTS, vol. 4, p. 1142.

35. Proceedings part of prosecution.—Clawson *v.* United States, 114 U. S. 477, 29 L. Ed. 179.

36. Statutory provisions.—Rodriguez *v.* United States, 198 U. S. 156, 162, 49 L. Ed. 994.

Applies to circuit and district courts only.—Reynolds *v.* United States, 98 U. S. 145, 25 L. Ed. 244; Miles *v.* United States, 103 U. S. 304, 310, 26 L. Ed. 481; Logan *v.* United States, 144 U. S. 263, 298, 36 L. Ed. 429; Thiede *v.* Utah, 159 U. S. 510, 515, 40 L. Ed. 237.

In Porto Rico.—As the Porto Rico statutes contain no provisions relating to the selection, drawing or impaneling of grand jurors, it was the duty of the district court of the United States for Porto Rico in criminal prosecutions for crimes against the United States, to conform to this act of congress. Rodriguez *v.* United States, 198 U. S. 156, 162, 49 L. Ed. 994.

In the territory of Utah.—Clawson *v.* United States, 114 U. S. 477, 478, 29 L. Ed. 179; Reynolds *v.* United States, 98 U. S. 145, 25 L. Ed. 244.

37. Venire issues at order of judge.—McDowell *v.* United States, 159 U. S. 596, 40 L. Ed. 271. See Rev. Stat., § 810.

38. Clerk may impanel.—Rodriguez *v.* United States, 198 U. S. 156, 165, 49 L. Ed. 994.

39. Swearing or affirming.—Bram *v.* United States, 168 U. S. 532, 568, 42 L. Ed. 568. See Rev. Stat., § 1025. See post, "Oath of Grand Jurors," VI.

40. Officer not entitled to compensation for.—United States *v.* Jones, 193 U. S. 528, 531, 48 L. Ed. 776. See clause 4, § 828, Rev. Stat.

41. Exclusion of certain qualified persons.—United States *v.* Gale, 109 U. S. 65, 70, 27 L. Ed. 857.

Where the court excludes particular persons who might properly have served on the jury, its action does not vitiate all subsequent proceedings so as to render them absolutely null and void. It might have sufficed to quash the indictment if

follow the practice in the highest court of the state in which they are sitting.[42]

G. Supplying Deficiency in Number of Grand Jurors.—In the territory of Utah, if the names of the two hundred persons in the jury box have been exhausted, a venire may be issued to the marshal to summons persons from the body of the district to supply the deficiency in the number of grand jurors.[43]

H. Presumption of Regularity.—If the indictment is regular on its face, it will be presumed to have been found by a grand jury properly summoned and impaneled.[44]

I. Objections to Manner of Summoning and Impaneling.—All ordinary objections based upon the informalities in summoning or impaneling the grand jury, where no statute makes such informal proceedings utterly void, should be taken in limine,[45] either by challenge,[46] by motion to quash,[47] or by plea in abatement.[48] Neglecting to do this, the defendant should be deemed to have waived the irregularity.[49] But there are cases which admit of a different con-

the objection had been timely and properly made. Nothing more. We think that this conclusion is the result not only of the English, but of the better American authorities. United States *v.* Gale, 109 U. S. 65, 71, 27 L. Ed. 857.

Exclusion of Mormons.—Clawson *v.* United States, 114 U. S. 477, 29 L. Ed. 179.

Exclusion of negroes.—See the title CIVIL RIGHTS, vol. 3, p. 831.

42. Excusing grand jurors.—Rodriguez *v.* United States, 198 U. S. 156, 162, 49 L. Ed. 994.

43. Supplying deficiency.—Clawson *v.* United States, 114 U. S. 477, 29 L. Ed. 179, decided under the act of congress of June 23, 1874, 18 Stat. 254.

44. Presumption of regularity.—Greene *v.* Henkel, 183 U. S. 249, 261, 46 L. Ed. 177; Tarrance *v.* Florida, 188 U. S. 519, 520, 47 L. Ed. 572. See the title INDICTMENTS, INFORMATIONS, PRESENTMENTS AND COMPLAINTS.

45. Objections to summoning and impaneling.—United States *v.* Gale, 109 U. S. 65, 69, 27 L. Ed. 857; Rodriguez *v.* United States, 198 U. S. 156, 165, 49 L. Ed. 994; In re Wood, 140 U. S. 278, 35 L. Ed. 505; Agnew *v.* United States, 165 U. S. 36, 44, 41 L. Ed. 624.

Where the original venire was issued November 18, the second venire issued December 2, 1895, the court opened December 3, 1895, and the indictment was returned December 12, the defendant did not file his plea in abatement until December 17, and the plea does not allege want of knowledge of threatened prosecution on the part of defendant, nor want of opportunity to present his objection earlier nor assign any ground why exception was not taken or objection made before, it was held to be too late. Agnew *v.* United States, 165 U. S. 36, 44, 41 L. Ed. 624. See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 34.

After verdict.—It would be trifling with justice, and would render criminal proceedings a farce, if such objections could be taken after verdict, even though the irregularity should appear in the record of the proceedings. United States *v.* Gale, 109 U. S. 65, 69, 27 L. Ed. 857.

46. By challenge.—Agnew *v.* United States, 165 U. S. 36, 44, 41 L. Ed. 624. See ante, "Challenge," III, L, 1, a.

47. Motion to quash.—Agnew *v.* United States, 165 U. S. 36, 44, 41 L. Ed. 624. But the objection cannot be so made under the practice in Florida. Tarrance *v.* Florida, 188 U. S. 519, 523, 47 L. Ed. 572. See ante, "Motion to Quash Indictment," III, L, 1, c.

In the case at bar, as may be inferred from the dates appearing in the record, and as is distinctly stated in the opinion delivered by the court below on denying a rehearing, where the grand jury had been impaneled before the commission of the offense for which the defendant was indicted, and he therefore never had any opportunity to challenge the array of the grand jury, he was entitled to present the objection on which he relied by motion to quash. Carter *v.* Texas, 177 U. S. 442, 447, 44 L. Ed. 839.

48. Plea in abatement.—Bram *v.* United States, 168 U. S. 532, 566, 42 L. Ed. 568; Agnew *v.* United States, 165 U. S. 36, 44, 41 L. Ed. 624; United States *v.* Gale, 109 U. S. 65, 27 L. Ed. 857. See ante, "Plea in Abatement of Indictment," III, L, 1, b.

When the defendant has had no opportunity to challenge the grand jury which found the indictment against him, the objection to the constitution of the grand jury upon the ground that persons of the colored race are excluded therefrom may be taken, either by plea in abatement, or by motion to quash the indictment, before pleading in bar. Carter *v.* Texas, 177 U. S. 442, 447, 44 L. Ed. 839; United States *v.* Gale, 109 U. S. 65, 67, 27 L. Ed. 857.

Under Florida practice.—"It has for many years been the practice in this state, sanctioned by repeated rulings of this court, that all objections to the competency of, and to irregularities in selecting, drawing and impaneling grand jurors, not appearing of record, must be taken advantage of by plea in abatement of the indictment, and not by motion to quash it." Tarrance *v.* Florida, 188 U. S. 519, 523, 47 L. Ed. 572.

49. Waiver of objection.—Rodriguez *v.*

sideration, and in which the objection to the grand jury may be taken at any time; as where the whole proceeding of forming the panel is void; or the jury is not a jury of the court or term in which the indictment is found; has been selected by persons having no authority whatever to select them; have not been sworn; or where some other fundamental requisite has not been complied with.[50] "Another general rule is that for such irregularities as do not prejudice the defendant, he has no cause of complaint, and can take no exception."[51]

VI. Oath of Grand Jurors.

The oath administered to the foreman in Rex *v.* Shaftsbury, 8 Howell's State Trials 759, was that "you shall diligently inquire and true presentments make of all such matters, articles, and things as shall be given to you in charge, as of all other matters, and things as shall come to your own knowledge touching this present service," etc. This oath has remained substantially unchanged to the present day.[52]

VII. Powers and Duties.

A. Territorial Extent of.—The territorial extent of the jurisdiction of a grand jury is usually coextensive with that of the court by which it is organized and for which it is to exercise its inquisitorial functions.[53] The jurisdiction of a circuit court of the United States is, as a general rule, bounded by the local limits of the districts within and for which it sits.[54] These courts may be required to be held at different places in a judicial district, and prosecutions for offenses committed in certain counties may be required to be tried, and writs and recognizances to be returned at each place, but this does not affect the power of the grand jury sitting at either place to present indictments for offenses committed anywhere within the district.[55]

B. To Examine Witnesses.—The examination of witnesses need not be preceded by a presentment or indictment formally drawn up.[56] In summoning wit-

United States, 198 U. S. 156, 165, 49 L. Ed. 994.

"We think that the doctrine of waiver applies as well to cases where the objection appears of record as where it appears by averments; and that it applies to all cases of objection to the qualifications of jurors, and to the mode of impaneling the jury; but does not apply to cases where the proceeding is wholly void by reason of some fundamental defect or vice therein." United States *v.* Gale, 109 U. S. 65, 72, 27 L. Ed. 857.

50. Cases in which objection may be otherwise made.—United States *v.* Gale, 109 U. S. 65, 71, 27 L. Ed. 857; Rodriguez *v.* United States, 198 U. S. 156, 164, 49 L. Ed. 994.

51. Irregularities not prejudicial.—Agnew *v.* United States, 165 U. S. 36, 44, 41 L. Ed. 624.

A plea in abatement is fatally defective where it is stated that the drawing "tended to his injury and prejudice," but no grounds whatever are assigned for such a conclusion, and the record exhibits none. Agnew *v.* United States, 165 U. S. 36, 44, 41 L. Ed. 624.

52. Hale *v.* Henkel, 201 U. S. 43, 60, 50 L. Ed. 652.

Additional oath.—Atwood *v.* Weems, 99 U. S. 183, 25 L. Ed. 471; Burt *v.* Penjaud, 99 U. S. 180, 25 L. Ed. 451.

Oath or affirmation.—Bram *v.* United States, 168 U. S. 532, 567, 42 L. Ed. 568. See ante, "Swearing or Affirming," V, D.

53. Territorial extent of—Coextensive with that of court.—Logan *v.* United States, 144 U. S. 263, 297, 36 L. Ed. 429.

54. Toland *v.* Sprague, 12 Pet. 300, 328, 9 L. Ed. 1093; Devoe Mfg. Co., 108 U. S. 401, 27 L. Ed. 764. See the title JURISDICTION.

55. It was said in Logan *v.* United States, 144 U. S. 263, 297, 36 L. Ed. 429, that the act of congress of 1894, c. 132, 28 Revised Statutes, "does not affect the authority of the grand jury for the district, sitting at any place at which the court is appointed to be held, to present indictments for offenses committed anywhere within the district. It only requires the trial to be had, and writs and recognizances to be returned, in the division in which the offense is committed. The finding of the indictment is no part of the trial." Post *v.* United States, 161 U. S. 583, 586, 40 L. Ed. 816; Barrett *v.* United States (No. 1), 169 U. S. 218, 221, 42 L. Ed. 723.

56. Examination of witnesses.—Hale *v.* Henkel, 201 U. S. 43, 63, 50 L. Ed. 652. See the title WITNESSES.

Compelling attendance.—Hale *v.* Henkel, 201 U. S. 61, 50 L. Ed. 652.

Determining credibility of testimony.—Hale *v.* Henkel, 201 U. S. 43, 59, 50 L. Ed. 652.

nesses before a grand jury it is quite sufficient to apprise them of the names of the parties with respect to whom they will be called to testify, without indicating the nature of the charge.[57]

C. To Initiate Prosecution.—This subject is treated elsewhere.[58]

VIII. Number of Grand Jurors.

The act of congress, prescribing the number of grand jurors to be impaneled, applies only to the circuit and district courts of the United States.[59] A defect in the number of grand jurors does not vitiate the entire proceedings; so that they can be challenged collaterally on habeas corpus, but it is only a matter of error to be corrected by proceedings in error.[60]

IX. Finding Indictment.

This subject is treated elsewhere.[61]

GRANT.—See the titles DEEDS, vol. 5, p. 245; LANDLORDS AND TENANTS; PUBLIC LANDS. A grant, in its own nature, amounts to an extinguishment of the right of the grantor; it is a contract executed; and a party is always estopped by his own grant.[1]

GRANTEE.—See the titles DEEDS, vol. 5, p. 245; PATENTS; VENDOR AND PURCHASER.

GRAVEYARD.—See the title CEMETERIES, vol. 3, p. 647.

Refreshing memory of witness.—Putnam *v.* United States, 162 U. S. 687, 40 L. Ed. 1118.

Self-incrimination. — Counselmann *v.* Hitchcock, 142 U. S. 547, 35 L. Ed. 1110; Hale *v.* Henkel, 201 U. S. 43, 61, 50 L. Ed. 652. See the title CONSTITUTIONAL LAW, vol. 4, p. 504.

57. Summoning witnesses.—Hale *v.* Henkel, 201 U. S. 43, 63, 50 L. Ed. 652.

58. To initiate prosecution, see the titles CRIMINAL LAW, vol. 5, p. 961; INDICTMENTS, INFORMATIONS, PRESENTMENTS AND COMPLAINTS. And see ante, "Origin and History," II.

59. Number of grand jurors.—Reynolds *v.* United States, 98 U. S. 145, 25 L. Ed. 244. See Rev. Stat., § 808. See the title DUE PROCESS OF LAW, vol. 5, p. 499.

For crime in jurisdiction of Cherokee Indian nation.—Talton *v.* Mayes, 163 U. S. 376, 41 L. Ed. 196.

60. Deficiency—Not ground for habeas corpus.—A deficiency in the number of grand jurors prescribed by law, there being present and acting a greater number than that requisite for the finding of an indictment, is not such a defect as, though unnoticed by the prisoner until after trial and sentence, vitiates the entire proceedings and compels his discharge on habeas corpus. In re Wilson, 140 U. S. 575, 582, 35 L. Ed. 513. See the title HABEAS CORPUS.

61. See the title INDICTMENTS, INFORMATIONS, PRESENTMENTS AND COMPLAINTS.

1. Grant.—Fletcher *v.* Peck, 6 Cranch 87, 137, 3 L. Ed. 162; Dartmouth College *v.* Woodward, 4 Wheat. 518, 681, 4 L. Ed. 629.

A gift by the crown of incorporeal hereditaments, such as corporate franchises, when executed, is, in the strictest sense of the terms, a **grant**; and a **grant** of franchises is not, in point of principle, distinguishable from a **grant** of any other property. Dartmouth College *v.* Woodward, 4 Wheat. 518, 683, 4 L. Ed. 629.

"There is a clear distinction between the effect of a license to enter lands, uncoupled with an interest, and a **grant**. A **grant** passes some estate of greater or less degree, must be in writing, and is irrevocable, unless it contains words of revocation; whereas a license is a personal privilege, can be conferred by parol or in writing, conveys no estate or interest, and is revocable at the pleasure of the party making it." De Haro *v.* United States, 5 Wall. 599, 627, 18 L. Ed. 681.

"Grant" as used in treaty.—The term **grant** in a treaty, "comprehends not only those which are made in form, but also any concession, warrant, order, or permission to survey, possess, or settle, whether evidenced by writing or parol, or presumed from possession." Strother *v.* Lucas, 12 Pet. 410, 436, 9 L. Ed. 1137. See, generally, the title PUBLIC LANDS.

Granted lands.—In the construction of land **grant** acts in aid of railroads, "**granted** lands" "are those falling within the limits specially designated, the title to which attaches when the lands are located by an approved and accepted survey of the line, filed in the land department, as of the date of the act of congress," "indemnity lands" "are those selected in lieu of parcels previously disposed of or reserved, the title to which accrues only from their selection." Barney *v.* Winona, etc., R. Co., 117 U. S. 228, 232, 29 L. Ed. 858. See the title PUBLIC LANDS.

GROSS NEGLIGENCE.—See the title NEGLIGENCE.
GROUND OF ACTION.—See note 1.

GROUND RENTS.

CROSS REFERENCES.

See the title ANNUITY, vol. 1, p. 329.

As to transfer of a fee farm rent, see the title ASSIGNMENT, vol. 2, p. 564. As to limitation of right to make claim for ground rent, see the titles IMPAIRMENT OF OBLIGATION OF CONTRACTS; LIMITATION OF ACTIONS AND ADVERSE POSSESSION. As to assignment by husband of quit rents due the wife, see the titles ASSIGNMENTS, vol. 2, p. 563; HUSBAND AND WIFE. As to liability on covenant to pay rent, see the title LANDLORD AND TENANT. As to liability of a tenant, holding possession of premises after termination of term, for ground rent, see the title LANDLORD AND TENANT. As to liability of a mortgagee for ground rent, see the title MORTGAGES AND DEEDS OF TRUST. As to a grant of a rent charge for a loan being usurious because amounting to more than legal rate of interest, see the title USURY. As to necessity of vendor to proceed judicially to recover a lot conveyed by him, because of the vendee's failure to pay ground rent, before he can reconvey the lot, see the titles LANDLORD AND TENANT; VENDOR AND PURCHASER.

Irredeemable Ground Rent.—An irredeemable ground rent under the laws of Pennsylvania is defined to be a rent reserved to himself and his heirs by the grantor of land, out of the land itself. It is not granted like an annuity or rent charge, but is reserved out of a conveyance of the land in fee. It is a separate estate from the ownership of the ground, and is held to be real estate, with the usual characteristics of an estate in fee simple, descendible, devisable, alienable.[2]

GUANO ISLANDS.—As to the acquisition by the United States of islands containing guano deposits, see the titles CONSTITUTIONAL LAW, vol. 4, pp. 96, 97; UNITED STATES. As to the jurisdiction of federal courts over offenses committed on Guano Islands, see the title CRIMINAL LAW, vol. 5, p. 76. As to the determination of the sovereignty over the Guano Islands, see the title INTERNATIONAL LAW. As to the general jurisdiction of the United States over the Guano Islands, see the titles INTERNATIONAL LAW; UNITED STATES. As to the manner in which the sovereignty of the United States shall be declared over the Guano Islands, see the title UNITED STATES. As to the judicial notice of courts of the United States of the jurisdiction of the United States over the Guano Islands, see the title JUDICIAL NOTICE. As to whether a breach of the bond given by the discovery of the Guano Islands affects the dominion of the United States over such islands, see the title UNITED STATES. As to whether or not a wife is entitled to dower, in the interest which her husband has in the Guano Islands which he had discovered, after his death, see the title DOWER, vol. 5, p. 487.

1. **Ground of action.**—A state statute provided that amendments to declarations might be made to correct any mistake, defect or informality in the same, not changing the form or **ground of action.** It was held that the phrase, **ground of action,** was not used in the statute in any technical or narrow sense, but was intended to refer rather to the real object of the plaintiff in bringing the suit than to the technical meaning of the word and that such a construction had always been given to the phrase as would further that object. West *v.* Smith, 101 U. S. 263, 266, 25 L. Ed. 809. See the title AMENDMENTS, vol. 1, pp. 299, 300.

2. Wilson *v.* Iseminger, 185 U. S. 55, 59, 46 L. Ed. 804.

GUARANTY.

BY FRANK MOORE.

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As to whether letter of recommendation was given to defraud and deceive, see the title FRAUD AND DECEIT, ante, p. 394. As to necessity for consideration in guaranty of payment of note, see the title BILLS, NOTES AND CHECKS, vol. 3, p. 277. As to power of national banks to make contracts of guaranty, see the title BANKS AND BANKING, vol. 3, p. 77.

I. Definitions.

A. Of Word "Guaranty."—In a case of an instrument under seal, the term "covenant" is the technical synonym for the word "guaranty."[1]

B. Of a Continuing Guaranty.—When by the terms of the guaranty it appears that the parties looked to a future course of dealing for an indefinite time, or a succession of credits to be given, the guaranty is a continuing one.[2]

1. **"Covenant" and "guaranty" synonymous terms.**—Hill *v.* Smith, 21 How. 283, 16 L. Ed. 113.

2. **Example of a continuing guaranty.**—The following guarantee, viz: "In consideration of Messrs. J. and A. Lawrence having a credit with your house, and in further consideration of $1 paid me by yourselves, receipt of which I hereby acknowledge, I engage to you that they shall fulfill the engagements they have made and shall make with you, for meeting and reimbursing the payments which you may assume under such credit at

As, for example, where words of continuing credit, such as "from time to time," or "at any time,"[3] or "having,"[4] are used.

II. Form and Essential Elements.

A. Form.—As the statute of frauds does not prescribe the form of a binding letter of guarantee, it is sufficient that the natural parts of it appear either expressed, or clearly to be implied; and correspondence and other evidence may be used to ascertain the true import and application of the agreement; by the aid of which extrinsic evidence, the proper construction may be made.[5]

B. Essential Elements—1. DEFINITENESS AND CERTAINTY.—The law will subject a man, having no interest in the transaction, to pay the debt of another, only when his undertaking manifests a clear intention to bind himself for that debt. Words of doubtful import ought not to receive that construction.[6] It is the duty of the individual, who contracts with one man on the credit of another, not to trust to ambiguous phrases and strained constructions, but to require an explicit and plain declaration of the obligation he is about to assume.[7]

their request, together with your charges; and I guaranty you from all payments and damages by reason of their default. You are to consider this as a standing and continuing guarantee, without the necessity of your apprizing me, from time to time, of your engagements and advances for their house; and in case of a change of partners in your firm or theirs, the guarantee is to apply and continue to transactions afterwards, between the firms as changed, until notified by me to the contrary: "—held, a continuing guarantee, and to include not only tranactions under a letter of credit existing at the date of the guarantee, but also transactions which arose under a second letter granted at the expiration of the first; although the second credit contained a proviso "that the bills be drawn by, or in favor of parties permanently resident in Europe; and if made from the continent, they be made at the customary date, say three months." Lawrence *v.* McCalmont, 2 How. 426, 11 L. Ed. 326.

3. **Words held to import a continuing guaranty.**—Douglass *v.* Reynolds, 7 Pet. 113, 8 L. Ed. 626.

Action upon the following letter of guaranty, written by the defendants and delivered to the plaintiffs: "Port Gibson, December 1827. Messrs. Reynolds, Byrne & Co. Gentlemen:—Our friend, Mr. Chester Haring, to assist him in business, may require your aid, from time to time, either by acceptance or indorsement of his paper, or advances in cash; in order to save you from harm by so doing, we do hereby bind ourselves, severally and jointly, to be responsible to you, at any time, for a sum, not exceeding eight thousand dollars, should the said Chester Haring fail to do so. Your obedient servants, James S. Douglass, John G. Singleton, Thomas Going." One count in the declaration was for money lent, and money had and received. Held, the guarantee given by the defendants covered successive advances, acceptances and indorsements made by the plaintiffs, to the amount of $8,000, at any subsequent times, toties quoties, whenever the antecedent transactions were discharged; it was a continuing guarantee. Douglass *v.* Reynolds, 7 Pet. 113, 8 L. Ed. 626.

4. **"Having" denotes continuing credit.**—"In the next place, the guarantee itself uses language susceptible of being treated as a present continuing consideration in fieri. It is 'in consideration of Messrs. J. and A. Lawrence having a credit with your house;' now, the word 'having' imports a present or future advance, just as much as a past. The word 'having' is in the present tense; and if the parties then understood the letter of credit to be in fieri, and to be absolute only upon a condition subsequent, viz; the giving of the guarantee, the word is the most appropriate which could be used." Lawrence *v.* McCalmont, 2 How. 426, 452, 11 L. Ed. 326.

5. **Form of guaranty.**—Drummond *v.* Prestman, 12 Wheat. 515, 6 L. Ed. 712; Douglass *v.* Reynolds, 7 Pet. 113, 8 L. Ed. 626; Lee *v.* Dick, 10 Pet. 482, 9 L. Ed. 503; Bell *v.* Bruen, 1 How. 169, 170, 183, 11 L. Ed. 89.

6. **Requisites of a valid guaranty.**—Russell *v.* Clarke, 7 Cranch 69, 3 L. Ed. 271, approved in Douglass *v.* Reynolds, 7 Pet. 113, 8 L. Ed. 626.

Contracts held not to be guarantees.—A letter of introduction in the following words, "You may be assured of their complying with any contracts or engagements they may enter into with you," was admitted by a majority of the court not to import an undertaking or guaranty. Clarke *v.* Russell, 3 Dall. 415, 1 L. Ed. 660.

The following words in a letter of guaranty, "Mr. Russell may be assured that Robert Murray & Co. will comply fully with their engagements," indicate no intention on the part of the person writing the letter to take any responsibility on himself. Russell *v.* Clarke, 7 Cranch 69, 3 L. Ed. 271.

7. Russell *v.* Clarke, 7 Cranch 69, 92, 3 L. Ed. 271.

2. Consideration—a. *Sufficiency of Consideration.*—A valuable consideration, however small or nominal, if given or stipulated for in good faith, is, in the absence of fraud, sufficient to support an action on any parol contract, and this is equally true as to contracts of guarantee as to others.[8] A contract of guaranty may be supported by a merely nominal consideration. In other words, a stipulation in consideration of one dollar is just as effectual and valuable a consideration as a larger sum stipulated for or paid.[9] Nor is it absolutely necessary that a benefit should accrue to the person making the promise to constitute a sufficient consideration. Thus, in the common case of a letter of credit given by A to B, the person who, on the faith of that letter, trusts B, is admitted to have his remedy against A, although no benefit accrued to A as a consideration of his promise.[9a]

b. *From Whom and to Whom Consideration Must Move.*—Where the guaranty is merely collateral to the principal contract, but made at the same time, and becomes an essential ground of the credit given to the principal or direct debtor, if there is no consideration other than that moving from the original debtor to the creditor under the principal contract, the plaintiff may be permitted to show that fact, if necessary, by parol proof.[10]

c. *Estoppel to Deny Consideration.*—Where the guarantor acknowledges the receipt of a consideration in the contract of guaranty, he is estopped afterwards to deny it.[11]

3. Mutual Assent.—A contract of guaranty, like every other contract, can only be made by the mutual assent of the parties.[12] But if the guaranty is signed by the guarantor at the request of the other party, or if the latter's agreement to accept is contemporaneous with the guaranty, or if the receipt from him of a valuable consideration, however small, is acknowledged in the guaranty, the mutual assent is proved, and the delivery of the guaranty to him or for his use completes the contract.[13]

III. Validity.

A standing guaranty by a mercantile house, to receive in payment of its debts all notes drawn by a certain other house, is valid, on the ground that the notes were taken on the credit of such guaranty. It may be terminated by a notice; but when so terminated all the notes are good against the guarantors, which were executed and circulated prior to the notice.[14]

IV. Interpretation and Construction of Contract.[15]

A. The Intention of the Parties Governs.—In the construction of all written instruments, to ascertain the intention of the parties is the great object of the court, and this is especially the case in acting upon guaranties.[16]

B. Words Construed Most Strongly against Guarantor.—It is a rule

8. The consideration for the guaranty.—Lawrence *v.* McCalmont, 2 How. 426, 11 L. Ed. 326; Davis *v.* Wells, 104 U. S. 159, 26 L. Ed. 686.

9. A consideration of one dollar is sufficient.—Davis *v.* Wells, 104 U. S. 159, 26 L. Ed. 686, following Lawrence *v.* McCalmont, 2 How. 426, 11 L. Ed. 326.

9a. Consideration sufficient though no benefit accure to promisor.—Violett *v.* Patton, 5 Cranch 142, 3 L. Ed. 61.

10. From whom and to whom consideration must move.—De Wolf *v.* Rabaud, 1 Pet. 476, 501, 7 L. Ed. 227.

11. Estoppel to deny consideration.—Lawrence *v.* McCalmont, 2 How. 426, 432, 11 L. Ed. 326; Davis *v.* Wells, 104 U. S. 159, 26 L. Ed. 686.

12. Mutual assent necessary to contract of guaranty.—Davis *v.* Wells, 104 U. S. 159, 26 L. Ed. 686; Davis Sewing Machine Co. *v.* Richards, 115 U. S. 524, 527, 29 L. Ed. 480; National Bank *v.* Hall, 101 U. S. 43, 49, 25 L. Ed. 822.

13. How mutual assent proved.—Davis *v.* Wells, 104 U. S. 159, 26 L. Ed. 686; Davis Sewing Machine Co. *v.* Richards, 115 U. S. 524, 527, 29 L. Ed. 480.

14. Validity of guaranty.—Louisville Mfg. Co. *v.* Welch, 10 How. 461, 13 L. Ed. 497; Woodruff *v.* Trapnall, 10 How. 190, 206, 13 L. Ed. 383.

As to constitutionality of retrospective laws, see the title STATUTES.

15. See the titles CONTRACTS, vol. 4, p. 570; INTERPRETATION AND CONSTRUCTION.

16. Intention of parties governs.—Marran *v.* Lallus, 16 Pet. 528, 10 L. Ed. 1053.

in expounding instruments such as letters of guaranty, that the words of the guarantee are to be taken as strongly against him as the sense will admit.[17] Such, also, is the English rule.[18]

C. The Surrounding Circumstances to Be Considered.—So it has been held, that, in construing a guaranty, it is proper to look at the surrounding circumstances in order to discover the subject matter the parties had in view, and thus to ascertain the scope and object of the guaranty.[19]

D. The Rule Where General Words Precede Particular Words.—Where a mercantile guarantee is preceded by a recital, definite in its terms, and to which the general words obviously refer, the same rule applies, of limiting the liability within the terms of the recital, in restraint of the general words.[20]

E. The Interpretation Should Be Fair and Reasonable.—Letters of guarantee ought to receive a fair and reasonable interpretation according to the true import of its terms. It being an engagement for the debt of another, there is certainly no reason for giving it an expanded signification, or liberal construction beyond the fair import of the terms.[21] Like all other contracts, a letter of guarantee must receive the construction which is most probable and natural under the circumstances, so as to attain the object which the parties to it had

17. Guaranty construed strongly against guarantor.—Drummond *v.* Prestman, 12 Wheat. 515, 516, 6 L. Ed. 712, cited and approved in Douglass *v.* Reynolds, 7 Pet. 113, 121, 8 L. Ed. 626.

It is true, even of a technical guaranty, that its words are to be construed as strongly against the guarantor as the sense will admit. Drummond *v.* Prestman, 12 Wheat. 515, 6 L. Ed. 712; Smeltzer *v.* White, 92 U. S. 390, 392, 23 L. Ed. 508.

A guaranty that county warrants are "genuine and regularly issued," does not mean simply that they are not forgeries, that they are not issued without consideration, and that they were ordered by the proper officers. But such guaranty undertakes also to say that they are not subject to any defense founded upon a want of legal form in the signatures or seals. Smeltzer *v.* White, 92 U. S. 390, 23 L. Ed. 508. See the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.

Guaranty of municipal bonds.—Where an ordinance of a city, authorizing a contract with a gas company, and the issue to it of bonds of the city, provided that the company should "guarantee the said bonds and assume the payment of the principal thereof at maturity:" Held: 1. That the guaranty embraced both the principal and interest of the bonds. 2. That the ordinance contemplated two undertakings by the company—one, to the bondholder, to answer for the city's liability; and the other, to the city, to provide for the payment of the principal of the bonds on their maturity. The indorsement on the bonds by the president of the company, guaranteeing "the payment of the principal and interest" of them, was a compliance with the ordinance and contract as to the guaranty. New Orleans *v.* Clark, 95 U. S. 644, 24 L. Ed. 521.

18. In England guaranty is strictly construed against guarantor.—Smeltzer *v.* White, 92 U. S. 390, 392, 23 L. Ed. 508.

19. Guaranty construed in light of surrounding circumstances.—Smeltzer *v.* White, 92 U. S. 390, 392, 23 L. Ed. 508; Russell *v.* Clarke, 7 Cranch 69, 3 L. Ed. 271; Drummond *v.* Prestman, 12 Wheat. 515, 6 L. Ed. 712; Lee *v.* Dick, 10 Pet. 482, 9 L. Ed. 503; Bell *v.* Bruen, 1 How. 169, 11 L. Ed. 89.

20. Particular words govern and limit general words.—Bell *v.* Bruen, 1 How. 169, 170, 184, 11 L. Ed. 89.

21. Interpretation should be fair and reasonable.—Bell *v.* Bruen, 1 How. 169, 170, 186, 11 L. Ed. 89, reaffirmed in Lawrence *v.* McCalmont, 2 How. 426, 11 L. Ed. 326; Douglass *v.* Reynolds, 7 Pet. 113, 122, 8 L. Ed. 626; Louisville Mfg. Co. *v.* Welch, 10 How. 461, 13 L. Ed. 497.

It has always been held in the federal supreme court that, notwithstanding the contract of guaranty is the obligation of a surety, it is to be construed as a mercantile instrument in furtherance of its spirit and liberally, to promote the use and convenience of commerical intercourse. Davis *v.* Wells, 104 U. S. 159, 169, 26 L. Ed. 686.

"Letters of guarantee ought to receive a liberal interpretation. By a liberal interpretation, we do not mean, that the words should be forced out of their natural meaning; but simply that the words should receive a fair and reasonable interpretation, so as to attain the objects for which the instrument is designed and the purpose to which it is applied. We should never forget that letters of guarantee are commercial instruments—generally drawn up by merchants in brief language—sometimes inartificial, and often loose in their structure and form; and to construe the words of such instruments with a nice and technical care would not only defeat the intentions of the parties, but render them too unsafe a basis to rely on for extensive credits, so often sought in the present active business of commerce

in contemplation in making it.[22] Or, it is to be construed according to what is fairly to be presumed to have been the understanding of the parties, without any strict technical nicety.[23] The presumption is of course to be ascertained from the facts and circumstances accompanying the entire transaction.[24]

F. Rule as to Construction of Bonds Not Applicable.—Commercial letters are not to be construed upon the same principles as bonds.[25]

G. Rule of Construction in Equity Courts.—The construction of a letter of credit, or of guaranty, must be the same in a court of equity, as in a court of law; and any facts which might be introduced into one court to explain the transaction, may be introduced into the other.[26]

H. Questions of Law and Fact.—In accordance with the general rule ap-

throughout the world." Lawrence *v.* McCalmont, 2 How. 426, 449, 11 L. Ed. 326.

22. Construction should be a natural and probable one.—Decatur Bank *v.* St. Louis Bank, 21 Wall. 294, 298, 22 L. Ed. 560.

Hogs included in term cattle.—A bank at Decatur, Illinois, accredited B. with a bank at St. Louis, Missouri, saying that "his drafts against shipments of cattle to the extent of $10,000 are hereby guaranteed." Held, that hogs were included within the term cattle, and that B.'s drafts against shipments of hogs not having been paid, the Bank of Decatur was responsible on its letter of credit. Decatur Bank *v.* St. Louis Bank, 21 Wall. 294, 22 L. Ed. 560.

23. Dick *v.* Lee, 10 Pet. 482, 493, 9 L. Ed. 503; Bell *v.* Bruen, 1 How. 169, 170, 187, 11 L. Ed. 89, reaffirmed in Lawrence *v.* McCalmont, 2 How. 426, 11 L. Ed. 326.

A guarantee is a mercantile instrument, and to be construed according to what is fairly to be presumed to have been the understanding of the parties, without any strict technical nicety. Lee *v.* Dick, 10 Pet. 482, 9 L. Ed. 503.

L., at Memphis, Tennessee, addressed a letter to D. & Co., at New Orleans, stating that N. & D. wished to draw on them for $2,000, saying, "Please accept their draft, and I hereby guaranty the punctual payment of it." In a letter of the same date, to one of the firm of N. & D., he said, "I send a guarantee for $2,000; the balance, I have no doubt, your friend W. will do for you." N. & D. drew a bill on D. & Co. for $4,250, which they accepted; and after having paid the draft, they gave notice to L. that they looked to him for the money; no notice was given by D. & Co. to L., that they intended to accept, or had accepted, and acted upon the guarantee, before they paid the draft; the drawers of the bill did not reimburse D. & Co. for any part of it. Action was instituted to recover $2,000 from L., being part of the bill for $4,250. Held, if the guarantee stood alone, unexplained by the letter which accompanied it, it would undoubtedly be limited to a specific draft for $2,000, and would not cover that amount in a bill for a larger sum; but the letter which accompanied it fully justified the conclusion, that the defendant undertook to guaranty $2,000, in a draft for a larger amount. The letter and guarantee were both written by the defendant, on the same sheet of paper, bear the same date, and may be construed together, as constituting the guarantee. Lee *v.* Dick, 10 Pet. 482, 9 L. Ed. 503.

24. Bell *v.* Bruen, 1 How. 169, 170, 187, 11 L. Ed. 89.

25. Rules as to construction of bonds, etc., not applicable.—Bell *v.* Bruen, 1 How. 169, 11 L. Ed. 89, reaffirmed in Lawrence *v.* McCalmont, 2 How. 426, 11 L. Ed. 326.

The adjudged cases, giving a construction to bonds with conditions, and contracts made directly between debtor and creditor, afford little aid in arriving at the true understanding of a commercial guarantee. Bonds, etc., are entered into with caution, and often after taking legal advice; they contain the entire contract, beyond which the courts rarely look for circumstances to aid in their construction. And if there be sureties bound by them, and the meaning is doubtful, the construction is restricted, and made most favorable to the sureties. Bell *v.* Bruen, 1 How. 169, 170, 186, 11 L. Ed. 89.

Letters of guarantee are (usually) written by merchants; rarely with caution, and scarcely ever with precision; they refer in most cases to various circumstances, and extensive commercial dealings, in the briefest, and most casual manner, without any regard to form; leaving much to inference, and their meaning open to ascertainment from extrinsic circumstances, and facts accompanying the transaction; without referring to which, they could rarely be properly understood by merchants, or by courts of justice. The attempt, therefore, to bring them to a standard of construction, founded on principles neither known or regarded by the writers, could not do otherwise than produce confusion. Such has been the consequence of the attempt to subject this description of commercial engagement to the same rules of interpretation applicable to bonds and similar precise contracts. Bell *v.* Bruen, 1 How. 169, 170, 186, 11 L. Ed. 89.

26. Rule of construction in equity courts.—Russell *v.* Clarke, 7 Cranch 69, 3 L. Ed. 271.

plicable to all written instruments, the construction of a letter of guaranty is a matter of law for the court.[27]

V. Steps Necessary to Bind Guarantor.

A. Notice of Acceptance—1. When Notice Necessary—a. *In General.*—Where the guaranty is of a debt which is to be subsequently created, and the guarantor cannot know beforehand whether he will be liable or not, or to what extent, notice of acceptance of the guaranty must be given to the guarantor within a reasonable time. This rule applies only where the instrument creating the guaranty is merely an offer or proposal, and an acceptance is necessary to that mutual assent without which there can be no contract.[28] And if the guaranty is signed by the guarantor without any previous request of the other party, and in his absence, for no consideration moving between them except future advances to be made to the principal debtor, the guaranty is in legal effect an offer or proposal on the part of the guarantor, needing an acceptance by the

27. **Construction of guaranty a question for the jury.**—Bell *v.* Bruen, 1 How. 169, 11 L. Ed. 89.

28. **Notice is necessary to bind the guarantor.**—Russell *v.* Clarke, 7 Cranch 69, 3 L. Ed. 271; Edmondston *v.* Drake, 5 Pet. 624, 8 L. Ed. 251; Douglass *v.* Reynolds, 7 Pet. 113, 8 L. Ed. 626; Lee *v.* Dick, 10 Pet. 482, 495, 9 L. Ed. 503; Adams *v.* Jones, 12 Pet. 207, 213, 9 L. Ed 1058; Reynolds *v.* Douglass, 12 Pet. 497, 9 L. Ed. 1171, cited and approved in Davis *v.* Wells, 104 U. S. 159, 164, 26 L. Ed. 686; National Bank *v.* Hall, 101 U. S. 43, 48, 25 L. Ed. 822.

Upon a letter of guaranty, addressed to a particular person, or to persons generally, for a future credit to be given to a party in whose favor the guarantee is drawn, to charge the guarantor, notice is necessarily to be given to him, that the person giving the credit has accepted or acted upon the guarantee, and has given credit on the faith of it. Russell *v.* Clarke, 7 Cranch 69, 3 L. Ed. 271; Edmondston *v.* Drake, 5 Pet. 624, 8 L. Ed. 251; Douglass *v.* Reynolds, 7 Pet. 113, 8 L. Ed. 626; and Lee *v.* Dick, 10 Pet. 482, 9 L. Ed. 503; Adams *v.* Jones, 12 Pet. 207, 9 L. Ed. 1058; Davis *v.* Wells, 104 U. S. 159, 163, 26 L. Ed. 686.

Illustrative cases.—Under the following guaranty, viz: "I hereby guaranty the payment of any purchases of bagging and rope which Thomas Barett may have occasion to make between this and the 1st of December next," it was held that the vendor was not bound to give immediate notice to the guarantor of the amount furnished, or the sum of money for which the guarantor was held responsible. It was sufficient to give this notice within a reasonable time after the transactions were closed, and the question what was a reasonable time was a question of fact for the jury. Louisville Mfg. Co. *v.* Welch, 10 How. 461, 13 L. Ed. 497.

Where there is no evidence of any request from the other party to the guarantors to sign the guaranty, but it is signed in the absence of the other party, and without any consideration moving from him and received or acknowledged by him at the time of the signing, such guaranty is in legal effect an offer or proposal on the part of the guarantor, needing an acceptance by the other party to complete the contract. And the general words at the beginning of a guaranty "value received," without stating from whom, are quite as consistent with a consideration received by the guarantors from the principal debtor only. Davis Sewing Machine Co. *v.* Richards, 115 U. S. 524, 29 L. Ed. 480.

A letter of credit was written by Edmondston, of Charleston, South Carolina, to a commercial house at Havana, in favor of J. & T. Robson, for $50,000, "which sum they may invest, through you, in the produce of your island;" on the arrival of Thomas Robson in Havana, the house to whom the letter of Edmondston was addressed, was unable to undertake the business, and introduced Thomas Robson to Drake & Mitchel, merchants of that place; exhibiting to them the letter of credit from Edmondston; Drake & Mitchel, on the faith of the letter of credit, and at the request of Thomas Robson, made large shipments of coffee to Charleston, for which they were, by agreement with Thomas Robson, to draw upon Goodhue & Co. of New York, at sixty days, where insurance was to be made; of this agreement, Edmondston was informed, and he confirmed it in writing. For a part of the cost of the coffee so shipped, Drake & Mitchel drew bills on New York, which were paid; and afterwards in consequence of a change in the rate of exchange, they drew for the balance of the shipments, on London; this was approved of by J. & T. Robson, but was not communicated to Edmondston; to provide for the payment of the bills drawn on London by Drake & Mitchel, the agents of J. & T. Robson remitted bills on London, which were protested for nonpayment; and Drake & Mitchel claimed from Edmondston, under the letter of credit, payment of their bills on London. Held, that Edmondston was not

other party to complete the contract.[29] When a party intends to avail himself of the guaranty by making sales on the faith of it to the person to whom it is given, such party must give notice, within a reasonable time, to the guarantor, of his acceptance and intention to act on it.[30]

b. *Reason of Rule.*—It is, in itself, a reasonable rule, enabling the guarantor to know the nature and extent of his liability; to exercise due vigilance in guarding himself against losses, which might otherwise be unknown to him; and to avail himself of the appropriate means, in law and equity, to compel the other parties to discharge him from future responsibility.[31] Transactions between the other parties, to a great extent, might, from time to time, exist, in which credits might be given, and payments might be made, the existence and due appropriation of which might materially affect his own rights and security.[32]

liable for the same. It would be an extraordinary departure from that exactness and precision which is an important principle in the law and usage of merchants, if a merchant should act on a letter of credit, such as that in this case, and hold the writer responsible, without giving notice to him that he had acted on it. Edmondston *v.* Drake, 5 Pet. 624, 8 L. Ed. 251.

The rule is absolute and imperative.—The rule requiring this notice of acceptance of the guaranty and of the intention of the party to act under it within a reasonable time after the acceptance is absolute and imperative in this court, according to all the cases; it is deemed essential to an inception of the contract; he is, therefore, advised of his accruing liabilities upon the guaranty, and may very well anticipate, or be charged with notice of, an amount of indebtedness to the extent of the credit pledged. Louisville Mfg. Co. *v.* Welch, 10 How. 461, 475, 13 L. Ed. 497.

But the same strictness of proof of notice is not necessary, to charge a party upon his guarantee, as would be to support an action upon the bill itself, when, by the law merchant, a demand upon, and refusal by, the acceptors, must be proved, in order to charge any other party upon the bill. There are many cases where the guarantee is of a specific existing demand, by a promissory note or other evidence of a debt, and such guarantee is given upon the note itself, or with reference to it, and recognition of it, when no notice would be necessary; the guarantor, in such cases, knows precisely what he guarantees, and the extent of his responsibility; and any further notice to him would be useless. But when the guarantee is prospective, and to attach upon future transactions, and the guarantor uninformed whether his guarantee has been accepted and acted upon, or not, the fitness and justice of the rule requiring notice, is supported by considerations that are unanswerable. Lee *v.* Dick, 10 Pet. 482, 9 L. Ed. 503.

29. Where guaranty is signed without request.—Davis *v.* Wells, 104 U. S. 159, 26 L. Ed. 686; Davis Sewing Machine Co. *v.* Richards, 115 U. S. 524, 527, 29 L. Ed. 480.

When is a guaranty an offer and proposal.—Where there is in the guaranty no evidence of any request from the plaintiff to the guarantor, or of any consideration moving from it and received or acknowledged by them at the time of their signing the guaranty, such guaranty is in legal effect an offer or proposal on the part of the guarantor, needing an acceptance by the other party to complete the contract. And the general words at the beginning of the guaranty, "value received," without stating from whom, are quite as consistent with a consideration received by the guarantors from the principal debtor only. Davis Sewing Machine Co. *v.* Richards, 115 U. S. 524, 29 L. Ed. 480, following Davis *v.* Wells, 104 U. S. 159, 26 L. Ed. 686.

30. Louisville Mfg. Co. *v.* Welch, 10 How. 461, 13 L. Ed. 497.

Where the guarantor took defense upon the ground that he had before notice given up securities belonging to the receiver of the guaranty which would have made him whole, the time of his doing this should have been given to the jury as an essential ingredient for their judgment upon the question whether or not he had received reasonable notice of his liability. Louisville Mfg. Co. *v.* Welch, 10 How. 461, 13 L. Ed. 497.

31. Reason of rule.—Adams *v.* Jones, 12 Pet. 207, 213, 9 L. Ed. 1058.

A party giving a letter of guaranty has a right to know whether it is accepted, and whether the person to whom it is addressed means to give credit on the footing of it, or not; it may be most material, not only as to his responsibility, but as to future rights and proceedings; it may regulate, in a great measure, his course of conduct, and his exercise of vigilance in regard to the party in whose favor it is given. Especially, it is important, in the case of a continuing guarantee, since it may guide his judgment in recalling or suspending it. Douglass *v.* Reynolds, 7 Pet. 113, 8 L. Ed. 626.

32. Adams *v.* Jones, 12 Pet. 207, 212, 9 L. Ed. 1058.

The reason of the rule applies more forcibly to a continuing guaranty,[33] or a general letter of guaranty; for it might otherwise be impracticable for the guarantor to know to whom, and under what circumstances, the guaranty attached, and to what period it might be protracted.[34]

c. *Rule in Pennsylvania.*—But in a case decided by the supreme court of Pennsylvania it was held unnecessary to answer a letter of guaranty, acquiescence and acceptance being implied.[35]

2. When Notice Unnecessary—a. *In General.*—Where, however, the guaranty is made at the request of the guarantee, it then becomes the answer of the guarantor to a proposal made to him, and its delivery to or for the use of the guarantee completes the communication between them and constitutes a contract. The same result follows where the agreement to accept is contemporaneous with the guaranty, and constitutes its consideration and basis. It must be so wherever there is a valuable consideration, other than the expected advances to be made to the principal debtor, which, at the time the undertaking is given, passes from the guarantee to the guarantor, and equally so where the instrument is in the form of a bilateral contract, in which the guarantee binds himself to make the contemplated advances, or which otherwise creates, by its recitals, a privity between the guarantee and the guarantor; for in each of these cases the mutual assent of the parties to the obligation is either expressed or necessarily implied.[36] Likewise where there is an express consideration stated in the in-

33. Continuing guaranties.—A party giving a letter of guaranty has a right to know whether it is accepted; and whether the person to whom it is addressed means to give credit on the footing of it, or not; it may be most material, not only as to his responsibility, but as to future rights and proceedings; it may regulate, in a great measure, his course of conduct, and his exercise of vigilance in regard to the party in whose favor it is given; especially is it important, in case of a continuing guarantee, since it may guide his judgment in recalling or suspending it. This last remark by no means warrants the conclusion, that notice is not necessary in a guarantee of a single transaction; but only, that the reason of the rule applies more forcibly to a continuing guarantee. Lee *v.* Dick, 10 Pet. 482, 9 L. Ed. 503, reaffirming Douglass *v.* Reynolds, 7 Pet. 113, 125, 8 L. Ed. 626.

34. General letters of guaranty.—Adams *v.* Jones, 12 Pet. 207, 213, 9 L. Ed. 1058.

35. Notice of acceptance unnecessary in Pennsylvania.—Eddowes *v.* Niell, 4 Dall. 133, 1 L. Ed. 772.

"Letters of credit are a common and useful instrument in the course of commerce. They are, however, of a very serious nature; and the writer is bound to comply with the contents, according to their genuine and honest import. In order to render them obligatory as a contract, it is not necessary that they should be answered, if credit is given upon them. Like the case of transmitting a bond, in a letter, acquiescence and acceptance are implied, in the silent receipt of the instrument." Eddowes *v.* Niell, 4 Dall. 133, 134, 1 L. Ed. 772.

36. When notice of acceptance unnecessary.—Davis *v.* Wells, 104 U. S. 159, 166, 26 L. Ed. 686; Davis Sewing Machine Co. *v.* Richards, 115 U. S. 524, 29 L. Ed. 480.

The rule requiring notice of acceptance of a guaranty by the guarantee and of his intention to act under it proceeds upon the ground that the case in which it applies is an offer or proposal on the part of the guarantor, which does not become effective and binding as an obligation until accepted by the party to whom it is made; that until then it is inchoate and incomplete, and may be withdrawn by the proposer. But a guaranty may be as well for an existing debt, or it may be supported by some consideration distinct from the advance to the principal debtor, passing directly from the guarantee to the guarantor. In the case of the guaranty of an existing debt, such a consideration is necessary to support the undertaking as a binding obligation. In both cases, no notice of assent other than the performance of the consideration, is necessary to perfect the agreement. Davis *v.* Wells, 104 U. S. 159, 26 L. Ed. 686.

What is an accepted guaranty.—A guaranty in the following words: "We hereby guarantee unto them, the said Wells, Fargo & Co., unconditionally at all times, any indebtedness of Gordon & Co.," etc., is not a mere unaccepted proposal. It carries upon its face conclusive evidence that it has been accepted by Wells, Fargo & Co., and that it was understood and intended to be, on delivery to them, as it took place, a complete and perfect obligation of guaranty. And the words "unconditionally at all times," have the effect of waiving the notice of acceptance, because they can have no effect at all except as the words of a contract, and there can be no contract without notice of acceptance. Davis *v.* Wells, 104 U. S. 159, 26 L. Ed. 686.

strument as paid by the guarantee to the guarantor, the guaranty is binding on delivery without notice of acceptance.[37]

b. *When Principal Debtor Is Insolvent.*—If the principal debtor be insolvent at the time when the payment becomes due, even this notice is not necessary, unless some damage or loss can be shown to have accrued to the guarantor in consequence of his not receiving such a notice. And in no instance, in case of a guaranty, will the guarantor be exempt from liability for want of notice, unless loss or damage is shown to have accrued as a consequence.[38]

3. Distinguished from Rule Respecting Negotiable Instruments.—The doctrine governing the question of notice at the close of the dealings on the faith of the guaranty, and also at a subsequent period when the indebtedness under it becomes due, is to be distinguished from the liability assumed in this respect by the drawer or indorser of commercial paper.[39]

4. Time of Giving Notice—a. *In General.*—Notice of acceptance need not be given to the guarantor immediately;[40] it is sufficient if it is given within a reasonable time,[41] and what is a reasonable time depends upon the circumstances of each particular case, and is generally a question of fact for the jury to determine.[42]

b. *Necessity for Intermediate Notice.*—Intermediate notice is not a necessary step to charge the guarantor, as notice of acceptance and intention to act upon the guaranty is regarded as sufficient until the debt becomes due and payable.[43] In other words, in the case of a continuing guaranty, it is not necessary to give notice of each successive transaction.[44]

5. Form and Sufficiency of Notice—a. *In General.*—This notice need not be proved to have been given in writing, or in any particular form; but may

37. Rule where consideration is expressed in guaranty.—In Davis *v.* Wells, 104 U. S. 159, 26 L. Ed. 686, it was held that a guaranty, if expressed to be in consideration of one dollar paid to the guarantor by the guarantee, the receipt of which is therein acknowledged, is not an unaccepted proposal, but is without notice of acceptance binding on delivery. Followed in Davis Sewing Machine Co. *v.* Richards, 115 U. S. 524, 29 L. Ed. 480.

38. Insolvency of principal debtor dispenses with notice.—Louisville Mfg. Co. *v.* Welch, 10 How. 461, 13 L. Ed. 497, following Reynolds *v.* Douglass, 12 Pet. 497, 9 L. Ed. 1171.

39. Distinguished from notice to be given by indorsers.—Louisville Mfg. Co. *v.* Welch, 10 How. 461, 13 L. Ed. 497. See the title BILLS, NOTES AND CHECKS, vol. 3, p. 257.

40. Immediate notice of acceptance unnecessary.—Louisville Mfg. Co. *v.* Welch. 10 How. 461, 13 L. Ed. 497.

41. Notice in a reasonable time sufficient.—The rule as laid down by the federal supreme court in Douglass *v.* Reynolds, 7 Pet. 113, 126, 8 L. Ed. 626, is, that, in a letter of credit, where the contract is a continuing one, all that is required is that, when all the transactions between the parties under the guaranty are closed, notice of the amount for which the guarantor is held responsible should, within a reasonable time afterwards, be communicated to him. Cited in Louisville Mfg. Co. *v.* Welch, 10 How. 461, 474, 13 L. Ed. 497.

42. Reasonableness of time a question for the jury.—Louisville Mfg. Co. *v.* Welch, 10 How. 461, 13 L. Ed. 497.

43. Intermediate notice not necessary.—Louisville Mfg. Co. *v.* Welch, 10 How. 461, 13 L. Ed. 497, cited and approved in Davis *v.* Wells, 104 U. S. 159, 26 L. Ed. 686.

44. Notice of each successive advance unnecessary in continuing guaranty.—Douglass *v.* Reynolds, 7 Pet. 113, 8 L. Ed. 626.

If this had been the case of a guarantee limited to a single transaction, it would have been the duty of the plaintiffs to have given notice of the advances, acceptances or indorsements made under it, within a reasonable time after they were made. But this being a continuing guarantee, in which the parties contemplate a series of transactions, and as soon as the defendants had received notice of the acceptance, they must necessarily have understood that there would be successive advances, acceptances and indorsements, which would be renewed and discharged, from time to time, there is no general principle upon which to rest, that notice of each successive transaction, as it arose, should be given; all that could be required would be, that when all the transactions under the guarantee were closed, notice for the amount for which the guarantors were responsible, should, within a reasonable time afterward, be communicated to them. Douglass *v.* Reynolds, 7 Pet. 113, 8 L. Ed. 626.

be inferred by the jury, from facts and circumstances which shall warrant such inference.[45]

b. *Notice to Guarantor's Agent.*—The well-settled rule governing the relations between principal and agent, that notice to the agent is notice to the principal, applies also in the case of a guaranty. Therefore notice to the guarantor of the agent that the guarantee has accepted and acted upon the letter of credit, will dispense with any further notice to the guarantor.[46]

6. Proof of Notice.—The admissions of the guarantor in a letter of guaranty for the payment of purchases of certain goods, when called upon for payment, that he had given up certain papers to the person whose credit is guaranteed which would have indemnified him, on his assurance that the debt had been settled, is not an acknowledgment of due notice that the plaintiffs had sold the goods on the faith of the letter of credit, because such admission may not have been made with full knowledge of all the facts in the case. At most it is only a question for the jury, accompanied with proper directions of the court as to the law.[47]

7. Waiver of Notice.—This notice may be waived expressly or impliedly.[48] But a recognition by the parties to a letter of credit, of their obligation to pay as guarantors, under a supposed liability, which did not arise from the facts of the case, and of which facts they were ignorant, would not be a waiver of the notice they were entitled to have of the acceptance of their guaranty.[49] Nor is a promise to pay a debt, by the guarantors, qualified with a condition which was rejected, a waiver by the guarantor of his right to notice of the acceptance of the guaranty.[50]

8. Questions of Law and Fact.—The sufficiency of notice of acceptance to bind the guarantor is a question of fact for the consideration of the jury at the trial.[51]

B. Demand on Principal Debtor and Notice of Default—1. In General.—There is no analogy between letters of guaranty on the one hand, and bills of exchange and other negotiable instruments on the other, with regard to the giving of notice of a default in payment by the principal, for the engagement of the letter of credit extends, in its very nature, to various transactions, without reference to time or amount.[52]

2. Necessity for Demand—a. *In General.*—By the very terms of this guaranty, as well as by the general principles of law, the guarantors are only collaterally liable, upon the failure of the principal debtor to pay the debt;[53] therefore, a demand of payment of the sum advanced under the guaranty, should be made of the person to whom the same was made, and in case of nonpayment

45. **No particular form of notice required.**—Reynolds *v.* Douglass, 12 Pet. 497, 9 L. Ed. 1171, cited and approved in Davis *v.* Wells, 104 U. S. 159, 164, 26 L. Ed. 686.

46. **Notice to agent as constituting notice to guarantor.**—The question whether knowledge of the guarantor of the agent of credits given to the principal debtor upon the faith of the guarantee is not full notice to the guarantor and dispenses with any further and other notice to him, is a question of fact for the jury; and if satisfactorily established will dispense with any further notice. Adams *v.* Jones, 12 Pet. 207, 9 L. Ed. 1058.

47. **Admissions of guarantor as acknowledgment of notice.**—Louisville Mfg. Co. *v.* Welch, 10 How. 461, 13 L. Ed. 497.

48. **Notice of acceptance may be waived.**—Davis *v.* Wells, 104 U. S. 159, 26 L. Ed. 686.

Where the guaranty is in the following words: "For and in consideration of one dollar to us in hand paid we hereby guarantee unconditionally at all times, any indebtedness, etc.," it was held that the words "unconditionally at all times" have the effect of waiving the notice of acceptance. Davis *v.* Wells, 104 U. S. 159, 26 L. Ed. 686.

49. **What is not a waiver of notice.**—Reynolds *v.* Douglass, 12 Pet. 497, 9 L. Ed. 1171.

50. Reynolds *v.* Douglass, 12 Pet. 497, 9 L. Ed. 1171.

51. **Sufficiency of notice of acceptance a question of fact.**—Adams *v.* Jones, 12 Pet. 207, 9 L. Ed. 1058.

52. **Notice of default in case of guaranties.**—Eddowes *v.* Niell, 4 Dall. 133, 1 L. Ed. 772.

53. **Demand on principal debtor and notice of default necessary.**—Douglass *v.* Reynolds, 7 Pet. 113, 8 L. Ed. 626.

by him, notice of such demand and nonpayment should be given, in a reasonable time, to the guarantors, otherwise, they would be discharged from the guaranty,[54] and if any loss happens in consequence of the omission to give the notice within a reasonable time, the fault is attributable to the laches of the creditor, and must fall on him.[55] But while it is undoubtedly true, that if the guarantee fails to give reasonable notice to the guarantor of the default of the principal debtor, and loss or damage thereby ensues to the guarantor, to that extent the latter is discharged, yet both the laches of the plaintiff and the loss of the defendant must concur to constitute a defense;[56] an unreasonable delay in giving notice, or a failure to give it altogether, is not of itself a bar.[57] If the guarantor can prove he has suffered damage by the neglect to make the demand on the maker, and to give notice, he can be discharged only to the extent of the damage sustained.[58] Moreover, the burden of proving injury flowing from want of notice rests upon the guarantor.[59]

b. *Rule Where Principal Debtor Is Insolvent.*—When the party in whose favor a letter of credit is given, afterwards becomes insolvent, and his insolvency is known to the guarantors, it is not necessary, in an action on the letter of credit, to prove that a demand of payment was made on the insolvent,[60] unless it can be shown that some damage or loss has accrued to the guarantor in consequence of his not receiving such notice.[61]

3. Sufficiency of Notice.—The authorities concur in making a distinction between actions upon a bill or note, and actions against a party who has guarantied such bill or note by a separate contract. In the former instances notice in order to charge the drawer or indorser is with very few established exceptions uniformly required; in the latter the obligation to give notice is much more relaxed, and its omission does not imply injury as a matter of course.[62] The guarantor must prove that he has suffered damage by the neglect to make the demand on the maker and to give notice, and then he is discharged only to the extent of the damage sustained.[63] The creditors are not bound to institute legal proceedings against the debtor, but they are bound to use reasonable diligence to make demand and to give notice of nonpayment.[64]

4. Questions of Law and Fact.—What is a reasonable time must depend upon the circumstances of each particular case, and is generally a question of fact for the jury to determine.[65]

54. Douglass *v.* Reynolds, 7 Pet. 113, 8 L. Ed. 626; Davis *v.* Wells, 104 U. S. 159, 26 L. Ed. 686.

When the debt falls due against the principal debtor, a demand of payment should be made, and in cases of nonpayment by him, notice of such demand should be given in a reasonable time to the guarantor; otherwise he would be discharged from his liability. Louisville Mfg. Co. *v.* Welch, 10 How. 461, 474, 13 L. Ed. 497, citing Douglass *v.* Reynolds, 7 Pet. 113, 126, 8 L. Ed. 626.

55. Guarantor discharged where injury results.—Louisville Mfg. Co. *v.* Welch, 10 How. 461, 475, 13 L. Ed. 497.

56. Both laches and damages must concur to discharge guarantor.—Davis *v.* Wells, 104 U. S. 159, 170, 26 L. Ed. 686.

57. Mere delay in giving notice no bar.—Davis *v.* Wells, 104 U. S. 159, 170, 26 L. Ed. 686.

58. Extent to which guarantor is discharged.—Rhett *v.* Poe, 2 How. 457, 485, 11 L. Ed. 338, following Reynolds *v.* Douglass, 12 Pet. 497, 9 L. Ed. 1171.

59. Burden of proving injury.—Rhett *v.* Poe, 2 How. 457, 11 L. Ed. 338.

60. Insolvency of principal debtor will excuse demand.—Reynolds *v.* Douglass, 12 Pet. 497, 9 L. Ed. 1171, reaffirmed in Rhett *v.* Poe, 2 How. 457, 485, 11 L. Ed. 338.

The guarantor of a promissory note, whose name does not appear upon the note, is bound without notice, where the maker of the note was insolvent at its maturity, unless he can show that he has sustained some prejudice by want of notice of a demand on the maker, and of notice of nonpayment. Rhett *v.* Poe, 2 How. 457, 485, 11 L. Ed. 338, following Reynolds *v.* Douglass, 12 Pet. 497, 9 L. Ed. 1171.

61. Louisville Mfg. Co. *v.* Welch, 10 How. 461, 13 L. Ed. 497.

62. Sufficiency of notice of demand.—Rhett *v.* Poe, 2 How. 457, 484, 11 L. Ed. 338.

63. Strictness of rule in case of negotiable instruments much relaxed.—Rhett *v.* Poe, 2 How. 457, 458, 11 L. Ed. 338.

64. Institution of a suit unnecessary.—Douglass *v.* Reynolds, 7 Pet. 113, 8 L. Ed. 626.

65. Reasonableness of time for giving notice a question of fact.—Lawrence *v.*

VI. Rights and Liabilities of Guarantor.

A. Rights—1. What Obligations Are Covered by the Guaranty.—Nothing can be clearer, upon principle, than that if a letter of credit be given, but in fact no advances are made upon the faith of it, the party is not entitled to recover for any debts due by him from the debtor in whose favor it was given, which have been incurred subsequently to the guaranty, and without any reference to it.[66]

2. Right of Guarantor to the Indemnity.—When a guarantor is insolvent, a court of equity will not decree the money (raised for his indemnity), to be paid to him, without security that the debt to the principal creditor should be satisfied.[67]

B. Liabilities—1. In General.—Although the liability of the guarantor is dependent upon the liability of the principal,[68] yet, upon general principles of law, in the case of a guaranty of payment, and not of collection merely, a suit may be commenced against the guarantor without any previous suit against the principal.[69]

2. Measure and Extent of Liability of Guarantor—a. *In General.*—As these instruments are of extensive use in the commercial world, upon the faith of which large credits and advances are made, care should be taken to hold the party bound to the full extent of what appears to be his engagement.[70] But in law and in the understanding of commercial men, credit given by a letter of credit is confined to a particular portion and to a particular time.[71]

b. *Extent of Liability with Respect to Amount.*—The general rule is, to attribute to the obligation of a guarantor, the same extent as that of the principal. Unless from the terms of the contract an intention appears to reduce his liability within more narrow bounds, a restriction will not be imposed by construction contrary to the nature of the engagement. If the terms of his engagement are general and unrestricted, and embrace the entire subject (omnem causam), his liability will be measured by that of the principal, and embrace the same accessories and consequences (connexorum et dependentium). It will be presumed that he had in view the guaranty of the obligations his principal had assumed.[72] A surety, however, cannot be held beyond the terms or legal effect of his engagement; and when that has respect to the conduct or fidelity of the principal, or to any other matter usually contemplated as arising in the future, it is to be interpreted prospectively, and not retrospectively. But if, from the nature of the case, the subject of guaranty is a past transaction in whole or in part, and the language of the engagement, taken in its natural sense or legal effect, is broad enough to cover it, such language may properly be construed to

McCalmont, 2 How. 426, 11 L. Ed. 326; Louisville Mfg. Co. *v.* Welch, 10 How. 461, 474, 13 L. Ed. 497.

66. **Right of guarantor to recover for debts subsequently incurred.**—Douglass *v.* Reynolds, 7 Pet. 113, 8 L. Ed. 626.

67. **Right of guarantor to indemnity.**—Russell *v.* Clarke, 7 Cranch 69, 3 L. Ed. 271.

68. **Liability of guarantor depends on liability of principal.**—Drummond *v.* Prestman, 12 Wheat. 515, 516, 6 L. Ed. 712.

69. **Right to proceed first against guarantor.**—Memphis *v.* Brown, 20 Wall. 289, 22 L. Ed. 264, citing Railroad Co. *v.* Howard, 7 Wall. 392, 407, 19 L. Ed. 117; Zabriskie *v.* Cleveland, etc., R. Co., 23 How. 381, 16 L. Ed. 488.

70. **Measure and extent of guarantor's liability.**—Douglass *v.* Reynolds, 7 Pet. 113, 122, 8 L. Ed. 626.

71. **Credit is confined to a particular time.**—Edmondston *v.* Drake, 5 Pet. 624, 8 L. Ed. 251.

72. **General rule as to measure of guarantor's liability.**—Benjamin *v.* Hillard, 23 How. 149, 164, 16 L. Ed. 518.

There being a contract for furnishing a steam engine, the following guaranty was made: "For value received, I hereby guaranty the performance of the within contract, on the part of Hopkins & Leach; and in case of nonperformance thereof, to refund to Messrs. Hillard & Mordecai all sums of money they may pay or advance thereon, with interest from the time the same is paid." Held, this contract is not in the alternative, but consists of two terms: one, that the principals shall perform their engagement, not merely by the delivery of some machinery, but of such machinery as the contract includes; the other, that if there be a nonperformance, whether excusable

do so.[73] It is one of the canons of the law of guaranty that no party shall be bound beyond the extent of the engagement which shall appear from the expression of the guaranty, and the nature of the transaction.[74]

Liability of Guarantor for Commissions and Disbursements.—The guarantor may be held liable to the guarantee for the commissions, disbursements, and other charges of the transaction.[75]

c. *Extent of Liability with Respect to Time.*—Where the time for which credit is to be given is left indefinite in the letter of guaranty, it must receive a reasonable interpretation. Accordingly where the period of credit was given between the date of the letter of guaranty and the first of December, it was held that the limitation was as to the time within which the purchases guaranteed in the letter of credit were to be made; not as to the time of the credit to be given the purchaser.[76]

3. Waiver or Release from Liability.—The mere use of and payment for articles furnished under a contract of guaranty, does not constitute a waiver, release or extinguishment of the liability of the guarantor.[77]

4. Effect of Election to Proceed First against Principal Debtor.—An

or not, the money advanced on the contract shall be secured to the plaintiffs, to the extent to which the principals are liable. Benjamin *v.* Hillard, 23 How. 149, 16 L. Ed. 518.

73. Meyers *v.* Block, 120 U. S. 206, 213, 30 L. Ed. 642.

74. Drummond *v.* Prestman, 12 Wheat. 515, 516, 6 L. Ed. 712.

The following letter of guaranty: "Baltimore, 17th Nov. 1803, Capt. Charles Drummond, Dear Sir—My son William having mentioned to me, that in consequence of your esteem and friendship for him, you had caused and placed property of yours and your brother's in his hands for sale, and that it is probable, from time to time, you may have considerable transactions together on my part, I think proper to guaranty to you the conduct of my son, and shall hold myself liable, and do hold myself liable for the faithful discharge of all his engagements to you, both now and in future. (Signed) Geo. Prestman," will extend to a partnership debt incurred by William P. to Charles Drummond, and Richard his brother, it being proved that the transactions to which the letter related were with them as partners, and that no other brother of the said Charles was interested therein. Drummond *v.* Prestman, 12 Wheat. 515, 516, 6 L. Ed. 712.

75. Liability for commissions, disbursements, etc.—B., a merchant in New York, wrote to L., a merchant in New Orleans, on the 9th of January, 1806, mentioning that a ship belonging to T. & Son, of Portland, was ordered to New Orleans for freight, and requesting L. to procure a freight for her, and purchase and put on board of her five hundred bales of cotton, on the owner's account; "for the payment of all shipments on owners' account, thy bill on T. & Son, of Portland, or me, 60 days sight, shall meet due honor." On the 13th of February, B. again wrote to L., reiterating the former request, and inclosing a letter from T. & Son, to L., containing their instructions to L., with whom they afterwards continued to correspond, adding, "thy bills on me, for their account, for cotton they order shipped by the Mac, shall meet with due honor." On the 24th of July, 1806, B. again wrote to L., on the same subject, saying, "the owners wish her loaded on their own account, for the payment of which, thy bills on me shall meet with due honor, at 60 days sight." L. proceeded to purchase and ship the cotton, and drew several bills on B., which were paid; he, afterwards, drew two bills on T. & Son, payable in New York, which were protested for nonpayment, they having, in the meantime, failed; and about two years afterwards, drew bills on B., for the balance due, including the two protested bills, damages and interest. Held, that L. had a right to recover from B. the commissions, disbursements and other charges of the transaction. Lanusse *v.* Barker, 3 Wheat. 101, 102, 4 L. Ed. 343.

76. Extent of guarantor's liability with respect to time.—The following guaranty, viz: "I hereby guaranty the payment of any purchases of bagging and rope which Thomas Barrett may have occasion to make between this and the 1st of December next," extends the liability of the guarantor to purchases upon a reasonable credit, made anterior to the 1st of December, although the time of payment was not to arrive until after that day. Louisville Mfg. Co. *v.* Welch, 10 How. 461, 13 L. Ed. 497.

77. Waiver or release of guarantor's liability.—Where there was a contract to furnish a steam engine with a guaranty of the performance of the contract on the part of the seller of the machine, it was held that the vendee's use of and payment for a machine with latent defects does not relieve the seller or his guarantor from liability. Benjamin *v.* Hillard, 23 How. 149, 16 L. Ed. 518.

election on the part of the guarantee to proceed in the first instance against the principal debtor, does not preclude him from afterwards resorting to the guarantor.[78]

VII. Rights of Guarantee.

A merchant who indorses the bills of another, upon the faith of the guarantee of a third, cannot (upon the insolvency of the principal debtor and of the guarantor) resort to a trust fund created by the principal debtor, for the indemnity of the guarantor, for the amount which the guarantor should pay.[79] But the person for whose benefit a trust is created, who is to be the ultimate receiver of money, may sustain a suit in equity, to have it paid directly to himself.[80]

VIII. Discharge of the Guarantor.

A. By Alteration in the Contract.—A material alteration of the contract of guaranty without the consent of the guarantor and not communicated to him, will discharge him from liability. As, for example, any alteration as to the place or form of payment.[81] But a waiver of punctual delivery does not constitute such a change in the contract as to discharge the guarantor.[82]

B. By Extension of Time of Payment.—By the general law of suretyship, any change whatever in the contract for the performance of which the guarantor is liable, made without his consent, such, for instance, as an extension of time for payment, if made upon sufficient consideration, discharges the guarantor from liability.[83] But the mere prolongation of the term of payment of the principal debtor, or of the time for the performance of his duty, will not discharge a surety or guarantor. "There must be another contract substituted

78. **Effect of election to proceed first against principal debtor.**—B., a merchant in New York, wrote to L., a merchant in New Orleans, on the 9th of January, 1806, mentioning that a ship belonging to T. & Son, of Portland, was ordered to New Orleans for freight, and requesting L. to procure a freight for her, and purchase and put on board of her five hundred bales of cotton, on the owner's account; "for the payment of all shipments on owners' account, thy bill on T. & Son, of Portland, or me, 60 days sight, shall meet due honor." On the 13th of February, B. again wrote to L., reiterating the former request, and inclosing a letter from T. & Son, to L., containing their instructions to L., with whom they afterwards continued to correspond, adding, "thy bills on me, for their account, for cotton they order shipped by the Mac, shall meet with due honor." On the 24th of July, 1806, B. again wrote to L., on the same subject, saying, "the owners wish her loaded on their own account, for the payment of which, thy bills on me shall meet with due honor, at 60 days sight." L. proceeded to purchase and ship the cotton, and drew several bills on B., which were paid; he, afterwards, drew two bills on T. & Son, payable in New York, which were protested for nonpayment, they having, in the meantime, failed; and about two years afterwards, drew bills on B., for the balance due, including the two protested bills, damages and interest. Held, that L., by making his election to draw upon T. & Son, in the first instance, did not, thereby, preclude himself from resorting to B., whose undertaking was, in effect, a promise to furnish the funds necessary to carry into execution the adventure. Lanusse *v.* Barker, 3 Wheat. 101, 102, 4 L. Ed. 343.

79. **Right of guarantee to indemnity fund provided for guarantor.**—Russell *v.* Clarke, 7 Cranch 69, 3 L. Ed. 271.

80. Russell *v.* Clarke, 7 Cranch 69, 3 L. Ed. 271.

81. **Discharge of guarantor by alteration of contract.**—Edmondston *v.* Drake, 5 Pet. 624, 8 L. Ed. 251.

82. **Waiver of punctual delivery does not discharge guarantor.**—In a contract to sell and deliver machinery, the performance of which has been guaranteed, a waiver of the punctual delivery of the machinery does not constitute such a change in the contract as to discharge the guarantor. A mutual alteration of the contract by the principal parties would operate to discharge the defendant as a guarantor; but an acquiescence on the part of the plaintiffs in a longer time than was specified in the contract for fulfillment, especially as the time of fulfillment was somewhat indefinite, would not, as a matter of law, operate to discharge the defendant. Benjamin *v.* Hillard, 23 How. 149, 16 L. Ed. 518.

83. **Extension of time for payment discharges guarantor.**—Miller *v.* Stewart, 9 Wheat. 680, 6 L. Ed. 189; Smith *v.* United States, 2 Wall. 219, 17 L. Ed. 788; Reese *v.* United States, 9 Wall. 13, 19 L. Ed. 541; Guaranty Co. *v.* Pressed Brick Co., 191 U. S. 416, 423, 48 L. Ed. 242.

for the original contract, or some alteration in a point so material as in effect to make a new contract, without the surety's consent to produce that result. But when the essential features of the contract and its objects are preserved, and the parties, without objection from the surety, and without any legal constraint on themselves, mutually accommodate each other, so as better to arrive at their end, we can find no ground for the surety to complain."[84]

C. By Extension of Time for Performance.—The guarantor will be discharged by an extension of time for performance, made without the consent of the guarantor.[85]

D. By Extinguishment of the Principal Obligation.—Although the payment of the principal obligation will operate as a discharge of the guarantor, yet according to well-settled principles this cannot be brought about through the medium of a promissory note unless it appears that it was received as an absolute payment, a fact which the court has no right to assume. But if the notes were received as conditional payment, the guarantor may be discharged if it appears that due diligence has not been used to recover the amount of them from the individuals responsible thereon. Because he who receives any note upon which third persons are responsible, as a conditional payment of a debt due to him, is bound to use due diligence to collect it of the parties thereto, at maturity, otherwise, by his laches, the debt will be discharged.[86]

E. By Fraud and False Representations.—False representations not coming from the guarantee will not release the guarantor from liability on his guaranty.[87]

84. Mere prolongation of time for payment does not discharge guarantor.—Benjamin *v.* Hillard, 23 How. 149, 165, 16 L. Ed. 518.

85. Extension of time for performance exonerates guarantor.—The ordinary rule that exonerates the guarantor, in case the time fixed for the performance of the contract by the principal be extended, does not apply to a bond given in pursuance of the act of 1894, 28 Stat. 278, c. 280, "for the protection of persons furnishing materials and labor for the construction of public works," executed by a guaranty company, not only for a faithful performance of the original contract, but for the payment of the debts of the principal obligor to third parties, especially where there is no evidence of loss thereby occasioned. Guaranty Co. *v.* Pressed Brick Co., 191 U. S. 416, 423, 48 L. Ed. 242.

86. Guarantor discharged by payment of principal obligation.—Douglass *v.* Reynolds, 7 Pet. 113, 8 L. Ed. 626.

Action upon the following letter of guaranty, written by the defendants and delivered to the plaintiffs: "Port Gibson, December 1827. Messrs. Reynolds Byrne & Co. Gentlemen:—Our friend, Mr. Chester Haring, to assist him in business, may require your aid, from time to time, either by acceptance or indorsement of his paper, or advances in cash; in order to save you from harm by so doing, we do hereby bind ourselves, severally and jointly, to be responsible to you, at any time, for a sum, not exceeding eight thousand dollars, should the said Chester Haring, fail to do so. Your obedient servants, James S. Douglass, John G. Singleton, Thomas Going." An account was stated between the plaintiffs and Chester Haring, showing an apparent balance against Haring of $22,573; and at the foot of the account, the plaintiffs gave a receipt for several promissory notes, payable at distant periods, dated on the same day with the account; the notes were made by C. Haring, and indorsed by Daniel Greenleaf. The receipt stated, that "the notes, when discounted, the proceeds to go to the credit of this account." The notes were discounted, and the proceeds received by the plaintiffs, but, being unpaid, they were protested; notice of their nonpayment was given to the indorsers, and they were afterwards taken up by the plaintiffs, as indorsers thereof. Held, if the plaintiffs below, by their indorsements, were compellable to pay, and did afterwards pay, the notes, upon their dishonor by the maker, and these notes fell within the scope of the guarantee, they might, without question, recover the amount from the guarantors. Douglass *v.* Reynolds, 7 Pet. 113, 8 L. Ed. 626.

87. Discharge of guarantor by false representations.—Lumber Co. *v.* Buchtel, 101 U. S. 633, 25 L. Ed. 1072.

A. contracted to sell B. a tract of pine land at a stipulated sum, payable in future installments, a conveyance to be made only upon payment of the several sums as they became due, the cutting or removal of the timber being in the meantime prohibited without the written permission of A. Two days afterwards B. assigned the contract to C. A. assented to the assignment, and gave C. permission to enter the lands and cut and remove the timber, in consideration whereof the latter guaranteed the payments stipu-

F. By Failure to Give Notice of Default and Failure to Proceed against Principal.—The gross negligence of the guarantee in failing to give notice of a default in payment by the principal, or to proceed against the principal when requested to do so, in order to save the debt, may operate to exonerate the guarantor both in law and equity.[88] But the lapse of nineteen years, without notice of a default in payment by the principal, will not operate to discharge the guarantor, where it appears that during most of this time war and various other excuses prevented the guarantee from calling upon the guarantor.[89]

IX. Revocation of Guaranties.

Uncertain and equivocal language will not work the revocation of an explicit letter of guaranty.[90] The guaranty can only be revoked by clear and explicit language. Implied revocations are not favored. Nothing could be more inconsistent with that candor and good faith which ought to mark the transactions of mercantile men, than to favor the revocation of an explicit contract, on the construction of a correspondence nowhere avowing that object.[91]

X. Pleading and Practice.

A. Jurisdiction.—The fact that a creditor has a remedy at law against a principal debtor does not prevent him, after the issue in vain of execution against such principal, from proceeding in equity against a guarantor.[92]

lated in the contract The first installment due not having been paid, A. brought suit against C. upon the guaranty. The latter set up the defense that he was induced to enter into the undertaking by the false and fraudulent representation of A. as to the quantity of good merchantable timber contained in the tract. The case was, by stipulation of the parties, tried before a referee, who reported that the representations were made by an agent of B., and that he did "not find" that A. participated therein. Held: 1. That A.'s grant of permission to C. to cut and remove the timber was the release of an important security to him against possible loss if payment were not made on the contract, and that the guaranty was a reasonable exaction from C. therefor. 2. That said representations not coming from A., nor relating to the permission to cut and remove the timber, did not release C. from liability on the guaranty. Lumber Co. *v.* Buchtel, 101 U. S. 633, 25 L. Ed. 1072.

88. **Discharge by failing to give notice of default.**—Eddowes *v.* Niell, 4 Dall. 133, 1 L. Ed. 772.

89. **Excuses for failure to give notice of default.**—Eddowes *v.* Niell, 4 Dall. 133, 1 L. Ed. 772.

90. **Guaranty not revoked by equivocal language.**—Lanusse *v.* Barker, 3 Wheat. 101, 4 L. Ed. 343.

Illustrative case.—B., a merchant in New York, wrote to L., a merchant in New Orleans, on the 9th of January, 1806, mentioning that a ship belonging to T. & Son, of Portland, was ordered to New Orleans for freight, and requesting L. to procure a freight for her, and purchase and put on board of her five hundred bales of cotton, on the owner's account; "for the payment of all shipments on owners' account, thy bill on T. & Son, of Portland, or me, 60 days sight, shall meet due honor." On the 13th of February, B. again wrote to L., reiterating the former request, and inclosing a letter from T. & Son, to L., containing their instructions to L., with whom they afterwards continued to correspond, adding, "thy bills on me, for their account, for cotton they order shipped by the Mac, shall meet with due honor." On the 24th of July, 1806, B. again wrote to L., on the same subject, saying, "the owners wish her loaded on their own account, for the payment of which, thy bills on me shall meet with due honor, at 60 days sight." L. proceeded to purchase and ship the cotton, and drew several bills on B., which were paid; he, afterwards, drew two bills on T. & Son, payable in New York, which were protested for nonpayment, they having, in the meantime, failed; and about two years afterwards, drew bills on B., for the balance due, including the two protested bills, damages and interest. Held, that the letters of the 13th of February, and 24th of July, contained no revocation of the undertaking in the letter of the 9th of January; that although the bills on T. & Son were not drawn, according to B.'s assumption, this could not affect the right of L. to recover the damages paid by him, on the return of the bills, but that L. had still a right to recover on the original guarantee of the debt. Lanusse *v.* Barker, 3 Wheat. 101, 4 L. Ed. 343.

91. **Implied revocations are not favored.**—Lanusse *v.* Barker, 3 Wheat. 101, 4 L. Ed. 343.

92. **Equity jurisdiction.**—Railroad Co. *v.* Howard, 7 Wall. 392, 19 L. Ed. 117. See the title EQUITY, vol. 5, p. 803.

B. Pleading—1. Form of Action.—No recovery can be had under the common counts in assumpsit, on a collateral guaranty.[93]

2. Parties.—Assumpsit will lie upon a letter of credit, by him who trusts a third person upon the faith of that letter.[94] But in a later case it is laid down that only the person or firm to which a letter of credit or guaranty is addressed can maintain an action on the letter.[95] Upon a written guaranty given to a person about to form a partnership with the son of the guarantor, indemnifying him against any loss or liability he may sustain from the former business of the guarantor's son, the firm cannot maintain an action. The indemnity is personal and limited to the guarantee.[96]

XI. Evidence.

A. Proof of Notice.—In an action on a guaranty of the performance of a contract, evidence of a notice to the defendant of defects in the work contracted to be performed is admissible, where it is not introduced as testimony of the defects.[97]

B. Parol Evidence.[98]—That salutary rule of evidence, that a written contract cannot be explained by parol evidence except where there is an ambiguity, applies equally to contracts of guaranty.[99] Accordingly, where a contract of guaranty is complete within itself, any additional agreement as to the time and character of the credit to be given cannot be imported into it by parol.[1] But extrinsic evidence may be used to ascertain the true import of a letter of guaranty.[2] Where extrinsic evidence is not offered to explain or establish the construction of the letter of credit, as whether it constitutes a limited or continuing guaranty, but is admitted simply to establish that credit has been given

93. **Assumpsit will not lie on collateral guaranty.**—Action upon the following letter of guaranty, written by the defendants and delivered to the plaintiffs: "Port Gibson, December 1827. Messrs. Reynolds, Byrne & Co. Gentlemen:—Our friend, Mr. Chester Haring, to assist him in business, may require your aid, from time to time, either by acceptance or indorsement of his paper, or advances in cash; in order to save you from harm by so doing, we do hereby bind ourselves, severally and jointly, to be responsible to you, at any time, for a sum, not exceeding eight thousand dollars, should the said Chester Haring fail to do so. Your obedient servants, James S. Douglass, John G. Singleton, Thomas Going." One count in the declaration was for money lent, and money had and received. Held, that upon a collateral undertaking of this sort, no such suit was maintainable. Douglass *v.* Reynolds, 7 Pet. 113, 8 L. Ed. 626. Compare Lawrason *v.* Mason, 3 Cranch 492, 2 L. Ed. 509.

94. **Proper parties plaintiff.**—Lawrason *v.* Mason, 3 Cranch 492, 2 L. Ed. 509.

A letter from the defendants to J. M., saying, that they would be his security for 130 barrels of corn, payable in twelve months, will sustain an action of assumpsit against the defendants, by any person who, upon the faith of the letter, shall have given credit to J. M. for the corn. "Thus, if money be delivered by A. to B., to be paid over to C., although no promise is made by B. to C., yet C. may recover the money from B. by an action of assumpsit. If it be said, that in such a case, the law raises the assumpsit from the facts, and if the facts do not imply an assumpsit, no action will lie; it may be answered, that in the present case, there is an actual assumpsit to all the world, and any person who trusts, in consequence of that promise has a right of action." Lawrason *v.* Mason, 3 Cranch 492, 495, 2 L. Ed. 509.

95. **Privity necessary to maintenance of action.**—Grant *v.* Naylor, 4 Cranch 224, 2 L. Ed. 603.

96. **Indemnity personal to guarantee.**—Mauran *v.* Bullus, 16 Pet. 528, 10 L. Ed. 1056.

97. **Notice of defects in machinery sold under guaranty.**—Benjamin *v.* Hillard, 23 How. 149, 167, 16 L. Ed. 518.

98. See the title PAROL EVIDENCE.

99. **Mistake in address of letter of credit.**—A letter of credit addressed, by mistake, to John and Joseph, and delivered to John and Jeremiah, will not support an action by John and Jeremiah for goods furnished by them to the bearer, upon the faith of the letter of credit. It is not a written contract between the plaintiffs and the defendant, and parol proof cannot be admitted to make it such It is not a case of ambiguity, or of fraud, or of mistake on the part of the plaintiffs. Grant *v.* Naylor, 4 Cranch 224, 2 L. Ed. 603.

1. Gilbert *v.* Moline Plough Co., 119 U. S. 491, 30 L. Ed. 476.

2. **Import of guaranty may be proven by parol.**—Bell *v.* Bruen, 1 How. 169, 11 L. Ed. 89; Moran *v.* Prather, 23 Wall. 492, 23 L. Ed. 121.

upon the faith of it, from time to time, and that it is treated by the plaintiffs as a continuing guaranty, such evidence is unobjectionable.[3]

C. Collateral Evidence.—In a case of guaranty and indemnity, a judgment against the person to be indemnified, if fairly obtained, especially if obtained on notice to the guarantor, is admissible evidence, in a suit against him, on his contract of indemnity.[4]

GUARDIAN AD LITEM.—See the title INFANTS.

3. **Admissibility of parol evidence to show guaranty a continuing one.**—The depositions of several witnesses, clerks in the counting house of the plaintiffs, were admitted, on the trial of the cause, in which the witnesses stated, that they knew that the letter of credit was considered by the plaintiffs as covering any balance due by C. H. to them, for advances from time to time, to the amount of $8,000; that advances were made, and moneys paid by them, on account of C. H., from the time of receiving the said letter, predicated on the letter always protecting the plaintiffs to the amount of $8,000, and that it was considered in the counting house, as a continuing letter of credit, and so acted upon by the plaintiffs. Held, that this evidence was rightly admitted, to establish that credit had been given to C. H. on the faith of it, from time to time, and that it was treated by the plaintiffs as a continuing guarantee; so that if, in point of law, it was entitled to that character, the plaintiff's claim might not be open to the suggestion that no such advances, acceptances or endorsements had been made upon the credit of it. This evidence was not open to the objection that it was an attempt by parol evidence to explain a written contract. Douglass *v.* Reynolds, 7 Pet. 113, 8 L. Ed. 626.

4. **The rule as to collateral facts in evidence.**—Clarke *v.* Carrington, 7 Cranch 308, 3 L. Ed. 354.

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CROSS REFERENCES.

See the titles APPEAL AND ERROR, vol. 1, p. 333; EJECTMENT, vol. 5, p. 695; EMBEZZLEMENT, vol. 5, p. 742; EXECUTORS AND ADMINISTRATORS, ante, p. 119; INFANTS; INSANITY; JUDGMENTS AND DECREES; PARENT AND CHILD; PARTNERSHIP; TRUSTS AND TRUSTEES; USURY; WITNESSES.

As to acknowledgment of deed by guardian, see the title ACKNOWLEDGMENTS, vol. 1, p. 84. As to right to custody of child being of a pecuniary estimation, as governing right of appeal, see the title APPEAL AND ERROR, vol. 1, pp. 854, 855. As to disqualification of a person from acting as guardian for purpose of punishment, see the title CONSTITUTIONAL LAW, vol. 4, p. 521. As to citizenship of guardian determining the jurisdiction of action brought by ward, see the title COURTS, vol. 4, p. 958. As to guardian for an insane minor, see the title INSANITY. As to validity of sale of property of ward by an agent of the guardian, see the title PRINCIPAL AND AGENT.

I. Appointment and Qualification.

A. Appointment—1. AT COMMON LAW.—Guardians at common law became such by their relation to the minor, without any judicial appointment. Guardians were also appointed by testament by the father of any minor from time immemorial in the province of York, and on failure to thus appoint, the ordinary had the power of appointment.[1]

2. AUTHORITY TO APPOINT.—The appointment of guardians is not, and never has been, peculiarly a chancery power. In this country the power to appoint guardians has generally by statute been conferred upon the probate courts.[2]

The courts of a state where the ward's real estate is situated have the exclusive right to appoint a guardian of a nonresident minor, and vest in such guardian the exclusive control and management of land belonging to the minor situate within the state.[3]

3. WHEN AND FOR WHAT GUARDIAN MAY BE APPOINTED.—**When Guardian May Be Appointed.**—Where in a contest for the custody of children they are given to the father, but he is required to give security for the management of

1. **No judicial appointment at common law.**—Hoyt *v.* Sprague, 103 U. S. 613, 632, 26 L. Ed. 585.

2. **Appointment by probate court.**—Hoyt *v.* Sprague, 103 U. S. 613, 632, 26 L. Ed. 585. But see the case of Williamson *v.* Berry, 8 How. 495, 555, 12 L. Ed. 1170.

The court of chancery possesses an inherent jurisdiction, which extends to the care of the persons of infants so far as is necessary for their protection and education; and also to the care of their property, real and personal, for its due management, and preservation, and proper application for their maintenance. The court is the general guardian, and, on the institution of proceedings therein involving rights of persons or property concerning them, they are regarded as wards of the court, and as under its special cognizance and protection; and no act can be done affecting either person or property, or the condition of infants, except under the express or implied direction of the court itself. Williamson *v.* Berry, 8 How. 495, 555, 12 L. Ed. 1170.

But it has been held under a Maryland statute, that where an infant entitled to property by descent, or under will, has no natural guardian, or a guardian appointed by will, the orphan's court of the county where the land lies has power to appoint a guardian to such infant. Thaw *v.* Ritchie, 136 U. S. 519, 538, 34 L. Ed. 531.

3. **Courts of state where real estate is situated.**—Clarke *v.* Clarke, 178 U. S. 186, 193, 44 L. Ed. 1028; Hoyt *v.* Sprague, 103 U. S. 613, 26 L. Ed. 585. See post, "Place of Appointment," I, A, 5.

their estate, if he fails to give such security a special guardian will be appointed to take possession of the property.[4]

To Convey Infant's Land.—A guardian may be appointed to execute a deed to convey infant's land. Should he die, or refuse to make the conveyance, on application, another guardian will be appointed to execute the deed.[5]

4. Who May Be Appointed.—In England, the next of kin, to whom the inheritance cannot descend, must be appointed guardian;[6] but, in this country, as a general rule the appointment of a guardian is in the discretion of the court.[7]

5. Place of Appointment.—The domicile of an infant is universally held to be the fittest place for the appointment of a guardian of his person and estate,[8] although, for the protection of either, a guardian may be appointed in any state where the person or any property of the infant may be found.[9]

B. Bond—1. Necessity for.—In most of the states of the Union the guardian of the property of a minor gives bond, with personal securities, for his faithful conduct.[10] But in some states in case the father is guardian; no security is required, for his entire real estate is bound for the proper discharge of his trust.[11]

2. Sufficiency of Security.—It has been held that one surety is enough on a guardian's bond for the discharge of his duties, if he owns property sufficient in amount to make good the bond as required by law.[12]

3. Execution of Bond on Condition Other Security Be Obtained.—A surety executed a guardian's bond upon a condition that a second security be obtained; though the second surety is not obtained the bond is good against third parties.[13]

4. When guardian may be appointed.—De Krafft *v.* Barney, 2 Black 704, 708, 17 L. Ed. 350. See, generally, the title PARENT AND CHILD.

5. Appointment to convey infant's land.—Van Ness *v.* United States Bank, 13 Pet. 17, 10 L. Ed. 38.

6. Who appointed at common law.—Graham's Appeal, 1 Dall. 136, 1 L. Ed. 70.

7. Appointment in discretion of court.—Graham's Appeal, 1 Dall. 136, 1 L. Ed. 70.

8. Domicile of ward as place for appointment.—Lamar *v.* Micou, 112 U. S. 452, 470, 28 L. Ed. 751.

While the English and American law require a guardianship where the property is situated, it is conceded that, in the due exercise of comity, preference would ordinarily be given to the person already clothed with the authority of guardian in the minor's own country. Hoyt *v.* Sprague, 103 U. S. 613, 631, 26 L. Ed. 585. See ante, "Authority to Appoint," I, A, 2.

9. May be appointed in any state where ward or property is located.—Lamar *v.* Micou, 112 U. S. 452, 470, 28 L. Ed. 751; Hoyt *v.* Sprague, 103 U. S. 613, 632, 26 L. Ed. 585; Clarke *v.* Clarke, 178 U. S. 186, 193, 44 L. Ed. 1028.

There can be no doubt that the legislature of Rhode Island, where the property was situate, had power, first, to pass for the appointment of guardians of the property of nonresident infants, situated in the state of New York; and, secondly, it had power to prescribe the manner in which such guardians shall perform their duties as regards the care, management, investment, and disposal of such property; and that this power is as full and complete as where the minors are domiciled in the state. Hoyt *v.* Sprague, 103 U. S. 613, 632, 26 L. Ed. 585.

10. Security generally necessary.—Lobrano *v.* Nelligan, 9 Wall. 295, 296, 19 L. Ed. 694.

11. Security not necessary where father of minor is guardian.—Lobrano *v.* Nelligan, 9 Wall. 295, 296, 19 L. Ed. 694.

In Louisiana, in case the father occupies that relation, a different security has been provided, for his entire real estate is bound for the proper discharge of his trust. The security is called a tacit mortgage, which is nothing more than a regulation by law, to assure the property of the minor in the custody of the parent against loss. Lobrano *v.* Nelligan, 9 Wall. 295, 296, 19 L. Ed. 694.

Although by the general law of Louisiana a father's guardianship of his minor children imports a mortgage on his immovable property in their favor, yet this mortgage does not make such a contract between the guardian to the minor as that the legislature may not, by special statute, authorize the father to sell his property divested of the tacit mortgage, especially where the proceeds are still preserved to the minors by an investment which the statute prescribes. Lobrano *v.* Nelligan, 9 Wall. 295, 19 L. Ed. 694.

12. Sufficiency of security.—So held in Ohio. Arrowsmith *v.* Gleason, 129 U. S. 86, 32 L. Ed. 630.

13. Bond executed on condition other security be obtained is valid.—Arrowsmith *v.* Gleason, 129 U. S. 86, 32 L. Ed. 630. See the title PRINCIPAL AND SURETY.

II. Compensation.

It has been provided in some instances that if a guardian embezzles money from the funds of his ward, he forfeits his right to all commissions.[14]

III. Powers, Duties and Liabilities of Guardian.

A. Powers and Duties—1. Powers Strictly Local.—The rights and powers of guardians are considered as strictly local; and not as entitling them to exercise any authority over the person or personal property of their wards in other states. But one of the ordinary rules of comity exercised by some European states is to acknowledge the authority and power of foreign guardians, that is, guardians of minors and others appointed under the laws of their domicile in other states. But this rule of comity does not prevail to the same extent in England and the United States.[15]

2. Degree of Care in Management of Ward's Estate.—A guardian must manage the funds of his ward as prudent men manage their own business.[16]

3. Duties as to Management of Estate Regulated by What Law.—As a general rule, the management and investment of a ward's property should be governed by the law of the state of his domicile, especially when he actually resides there, rather than by the law of any state in which a guardian may have been appointed or may have received some property of the ward.[17]

4. Power to Change Ward's Domicile.—See the title Domicile, vol. 5, p. 479.

5. Power to Collect, Compromise and Release Debts.—A guardian, unless restricted by statute, may collect or compromise and release debts due to the ward, subject to the liability to be called to account if he has acted without due regard to the ward's interest.[18]

14. Compensation.—A conviction of the crime of embezzlement is not essential to the forfeiture. Fields *v.* United States, 205 U. S. 292, 51 L. Ed. 807; § 841, Code, District of Columbia. See the titles APPEAL AND ERROR, vol. 1, p. 851; EMBEZZLEMENT, vol. 5, p. 742.

15. Power strictly local.—Hoyt *v.* Sprague, 103 Va. 613, 26 L. Ed. 585; Clarke *v.* Clarke, 178 U. S. 186, 194, 44 L. Ed. 1028.

"The authority of a guardian, appointed by a court of one state, is limited to that state, and he cannot sue in a court, even of the United States, held within any state, except so far as authorized to do so by its laws. Hoyt *v.* Sprague, 103 U. S. 613, 631, 26 L. Ed. 585; Lamar *v.* Micou, 112 U. S. 452, 470, 28 L. Ed. 751." Morgan *v.* Potter, 157 U. S. 195, 197, 39 L. Ed. 670.

By the law of England and of this country, a guardian appointed by the courts of one state has no authority over the ward's person or property in another state, except so far as allowed by the comity of that state, as expressed through its legislature or its courts; but the tendency of modern statutes and decisions is to defer to the law of the domicile, and to support the authority of the guardian appointed there. Lamar *v.* Micou, 112 U. S. 452, 470, 28 L. Ed. 751.

"It cannot be doubted that the courts of a state where real estate is situated have the exclusive right to vest in a guardian of a nonresident minor the exclusive control and management of land belonging to said minor, situated within the state. This court had occasion to consider and pass upon this doctrine in the case of Hoyt *v.* Sprague, 103 U. S. 613, 26 L. Ed. 585." Clarke *v.* Clarke, 178 U. S. 186, 193, 44 L. Ed. 1028.

In Europe, the guardian appointed in the state of the domicile of the ward is generally recognized as entitled to the control and dominion of the ward and his movable property everywhere, and guardians specially appointed in other states are responsible to the principal guardian. Lamar *v.* Micou, 112 U. S. 452, 470, 28 L. Ed. 751.

16. Must manage wards funds as prudent men would manage their own businesses.—Lamar *v.* Micou, 112 U. S. 452, 469, 28 L. Ed. 751.

Under statute of Maryland.—See the case of Thaw *v.* Ritchie, 136 U. S. 519, 539, 34 L. Ed. 531.

Under statute of Texas.—See the case of Mexican Central R. Co. *v.* Eckman, 187 U. S. 429, 434, 435, 47 L. Ed. 245.

In South Carolina, before the war, no more definite rule appears to have been laid down than that guardians must manage the funds in their hands as prudent men manage their own affairs. Lamar *v.* Micou, 112 U. S. 452, 469, 28 L. Ed. 751.

17. Duties as to management regulated by law of ward's domicile.—Lamar *v.* Micou, 112 U. S. 452, 471, 28 L. Ed. 751.

18. May collect, compromise and release debts if in interest of ward.—Lamar

6. Power to Bind Ward by Contract within Authority.—A contract made by a guardian within his authority, will be binding upon his ward upon his attaining full age. Thus, a contract to pay a certain rate of interest upon borrowed money, will bind the ward after his majority to pay the same rate of interest, though upon attaining majority the ward may pay the debt, or agree with the lendor for a less rate of interest.[19]

7. Power to Encroach on Capital of Ward's Estate.—An order of court is necessary before a guardian may encroach on the corpus of his ward's estate.[20]

8. Power to Convert Personalty into Realty.—A guardian has no power to convert the personal property of his ward into realty.[21]

9. Sale of Ward's Personal Property.—A guardian, unless his powers in this respect are restricted by statute, is authorized, by virtue of his office, to sell his ward's personal property for the purpose of reinvestment, subject to the liability to be called to account in the proper court if he has acted without due regard to the ward's interest.[22] And an order of court is not necessary to the validity of such sale.[23]

10. Sale of Ward's Real Estate—a. *Guardian Must Act in Good Faith.*—Though a guardian must act in good faith in a sale of his ward's real estate, a sale by order of court will be valid, if an adequate price is received therefor, though he acquires an interest in the property before the purchase price is paid.[24]

b. *Necessity for Order of Sale by Court.*—A guardian cannot dispose of the real property of his ward without permission of court.[25]

c. *Conditions Rendering Sale Permissible*—(1) *Ward's Maintenance and Education.*—A guardian may be ordered to sell his infant ward's real estate for his maintenance and education.[26]

v. Micou, 112 U. S. 452, 475, 28 L. Ed. 751; Maclay *v.* Equitable Life Assurance Society, 152 U. S. 499, 503, 38 L. Ed. 528.

Under statute of Texas.—See the case of Mexican Central R. Co. *v.* Eckman, 187 U. S. 429, 434, 47 L. Ed. 245.

19. May bind ward by contract within authority.—United States Mortgage Co. *v.* Sperry, 138 U. S. 313, 34 L. Ed. 969.

20. Cannot encroach on capital of ward.—Thaw *v.* Ritchie, 136 U. S. 519, 544, 34 L. Ed. 531.

21. Cannot convert personalty into realty.—Yerger *v.* Jones, 16 How. 30, 37, 14 L. Ed. 832.

22. Guardian may sell personalty.—Lamar *v.* Micou, 112 U. S. 452, 475, 28 L. Ed. 751; Maclay *v.* Equitable Life Assurance Society, 152 U. S. 499, 503, 38 L. Ed. 528.

The Maryland statute of 1798, c. 101, § 12.—See Thaw *v.* Ritchie, 136 U. S. 519, 540, 34 L. Ed. 531.

23. Order of court not necessary.—Lamar *v.* Micou, 112 U. S. 452, 475, 28 L. Ed. 751; Maclay *v.* Equitable Life Assurance Society, 152 U. S. 499, 503, 38 L. Ed. 528.

24. Guardian must act in good faith.—Kearney *v.* Taylor, 15 How. 494, 14 L. Ed. 787; Lamar *v.* Micou, 112 U. S. 452, 465, 28 L. Ed. 751.

Where a company, organized for the purpose of improving land, purchased from a duly appointed guardian the lands of his infant wards at a price greater than any previous estimate of the value of the property; there was no constructive fraud on the part of said guardian and the commissioners who decided that the property ought to be sold, even though, subsequent to the sale and before the first half of the purchase money was due, said guardian and said commissioners became interested in the company aforesaid; and no actual fraud being shown, there is no sufficient reason for setting aside the sale. Kearney *v.* Taylor, 15 How. 494, 14 L. Ed. 787.

Where land was sold in New Jersey by a guardian by order of the orphan's court of one of the counties, the conveyance was made not to the actual bidders, but to a person whom they appointed to represent them. Afterwards, the supreme court of the state having decided that such a practice was irregular, the legislature passed a law enacting that, upon proof of the absence of fraud, such deeds might be given in evidence. This cured the defect in the title. Kearney *v.* Taylor, 15 How. 494, 14 L. Ed. 787.

25. Order of sale by court necessary.—Hoyt *v.* Hammekin, 14 How. 346, 350, 14 L. Ed. 449; Thaw *v.* Ritchie, 136 U. S. 519, 544, 34 L. Ed. 531.

Real estate cannot be diminished but by the approbation of the court of chancery. Thaw *v.* Ritchie, 136 U. S. 519, 544, 34 L. Ed. 531.

Of the application to sell real estate, notice must be given § 31, ch. 64, Illinois Rev. Stat., 1874, by publication to all persons concerned, and tried "as in other cases in chancery." United States Mortgage Co. *v.* Sperry, 138 U. S. 313, 327, 34 L. Ed. 969.

26. May sell real estate to maintain and

(2) *For Purpose of Reinvestment.*—A guardian may sell, by order of court, the real estate of his ward, for the purpose of reinvestment.[27]

d. *Fraudulent Sale.*—**Jurisdiction to Set Aside.**—A circuit court of the United States may, if other conditions of jurisdiction are satisfied, set aside a fraudulent sale of infant's land, made by his guardian.[28]

e. *Who May Question Validity of Sale.*—The validity of a sale, by a guardian, of an infant's real estate cannot be questioned, so far as her rights are involved, by the widow of the infant's deceased father.[29]

11. Power to Purchase Property for Ward with Guardian's Funds.—A guardian cannot purchase, with his own money, property for his ward. If such purchase be made the ward may have the purchase set aside as to the guardian, and have the estate decreed the individual property of the guardian. After a final decree to that effect, the ward cannot claim title to the property.[30]

12. Lease of Ward's Real Estate.—Generally, by statute, a guardian is allowed to lease the real estate of the ward upon such terms, not extending beyond the minority of the ward, as the court shall approve.[31]

13. Mortgage of Ward's Real Estate.—A guardian will generally be allowed, upon application to court, setting out sufficient cause, to mortgage the real estate of his ward.[32]

educate ward.—Thaw *v.* Ritchie, 136 U. S. 519, 34 L. Ed. 531.

The real estate of an infant may be sold by his guardian for his maintenance and education, if such sale be approved by the circuit court of the United States sitting in chancery. An order of sale may be authorized by the orphan's court of the District of Columbia, to be approved by the circuit court of the United States. Such sale is authorized by the statute of Maryland of 1798, c. 101, subch. 12, § 10. Thaw *v.* Ritchie, 136 U. S. 519, 34 L. Ed. 531.

The act of congress of March 3, 1843, ch. 87, did not repeal the statute of Maryland of 1798, ch. 101, subch. 12, § 10. Thaw *v.* Ritchie, 136 U. S. 519, 544, 34 L. Ed. 531.

Property was devised by a testator to his widow and infant children and the fee over to the one that survived. Upon application by the widow and the infant's guardian, for a sale of the real estate for their maintenance, it was held that an order for sale was valid under the Maryland act of 1798, ch. 101, subch. 12, § 10. Thaw *v.* Ritchie, 136 U. S. 519, 34 L. Ed. 531.

And a sale under this statute cannot be collaterally impeached. Thaw *v.* Ritchie, 136 U. S. 519, 34 L. Ed. 531.

Sale not restricted to legal estates.—Other than legal estates, or estates in possession, may be authorized to be sold under the statute of Maryland of 1798, ch. 101, subch. 12, § 10. Thaw *v.* Ritchie, 136 U. S. 519, 545, 34 L. Ed. 531.

Under Illinois statutes.—See United States Mortgage Co. *v.* Sperry, 138 U. S 313, 327, 34 L. Ed. 969.

27. May sell real estate for purpose of reinvestment.—Thaw *v.* Ritchie, 136 U. S. 519, 545, 34 L. Ed. 531; United States Mortgage Co. *v.* Sperry, 138 U. S. 313, 327, 34 L. Ed. 969.

The power to sell real estate for the purpose of investing the proceeds in other real estate, improved or unimproved, is not, looking at its nature or the consequences to result from its exercise, less important than the power to borrow money, secured by mortgage, to improve the ward's real property. United States Mortgage Co. *v.* Sperry, 138 U. S. 313, 331, 34 L. Ed. 969.

28. Jurisdiction to set aside fraudulent sale.—Arrowsmith *v.* Gleason, 129 U. S. 86, 32 L. Ed. 630.

29. Widow of ward's deceased father cannot question validity of sale.—Knotts *v.* Stearns, 91 U. S. 638, 23 L. Ed. 252.

30. Cannot purchase property for ward with guardian's money.—Corker *v.* Jones, 110 U. S. 317, 28 L. Ed. 161.

Where a person who was acting as guardian to a minor, but without any legal authority, being indebted to the minor, contracted to purchase real estate for the benefit of his ward, and transferred his own property in part payment therefor, the ward cannot claim to receive from the vendor the amount of property so transferred. He can either complete the purchase by paying the balance of the purchase money, or set aside the contract and look to his guardian for reimbursement; but in the absence of fraud, he cannot compel the vendor to return such part of the purchase money as had been paid by the guardian. Yerger *v.* Jones, 16 How. 30, 14 L. Ed. 832.

31. May lease estate of ward.—United States Mortgage Co. *v.* Sperry, 138 U. S. 313, 326, 34 L. Ed. 969.

Statute of Illinois.—See United States Mortgage Co. *v.* Sperry, 138 U. S. 313, 326, 34 L. Ed. 969.

The Maryland statute.—See Thaw *v.* Ritchie, 136 U. S. 519, 539, 34 L. Ed. 531.

32. Guardian allowed to mortgage ward's real estate.—United States Mortgage Co. *v.* Sperry, 138 U. S. 313, 329, 34 L. Ed. 969.

The express restrictions under Illinois Rev. Stats., 1874, ch. 64, §§ 24, 25, are:

14. Investment of Ward's Money—a. *In General.*—A guardian may invest money of his ward, but he is bound to act honestly and faithfully, as do men of ordinary prudence in their own business.[33] But he should not, in accounting for investment, unless expressly so by statute, be held to a diverse rule of accounting from the one in the state of the ward's domicile.[34]

Sale of Personalty for Purpose of Reinvestment.—See ante, "Sale of Ward's Personal Property," III, A, 9.

Sale of Real Estate for Purpose of Reinvestment.—See ante, "For Purpose of Reinvestment," III, A, 10, c, (2).

b. *Investment in Capital Stock of Corporation.*—The legislature certainly might, if it saw fit, pass a general law authorizing a guardian to invest the property of his ward in capital stock of a corporation engaged in manufacturing, trading, or financial operations, or in a particular class of operations, as banking, insurance, or any other that might be specified. Usually, such authority, if given, would be required to be exercised under the allowance and supervision of a court; but that would be a matter of legislative discretion. That such an author-

First, that he obtains the leave of the county court, based upon petition setting out the condition of the estate, the facts and circumstances on which the petition is founded, and a description of the premises to be mortgaged; second, that the mortgage, if not in fee, must be for a term of years not extending beyond the minority of the ward; third, that the time of the maturity of the indebtedness secured by it should not extend beyond the minority of the ward. United States Mortgage Co. *v.* Sperry, 138 U. S. 313, 329, 34 L. Ed. 969.

The implied restrictions, controlling the discretion and power both of the guardian and the county court is that the indebtedness secured by the mortgage must arise out of, and have some necessary or appropriate connection with, the management of the ward's estate. United States Mortgage Co. *v.* Sperry, 138 U. S. 313, 329, 34 L. Ed. 969.

Where the ward's buildings were destroyed by fire it was held that under the Illinois statute the guardian might, with leave of court, mortgage the ward's lands to replace the burnt buildings and pay off existing encumbrances. United States Mortgage Co. *v.* Sperry, 138 U. S. 313, 34 L. Ed. 969. It was also held in this case that it is not necessary to the validity of the mortgage that it should expressly reserve the right of redemption. See, generally, the title MORTGAGES AND DEEDS OF TRUST.

33. May invest money of ward.—Lamar *v.* Micou, 112 U. S. 452, 28 L. Ed. 751; Hoyt *v.* Sprague, 103 U. S. 613, 633, 26 L. Ed. 585; Baldy *v.* Hunter, 171 U. S. 388, 403, 43 L. Ed. 208; United States Mortgage Co. *v.* Sperry, 138 U. S. 313, 326, 34 L. Ed. 969.

The guardian is bound to act honestly and faithfully, and to exercise a sound discretion, such as men of ordinary prudence and intelligence use in their own affairs. In some jurisdictions, no attempt has been made to establish a more definite rule; in others, the discretion has been confined, by the legislature or the courts, within strict limits. Lamar *v.* Micou, 112 U. S. 452, 465, 28 L. Ed. 751.

Investment in city or railroad bonds.—An investment before the Civil War in bonds of the cities of Mobile, New Orleans and Memphis, and in bonds of a railroad corporation, indorsed by a state at the time they were issued, and deposited in a bank in Canada, was not such an investment as will make the guardian liable to the ward for loss by depreciation of the bonds, if at the time he exercised due care and prudence. Lamar *v.* Micou, 112 U. S. 452, 28 L. Ed. 751.

By the law of Georgia before 1863 and by the law of Alabama, investments in such bonds were valid. Lamar *v.* Micou, 112 U. S. 452, 28 L. Ed. 751.

Illinois.—See United States Mortgage Co. *v.* Sperry, 138 U. S. 313, 326, 34 L. Ed. 969.

As to what law governs the duties as to investment, see ante, "Duties as to Management of Estate Regulated by What Law," III, A, 3.

34. Accounting for investing.—Lamar *v.* Micou, 112 U. S. 452, 28 L. Ed. 751; Lamar *v.* Micou, 114 U. S. 218, 29 L. Ed. 94.

A guardian, who had in good faith conformed to the law of the state in which he was appointed, might perhaps be excused for not having complied with stricter rules prevailing at the domicile of the ward. But in a case in which the domicile of the ward has always been in a state whose law leaves much to the discretion of the guardian in the matter of investments, and he has faithfully and prudently exercised that discretion with a view to the pecuniary interests of the ward, it would be inconsistent with the principles of equity to charge him with the amount of the moneys invested, merely because he has not complied with the more rigid rules adopted by the courts of the state in which he was appointed. Lamar *v.* Micou, 112 U. S. 452, 473, 28 L. Ed. 751.

ity could be conferred by law there can be no doubt.[35]

c. *Investment in Confederate State Bonds.*—"A guardian who, during the war between the states, in good faith invested the funds of his ward in bonds of the Confederate States, under an order of the judge of the superior court of a state properly obtained under then existing laws, was protected thereby, and is not liable to the ward for the value of the money invested."[36]

15. Power to Discharge Insurance Policy.—A statute authorizing an order of court for the sale of a ward's personal property by his guardian, has no application and does not require an order of court before a guardian can discharge a policy of life insurance, on the tontine dividend plan, after completion of the dividend period, and receipt of the actual surrendered value.[37]

16. Power to Release Claim to an Inheritance.—A natural guardian has no power to release the claim of a ward to an inheritance without the sanction of some tribunal.[38]

17. Power to Bind Ward Out as a Servant.—There have been instances of infants being apprenticed to some art, trade, occupation or labor, but this has not been general and the court of justice would hardly allow a guardian to bind out his ward as a servant.[39]

18. Duty to Educate Ward.—Guardians are often authorized by statute to apply his ward's funds, or the income and profits thereof, to the support and education of his ward.[40]

19. Bringing Suits—a. *Guardian May Sue in Own Name.*—A guardian in Texas may sue in his own name to enforce obligation in favor of his ward.[41]

35. Investment in capital stock of corporation.—Hoyt *v.* Sprague, 103 U. S. 613, 633, 26 L. Ed. 585.

36. Investment in Confederate state bonds.—Baldy *v.* Hunter, 171 U. S. 388, 392, 43 L. Ed. 208.

A guardian becoming such under the law of New York, and without authority invested money of his ward in bonds of the Confederate States. It was held that the guardian was responsible for the money invested. Lamar *v.* Micou, 112 U. S. 452, 28 L. Ed. 751.

It appears that Lamar *v.* Micou, 112 U. S. 452, 476, 28 L. Ed. 751, "was a case in which the guardian, becoming such under the laws of New York, in violation of his duty to the country, and after the war became flagrant, voluntarily went into the Confederate lines, and there gave aid and comfort to the rebellion; and yet he asked that the investment of his ward's money in Confederate States bonds receive the sanction of the courts sitting in the state under the authority of whose laws he became and acted as guardian. Besides, it is distinctly stated in the opinion in that case that the sums which Lamar used in the purchase of bonds of the Confederate States were moneys of the wards in his hands 'arising either from dividends which he had received in their behalf, or from interest with which he charged himself upon sums not invested,' which is a very different thing from reinvesting (as in the present case) in Confederate currency moneys previously received in the like kind of currency. The present case is governed by considerations that do not apply to that case. We do not doubt the correctness of the decision in Lamar *v.* Micou, 112 U. S. 452, 476, 28 L. Ed. 751, upon its facts as set out in the report of that case." Baldy *v.* Hunter, 171 U. S. 388, 403, 43 L. Ed. 208.

See the case of Horn *v.* Lockhart, 17 Wall. 570, 21 L. Ed. 657, where an executor was held liable for investing funds in Confederate government bonds.

37. So held under Mississippi statute.—Maclay *v.* Equitable Life Assurance Society, 152 U. S. 499, 38 L. Ed. 528.

The guardian was certainly authorized to collect for the benefit of his ward any amount due under the policy, and had the right and the duty to elect, either to keep it in force by paying the premiums, or to surrender it in consideration of being paid at once its surrender value, whichever appeared to be most beneficial to the ward. Maclay *v.* Equitable Life Assurance Society, 152 U. S. 499, 504, 38 L. Ed. 528.

38. Cannot release claim to an inheritance.—Neaglin *v.* De Cordoba, 171 U. S. 638, 641, 43 L. Ed. 315.

39. Power to bind ward out as servant.—Respublica *v.* Keppele, 2 Dall. 197, 198, 1 L. Ed. 347.

40. Duty to apply funds to support and educate ward.—Thaw *v.* Ritchie, 136 U. S. 519, 539, 34 L. Ed. 531; United States Mortgage Co. *v.* Sperry, 138 U. S. 313, 326, 34 L. Ed. 969.

Sale of real estate to educate ward.—See ante, "Ward's Maintenance and Education," III. A, 10, c, (1).

41. Guardian may sue in own name.—Mexican Central R. Co. *v.* Eckman, 187 U. S. 429, 47 L. Ed. 245.

b. *Duty to Sue.*—Where, upon the death of the father, a guardian is appointed for his children, it is the duty of the guardian to take legal steps to recover money due the children, and the guardian is bound to prosecute the suit with diligence; and a contract with an attorney to prosecute the claim for a contingent fee is not void, where a division of the proceeds recovered is not extortionate.[42]

c. *Where Guardian May Sue.*—A guardian, appointed by a court of one state, cannot sue in a court held within another state, except so far as authorized by statute.[43]

d. *Jurisdiction.*—**Determined by Citizenship of Guardian.**—See the title COURTS, vol. 4, p. 958.

20. EFFECT OF WAR ON GUARDIAN'S DUTIES.—A state of war does not release a guardian from the duty to keep the ward's property safely.[44]

21. ESTOPPEL OF WARD BY NEGLIGENCE OF GUARDIAN.—Ordinarily, negligence of a guardian will not estop the ward from asserting his rights upon attaining full age.[45]

22. CONTRACTS BETWEEN GUARDIAN AND WARD.—A ward has no capacity, by contract with his guardian, to affect his own rights.[46]

23. RATIFICATION OF GUARDIAN'S UNLAWFUL ACTS.—A ward, during his minority, cannot assent to his guardians unlawful acts to affect his own rights.[47]

24. GIFT BY WARD TO GUARDIAN AFTER ATTAINING MAJORITY—a. *General Rule.*—If after the ward comes of age, and after actually put into possession of his estate, he thinks fit, when sui juris, and at liberty, he may make any reasonable grant by way of award for care and trouble. When done with eyes open, the court will never set it aside.[48]

42. Duty to bring suit.—Taylor *v.* Bemiss, 110 U. S. 42, 28 L. Ed. 64.

A widow of a citizen of Louisiana, who, in his lifetime, had a claim against the United States, was appointed tutrix of his minor children. It was her duty to prosecute a suit with diligence to recover the claims. Taylor *v.* Bemiss, 110 U. S. 42, 28 L. Ed. 64.

Contract for contingent fee looked upon with suspicion.—See the title ATTORNEY AND CLIENT, vol. 2, pp. 724, 725.

43. Where guardian may sue.—Hoyt *v.* Sprague, 103 U. S. 613, 631, 26 L. Ed. 585; Lamar *v.* Micou, 112 U. S. 452, 470, 28 L. Ed. 751; Morgan *v.* Potter, 157 U. S. 195, 197, 39 L. Ed. 670.

The statutes of Kansas confer no general power to sue upon guardians appointed in other states but do provide that when a minor, for whom a guardian has been appointed in this state, removes to another state, and a guardian of the minor is there appointed, he may bring suit against the guardian appointed in this state. Morgan *v.* Potter, 157 U. S. 195, 197, 39 L. Ed. 670.

44. War does not affect guardian's duties.—Lamar *v.* Micou, 112 U. S. 452, 464, 28 L. Ed. 751.

A state of war does not put an end to pre-existing obligations, or transfer the property of wards to their guardians. Lamar *v.* Micou, 112 U. S. 452, 464, 28 L. Ed. 751.

45. Ward not estopped by negligence of guardian.—Telegraph Co. *v.* Davenport, 97 U. S. 369, 24 L. Ed. 1047.

The negligence of their guardian cannot preclude minors from asserting, by suit, their right to stock belonging to them, which was so sold and transferred. If competent to transfer it, or to approve of the transfer made, they must, to create an estoppel against them, have, by some act or declaration by which the corporation was misled, authorized the use of their names, or subsequently approved such use by accepting the purchase money with knowledge of the transfer; but under the statute of Ohio, where the minors who are the complainants herein resided, they were not, nor, without the authority of the probate court, was their guardian, competent to authorize a sale of their property. Telegraph Co. *v.* Davenport, 97 U. S. 369, 24 L. Ed. 1047.

46. Contract between guardian and ward does not affect ward's rights.—Lamar *v.* Micou, 112 U. S. 452, 476, 28 L. Ed. 751; Baldy *v.* Hunter, 171 U. S. 388, 402, 43 L. Ed. 208.

47. Ward cannot ratify guardian's unlawful acts.—Baldy *v.* Hunter, 171 U. S. 388, 402, 43 L. Ed. 208.

48. May make gift to guardian.—Ralston *v.* Turpin, 129 U. S. 663, 672, 32 L. Ed. 747.

Deeds made by a ward, upon arriving at full age, to his guardian, will be sustained if it appears that they were freely and voluntarily made, upon full knowledge of the facts, without misrepresentation or suppression of material facts, by the guardian. Ralston *v.* Turpin, 129 U. S. 663, 673, 32 L. Ed. 747.

b. *Limitation to Rule.*—The courts guard against gifts by a ward to his guardian if made at the very time of accounting and delivering up the estate.[49] But this rule relating to gifts by a ward, just arriving at majority, does not apply to gifts made some years after attaining majority.[50]

B. Liabilities.—Where a payment is made to a guardian, or his authorized attorney, for infants, the guardian is responsible for the receipt of the money. And this is a matter of accounting to the infants in his fiduciary character as guardian.[51]

Of a Guardian after Transfer of Property to Another Guardian.—A guardian in one state transferred personal property of a ward to a guardian in another state and took a receipt therefor. It was held that the receipt did not discharge the former guardian from liability for losses incurred from his mismanagement of the property before the transfer and the fact that the guardian, to whom the property was transferred, aided in the mismanagement before his appointment did not affect the liability.[52]

Liability Not Affected by War.—"The war of rebellion, and the residence of both ward and guardian within the territory controlled by the insurgents did not discharge the guardian from his responsibility to account, after the war, for property of the ward's which had at any time come into his hands, or which he might by the exercise of due care have obtained possession of."[53]

IV. Accounting.

A guardian, upon the ward's arrival at age, must make a final accounting to the court having jurisdiction of the cause.[54]

49. Limitation to rule.—So held under code of Georgia. Ralston *v.* Turpin, 129 U. S. 663, 673, 32 L. Ed. 747.

50. Deeds made to a guardian more than eleven years after the ward attained full age, and after the guardian finally settled his accounts as guardian, were valid. Ralston *v.* Turpin, 129 U. S. 663, 673, 32 L. Ed. 747.

51. Liability for money collected.—Taylor *v.* Bemiss, 110 U. S. 42, 28 L. Ed. 64.

"The subject of such payments by the United States to administrators appointed in the states is very fully discussed in the case of Wyman *v.* Halstead, decided simultaneously with the present case, 109 U. S. 654, 27 L. Ed. 1068, and, upon the principles there laid down, we are of opinion that payment to Mrs. Bemiss as tutrix under the Louisiana appointment is a valid payment, and that she is responsible under that appointment, and the receipt of the money by herself and by her authorized attorney, to these minors if they have been wronged. And this is a matter of accounting with them in her fiduciary character of tutrix." Taylor *v.* Bemiss, 110 U. S. 42, 45, 28 L. Ed. 64.

52. After transfer of property to another guardian.—Lamar *v.* Micou, 112 U. S. 452, 28 L. Ed. 751.

53. Liability not affected by war.—Lamar *v.* Micou, 112 U. S. 452, 464, 28 L. Ed. 751.

54. Must make an accounting upon ward becoming of age.—Thaw *v.* Ritchie, 136 U. S. 519, 540, 34 L. Ed. 531.

Rules of accounting.—There were two trustees of real and personal estate for the benefit of a minor. One of the trustees was also administrator de bonis non upon the estate of the father of the minor, and the other trustee was appointed guardian to the minor. When the minor arrived at the proper age, and the accounts came to be settled, the following rules ought to have been applied: 1. The trustees ought not to have been charged with an amount of money, which the administrator trustee had paid himself as a commission. That item was allowed by the orphans' court, and its correctness cannot be reviewed collaterally, by another court. 2. Nor ought the trustees to have been charged with allowances made to the guardian trustee. The guardian's accounts also were cognizable by the orphans' court. Having power under the will to receive a portion of the income, the guardian's receipts were valid to the trustees. 3. The trustees were properly allowed and credited by five per cent. on the principal of the personal estate, and ten per cent. on the income. 4. Under the circumstances of this case, the trustees ought not to have been charged upon the principle of six months' rests and compound interest. 5. The trustees ought to have been charged with all gains, as with those arising from usurious loans, unknown friends, or otherwise. 6. The trustees ought not to have been credited with the amount of a sum of money, deposited with a private banking house, and lost by its failure, so far as related to the capital of the estate, but ought to have been credited for so much of the loss as arose from the deposit of current collections of income. Barney *v.* Saunders, 16 How. 535, 14 L. Ed. 1047.

The Maryland statute.—See Thaw *v.* Ritchie, 136 U. S. 519, 540, 34 L. Ed. 531.

Form of Accounting.—The form of accounting will generally be governed by the law of the court in which the accounting is sought.[55]

For What Guardian Must Account.—If a ward acquiesced in benefits, resulting from investment made by his guardian, for several years after becoming of age, he cannot require the guardian to make an accounting of the estate.[56]

Accounting for Investments.—See ante, "In General," III, A, 14, a.

Accounting for Payments Made to Guardian.—See ante, "Liabilities," III, B.

Jurisdiction of Probate Court to Pass upon Accounts of Guardian.—The power to pass upon the accounts of guardians has generally by statutes been conferred upon the probate court.[57]

GUILTY, PLEA OF NOT.—See the title CRIMINAL LAW, vol. 5, p. 107.

55. Form of accounting governed by what law.—Lamar *v.* Micou, 112 U. S. 452, 471, 28 L. Ed. 751.

The form of accounting, so far as concerns the remedy only, must indeed be according to the law of the court in which relief is sought. Lamar *v.* Micou, 112 U. S. 452, 471, 28 L. Ed. 751.

"It may be suggested that this would enable the guardian, by changing the domicile of his ward, to choose for himself the law by which he should account. Not so. The father, and after his death the widowed mother, being the natural guardian, and the person from whom the ward derives his domicile, may change that domicile. But the ward does not derive a domicile from any other than a natural guardian. A testamentary guardian nominated by the father may have the same control of the ward's domicile that the father had." Lamar *v.* Micou, 112 U. S. 452, 471, 28 L. Ed. 751.

56. For what guardian must account.—Hoyt *v.* Sprague, 103 U. S. 613, 26 L. Ed. 585.

57. Probate courts have jurisdiction to pass upon accounts of guardians.—Hoyt *v.* Sprague, 103 U. S. 613, 632, 26 L. Ed. 585.

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CROSS REFERENCES.

See the titles APPEAL AND ERROR, vol. 1, p. 333; EXTRADITION, ante, p. 215; REMOVAL OF CAUSES.

I. Definition, Nature and Object.

A. Definition.—The writ of habeas corpus is the remedy which the law gives for the enforcement of the civil right of personal liberty.[1] In pursuance to its command, the body of the petitioner is brought before the court, that it may inquire into the legality of his detention.[2] The term "habeas corpus," as used in the judiciary act, is to be given the common-law definition.[3]

B. Nature.—The writ of habeas corpus is a high prerogative writ,[4] known to the common law, similar in nature to the writs of quo warranto, mandamus, certiorari and prohibition,[5] and the proceedings thereunder are regarded as appellate in character,[6] but it cannot be made to perform the office of a writ of error or appeal,[7] though it has been held that it can be used to serve such pur-

1. **Definition.**—Ex parte Tom Tong, 108 U. S. 556, 559, 27 L. Ed. 826; United States *v.* Ju Toy, 198 U. S. 253, 272, 49 L. Ed. 1040.

The writ of habeas corpus is a high prerogative writ, known to the common law, the great object of which is the liberation of persons imprisoned without sufficient cause. Ex parte Watkins, 3 Pet. 193, 201, 7 L. Ed. 650.

2. Ex parte Watkins, 3 Pet. 193, 199, 7 L. Ed. 650.

3. **Common-law definition of statutory term.**—Ex parte Siebold, 100 U. S. 371, 375, 25 L. Ed. 717; Ex parte Bollman, 4 Cranch 75, 93, 94, 2 L. Ed. 554.

Name and incidents derived from common law.—Ex parte Siebold, 100 U. S. 371, 375, 25 L. Ed. 717.

The term is generic and includes every species of the writ known to the common law. Ex parte Bollman, 4 Cranch 75, 95, 2 L. Ed. 554. See post, "Different Writs of Habeas Corpus," III.

4. **Nature—Prerogative writ.**—Holmes *v.* Jennison, 14 Pet. 540, 586, 10 L. Ed. 579; Ex parte Watkins, 3 Pet. 193, 201, 7 L. Ed. 650; Kendall *v.* United States, 12 Pet. 524, 627, 629, 9 L. Ed. 1181; Whitney *v.* Dick, 202 U. S. 132, 135, 50 L. Ed. 963.

This is "a high mandate, by means of which courts or judges, in protection of the liberty of individuals, exercise functions appertaining to the sovereign power, and which in intendment of law rest only in the sovereign and are coextensive with his dominion." In re Burrus, 136 U. S. 586, 603, 34 L. Ed. 500.

5. **Similar to quo warranto, mandamus, etc.**—Ex parte Watkins, 3 Pet. 193, 7 L. Ed. 650. Mandamus, however, in this country, has ceased to be regarded as a prerogative writ. See the title MANDAMUS.

6. **Appellate in nature.**—The decision that the individual shall be imprisoned must always precede the application for a writ of habeas corpus, and this writ must always be for the purpose of revising that decision, and therefore, appellate in its nature. Ex parte Bollman, 4 Cranch 75, 101, 2 L. Ed. 554.

The writ of habeas corpus is a mode provided for the exercise of the appellate jurisdiction of the federal supreme court whenever, by any unauthorized action of an inferior tribunal, whether it be by its order, decree, or process, a citizen is restrained of his personal liberty. Ex parte Virginia, 100 U. S. 339, 350, 25 L. Ed. 676, dissenting opinion of Field, J. See, also, Ex parte Parks, 93 U. S. 18, 21, 23 L. Ed. 787.

This writ is in the nature of a writ of error, which brings up the body of the prisoner, with the cause of commitment. Ex parte Watkins, 3 Pet. 193, 202, 7 L. Ed. 650; Holmes *v.* Jennison, 14 Pet. 540, 586i, 10 L. Ed. 579.

7. **Not equivalent of writ of error.**—"The writ of habeas corpus is not the equivalent of an appeal or writ of error. It is not a proceeding to correct errors which may have occurred in the trial of the case below. It is an attack directly upon the validity of the judgment, and, as has been frequently said, it cannot be transformed into a writ of error." Whitney *v.* Dick, 202 U. S. 132, 136, 50 L. Ed. 963; Roberts *v.* Reilly, 116 U. S. 80, 93, 29 L. Ed. 544; Wales *v.* Whitney, 114 U. S. 564, 571, 29 L. Ed. 277.

This is true even in an appellate court. Bessette *v.* Conkey Co., 194 U. S. 324, 335, 48 L. Ed. 997. See the title APPEAL AND ERROR, vol. 1, p. 399. And see post, "As Determined by Validity of Proceedings," V, E; "Erroneous Judgment or

pose in conjunction with the writ of certiorari in some cases.[8] The proceeding under a writ of habeas corpus is a "suit,"[9] within the meaning of § 25 of the judiciary act of 1789, giving the supreme court jurisdiction of suits appealed from the highest court of a state in certain cases,[10] and a "cause" from which questions may be certified from a lower court to this,[11] but not in the sense of a suit or controversy between private parties.[12] It is a new suit instituted by the petitioner to enforce the civil right to his personal liberty, and is separate and distinct from the criminal prosecution under which he is held in custody.[13] The

Order," V, J, 6, c; "Mere Errors," IX, D, 8, c.

8. **In conjunction with certiorari.**—"The writ of habeas corpus is not a writ of error, though in some cases, in which the court issuing it has appellate power over the court by whose order the petitioner is held in custody, it may be used with the writ of certiorari for that purpose." Wales *v.* Whitney, 114 U. S. 564, 571, 29 L. Ed. 277; Roberts *v.* Reilly, 116 U. S. 80, 93, 29 L. Ed. 544. See the title CERTIORARI, vol. 3, p. 659. And see post, "Habeas Corpus and Certiorari," IX, D, 8, c, (2).

9. **Proceeding is a suit.**—Writs of habeas corpus prosecuted for the attainment of the parties' rights, are suits within the meaning of the law. Upshur County *v.* Rich, 135 U. S. 467, 474, 34 L. Ed. 196; Weston *v.* Charleston, 2 Pet. 449, 464, 7 L. Ed. 481; Kendall *v.* United States, 12 Pet. 524, 9 L. Ed. 1181; Holmes *v.* Jennison, 14 Pet. 540, 564, 566, 567, 10 L. Ed. 579; Ex parte Milligan, 4 Wall. 2, 112, 18 L. Ed. 281; Kohl *v.* United States, 91 U. S. 367, 375, 23 L. Ed. 449. But see In re Barry (Note), 136 U. S. 597, 34 L. Ed. 504. See post, "As Institution of Suit," VI, H, 2.

It is the petitioner's suit in court, to recover his liberty. Holmes *v.* Jennison, 14 Pet. 540, 564, 10 L. Ed. 579.

"When the petition is filed and the writ prayed for, it is a suit—the suit of the party making the application." Ex parte Milligan, 4 Wall. 2, 113, 18 L. Ed. 281.

A suit is commenced when the petitioner has demanded his release by the proceeding relating to habeas corpus. Ex parte Milligan, 4 Wall. 2, 113, 18 L. Ed. 281.

Distinction between habeas corpus and ordinary action.—Gusman *v.* Marrero, 180 U. S. 81, 45 L. Ed. 436. See the title ACTIONS, vol. 1, p. 99.

But there is no amount in controversy.—Whitney *v.* Dick, 202 U. S. 132, 135, 50 L. Ed. 963; In re Lennon, 150 U. S. 393, 397, 37 L. Ed. 1120. See the title APPEAL AND ERROR, vol. 1, p. 852.

Not action for damages.—The proceeding under a writ of habeas corpus is different from an action for damages. Ekiu *v.* United States, 142 U. S. 651, 662, 35 L. Ed. 1146.

10. **Appeal from state court.**—One of the questions in Holmes *v.* Jennison, 14 Pet. 540, 597, 10 L. Ed. 579, was whether under the 25th section of the judiciary act a proceeding for a writ of habeas corpus was a "suit." Chief Justice Taney held, that, "if a party is unlawfully imprisoned, the writ of habeas corpus is his appropriate legal remedy. It is his suit in court to recover his liberty." There was much diversity of opinion on another ground of jurisdiction; but that, in the sense of the 25th section of the judiciary act, the proceeding by habeas corpus was a suit, was not controverted by any except Baldwin, Justice, and he thought that "suit" and "cause" as used in the section, meant the same thing. Ex parte McCardle, 6 Wall. 318, 18 L. Ed. 816; Columbian Ins. Co. *v.* Wheelright, 7 Wheat. 534, 5 L. Ed. 516; Ex parte Milligan, 4 Wall. 2, 113, 18 L. Ed. 281. See the title APPEAL AND ERROR, vol. 1, p. 549.

11. **Is a "cause."**—It is maintained with earnestness and ability that a certificate of division of opinion can occur only in a cause; and that the proceeding by a party, moving for a writ of habeas corpus, does not become a cause until after the writ has been issued and a return made. It is true that it is usual for a court, on application for a writ of habeas corpus, to issue the writ, and, on the return, to dispose of the case; but the court can elect to waive the issuing of the writ and consider whether, upon the facts presented in the petition, the prisoner, if brought before it, could be discharged. If, in the sense of the law, the proceeding for the writ of habeas corpus was the "cause" of the party applying for it, then it is evident that the "cause" was pending before the court, and that the questions certified arose out of it, belonged to it, and were matters of right and not of discretion. The court said: "This we deny. It was the cause of Milligan when the petition was presented to the circuit court. It would have been the cause of both parties, if the court had issued the writ and brought those who held Milligan in custody before it." Ex parte Milligan, 4 Wall. 2, 110, 112, 18 L. Ed. 281. See the titles ACTIONS, vol. 1, p. 100; APPEAL AND ERROR, vol. 2, p. 33.

12. **Not controversy between private parties.**—"It is an inquisition by the government, at the suggestion and instance of an individual, most probably, but still in the name and capacity of the sovereign." In re Burrus, 136 U. S. 586, 615, 34 L. Ed. 500.

13. **Proceeding separate from prosecution.**—Ex parte Tom Tong, 108 U. S. 556,

proceeding is, in its nature, civil rather than criminal,[14] legal rather than equitable,[15] appellate rather than original,[16] collateral rather than direct,[17] and summary rather than cumbersome.[18] It is sometimes used as an ancillary proceeding.[19]

C. Object.—The object of the proceeding by a writ of habeas corpus is to inquire into the legality of the detention of the petitioner.[20]

II. Origin and History.

A. In General.—The great writ of habeas corpus has been for centuries esteemed the best and only sufficient defense of personal freedom.[21]

B. In England.—The English judges, being originally under the influence of the crown, neglected to issue this writ, where the government entertained suspicions which could not be sustained by evidence; and the writ, when issued, was sometimes disregarded or evaded, and great individual oppression was suffered, in consequence of delays in bringing prisoners to trial. To remedy this evil, the celebrated habeas corpus act of the 31 Car. II, was enacted, for the purpose of securing the benefits for which the writ was given. This statute may be referred to, as describing the cases in which relief is, in England, afforded by this writ to a person detained in custody. It enforces the common law. This statute excepts from those who are entitled to its benefit, persons committed for felony or treason, plainly expressed in the warrant, as well as persons convicted or in execution.[22]

C. In United States.—The people of this country brought with them to its

559, 27 L. Ed. 826. See post, "Guilt or Innocence," IX, D, 3.

14. Civil proceeding.—Farnsworth *v.* Montana, 129 U. S. 104, 113, 32 L. Ed. 616; Ex parte Tom Tong, 108 U. S. 556, 27 L. Ed. 826; Kurtz *v.* Moffitt, 115 U. S. 487, 494, 29 L. Ed. 458; Cross *v.* Burke, 146 U. S. 82, 88, 36 L. Ed. 896; United States *v.* Pridgeon, 153 U. S. 48, 59, 38 L. Ed. 631; In re Frederich, 149 U. S. 70, 75, 37 L. Ed. 653; Fisher *v.* Baker, 203 U. S. 174, 181, 51 L. Ed. 142; In re Lennon, 150 U. S. 393, 397, 37 L. Ed. 1120; Gonzales *v.* Cunningham, 164 U. S. 612, 618, 41 L. Ed. 572; United States *v.* Sanges, 144 U. S. 310, 320, 36 L. Ed. 445; Washington, etc., R. Co. *v.* District of Columbia, 146 U. S. 227, 36 L. Ed. 951; In re Chapman, 156 U. S. 211, 215, 39 L. Ed. 401; In re Belt, 159 U. S. 95, 100, 40 L. Ed. 88; Chapman *v.* United States, 164 U. S. 436, 41 L. Ed. 504; Perrine *v.* Slack, 164 U. S. 452, 41 L. Ed. 510.

15. Legal.—Ex parte Watkins, 3 Pet. 193, 7 L. Ed. 650.

16. Appellate.—Ex parte Watkins, 3 Pet. 193, 7 L. Ed. 650. See post, "Nature of," IV. A.

17. Collateral.—United States *v.* Pridgeon, 153 U. S. 48, 59, 38 L. Ed. 631; In re Frederich, 149 U. S. 70, 76, 37 L. Ed. 653; Savin, Petitioner, 131 U. S. 267, 280, 33 L. Ed. 150.

18. Summary.—"In order to be effectual for the purposes for which it is intended, the proceedings must be summary; and the law has accordingly made them so." Holmes *v.* Jennison, 14 Pet. 540, 564, 10 L. Ed. 579; Tarble's Case, 13 Wall. 397, 409, 20 L. Ed. 597; Ex parte Wells, 18 How. 307, 330, 15 L. Ed. 421; Roberts *v.* Reilly, 116 U. S. 80, 93, 29 L. Ed. 544; In re Kaine, 14 How. 103, 113, 14 L. Ed. 345.

19. Ancillary.—Virginia *v.* Paul, 148 U. S. 107, 123, 37 L. Ed. 386. See post, "As Ancillary Proceeding," V, N, 4.

20. Object—Inquiry into legality of detention.—Holmes *v.* Jennison, 14 Pet. 540, 564, 566, 10 L. Ed. 579; Ex parte Tom Tong, 108 U. S. 556, 560, 27 L. Ed. 826; In re Boardman, 169 U. S. 39, 43, 42 L. Ed. 653; Ex parte Watkins, 3 Pet. 193, 201, 7 L. Ed. 650; Wales *v.* Whitney, 114 U. S. 564, 571, 29 L. Ed. 277; Iasigi *v.* Van De Carr, 166 U. S. 391, 395, 41 L. Ed. 1045; Ex parte Bollman, 4 Cranch 75, 114, 125, 2 L. Ed. 554; Coleman *v.* Tennessee, 97 U. S. 509, 519, 24 L. Ed. 1118; United States *v.* McBratney, 104 U. S. 621, 624, 26 L. Ed. 869.

The proceeding under a writ of habeas corpus is not like an action to recover damages for an unlawful arrest or commitment, but its object is to ascertain whether a prisoner can be legally detained in custody. Ekiu *v.* United States, 142 U. S. 651, 662, 35 L. Ed. 1146. See post, "In General," IX, D, 1.

21. Origin and history.—Ex parte Yerger, 8 Wall. 85, 95, 19 L. Ed. 332.

22. In England.—Ex parte Watkins, 3 Pet. 193, 202, 7 L. Ed. 650.

In England, after a long struggle, the right of personal liberty was firmly guaranteed by the famous Habeas Corpus Act of May 27, 1679, "for the better securing of the liberty of the subject," which, as Blackstone says, "is frequently considered as another Magna Charta." Ex parte Yerger, 8 Wall. 85, 95, 19 L. Ed. 332.

shores the rights of Englishmen; the rights which had been wrested from English sovereigns at various periods of the nation's history. One of these fundamental rights was that of habeas corpus, or the right of having any invasion of personal liberty judicially examined into, at once, by a competent judicial magistrate.[23] Naturally, therefore, when the confederated colonies became united states, and the formation of a common government engaged their deliberations in convention, this great writ found prominent sanction in the constitution.[24] The enactments now found in the Revised Statutes of the United States on the subject of the writ of habeas corpus are the result of a long course of legislation forced upon congress by the attempt of the states of the Union to exercise the power of imprisonment over officers and other persons asserting rights under the federal government or foreign governments, which the states denied.[25]

III. The Different Writs of Habeas Corpus.

There are a number of different writs of habeas corpus known to the law.[26]

23. **In United States.**—Slaughter-House Cases, 16 Wall. 36, 114, 115, 21 L. Ed. 394, dissenting opinion of Bradley, J.

24. **Constitutional and statutory recognition.**—That sanction is in these words: "The privilege of the writ of habeas corpus shall not be suspended unless when in cases of rebellion or invasion the public safety may require it." The terms of this provision necessarily imply judicial action. In England, all the higher courts were open to applicants for the writ, and it is hardly supposable that, under the new government, founded on more liberal ideas and principles, any court would be, intentionally, closed to them. Accordingly, the first congress under the constitution, after defining, by various sections of the act of September 24, 1789, the jurisdiction of the district courts, the circuit courts, and the supreme court in other cases, proceeded, in the 14th section, to enact, "that all the before-mentioned courts of the United States shall have power to issue writs of scire facias, habeas corpus, and all other writs, not specially provided by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." Ex parte Yerger, 8 Wall. 85, 95, 19 L. Ed. 332. See post, "Source of," IV, C, 1.

25. **History of extention of federal jurisdiction.**—In re Neagle, 135 U. S. 1, 70, 34 L. Ed. 55; In re Burrus, 136 U. S. 586, 590, 34 L. Ed. 500; Ex parte Yerger, 8 Wall. 85, 101, 19 L. Ed. 332; Whitten *v.* Tomlinson, 160 U. S. 231, 239, 40 L. Ed. 406. See post, "For Act Done or Omitted in Pursuance of Law, etc," IV, C, 3, b, (3); "Where Prisoner Is Citizen of Foreign State," IV, C, 3, b, (5).

26. **Habeas corpus ad satisfaciendum.**—This writ is proper "when a prisoner hath had judgment against him in an action, and the plaintiff is desirous to bring him up to some superior court to charge him with process of execution." 3 Blk. Com. 129. Ex parte Bollman, 4 Cranch 75, 97, 2 L. Ed. 554.

"This case can never occur in the courts of the United States. One court never awards execution on the judgment of another. Our whole judicial system forbids it." Ex parte Bollman, 4 Cranch 75, 98, 2 L. Ed. 554.

Habeas corpus ad prosequendum, etc.—The writ of ad prosequendum, testificandum, deliberandum, etc., may issue "when it is necessary to remove a prisoner, in order to prosecute, or bear testimony, in any court, or to be tried in the proper jurisdiction wherein the fact was committed." 3 Blk. Com. 129. Ex parte Bollman, 4 Cranch 75, 98, 2 L. Ed. 554.

Habeas corpus ad faciendum et recipiendum—Cum causa.—The common writ ad faciendum et recipiendum, "issues out of any of the courts of Westminster Hall, when a person is sued in some inferior jurisdiction, and is desirous to remove the action into the superior court, commanding the inferior judges to produce the body of the defendant, together with the day and cause of his caption and detainer (whence the writ is frequently denominated a habeas corpus cum causa), to do and receive whatever the king's court shall consider in that behalf. This writ is grantable of common right, without any motion in court, and it instantly supersedes all proceedings in the court below." 3 Blk. Com. 129. Ex parte Bollman, 4 Cranch 75, 98, 2 L. Ed. 554. See Virginia *v.* Rives, 100 U. S. 313, 25 L. Ed. 667.

It would not be difficult to demonstrate that the writ of habeas corpus cum causa cannot be the particular writ contemplated by congress in the 14th section of the judiciary act; but it will be sufficient to observe, generally, that the same act prescribes a different mode for bringing into the courts of the United States suits brought in a state court against a person having a right to claim the jurisdiction of the courts of the United States. Ex parte Bollman, 4 Cranch 75, 98, 2 L. Ed. 554.

This writ may be issued by the United States courts in aid of their jurisdiction. Ex parte Crouch, 112 U. S. 178, 180, 28

IV. Jurisdiction.

A. Nature of.—The jurisdiction of the different courts to issue writs of habeas corpus is, in its nature, appellate rather than original.[27]

B. Of English Courts.—The issuance of writs of habeas corpus for the discharge of persons unlawfully imprisoned is one of the few grounds of jurisdiction over criminal matters possessed by the English court of chancery.[28]

C. Of United States Courts—1. Source of—a. *Express Statutory Enactment.*—The power of the courts of the United States to award the writ of habeas corpus must be given by written law compatible with the constitution of the United States.[29] The intent of the constitution, in respect to the writ of habeas corpus, is manifest. It is that every citizen may be protected by judicial action from unlawful imprisonment. To this end the act of 1789 provided that every court of the United States should have power to issue the writ.[30] The fourteenth section of the judiciary act and subsequent acts supplemental thereto and amendatory thereof, and not the sections conferring general jurisdiction, have been considered as containing a substantive grant of this power.[31]

L. Ed. 690. See post, "As Ancillary Proceeding," V, N, 4.

As to the issuance of this writ on removal of causes, see the title REMOVAL OF CAUSES.

Habeas corpus ad respondendum.—As stated and accurately defined by Judge Blackstone (3 Bl. Com. 129), the writ of habeas corpus ad respondendum lies: "When a man hath a cause of action against one who is confined by the process of some inferior court, in order to remove the prisoner and charge him with this new action in the court above." Ex parte Bollman, 4 Cranch 75, 97, 2 L. Ed. 554.

"This case may occur, when a party, having a right to sue in this court * * * wishes to institute a suit against a person who is already confined by the process of an inferior court. This confinement may be either by the process of a court of the United States, or of a state court." Ex parte Bollman, 4 Cranch 75, 97, 2 L. Ed. 554.

Habeas corpus ad subjiciendum.—The writ of habeas corpus ad subjiciendum is not by the common law the proper mode of instituting a proceeding to try the legal right of a party to the guardianship of an infant. In re Burrus, 136 U. S. 586, 594, 34 L. Ed. 500. See post, "In Other Cases," IV, C, 3, f.

27. Appellate in nature.—Holmes *v.* Jennison, 14 Pet. 540, 586h, 10 L. Ed. 579; Ex parte Clarke, 100 U. S. 399, 402, 25 L. Ed. 715; Ex parte Virginia, 100 U. S. 339, 341, 25 L. Ed. 676; In re Metzger, 5 How. 176, 190, 191, 12 L. Ed. 104; Ex parte Siebold, 100 U. S. 371, 374, 25 L. Ed. 717; Ex parte Burford, 3 Cranch 448, 2 L. Ed. 495; Ex parte Bollman, 4 Cranch 75, 100, 101, 2 L. Ed. 554; Ex parte Yerger, 8 Wall. 85, 98, 19 L. Ed. 332; Ex parte Dorr, 3 How. 103, 104, 11 L. Ed. 514; Ex parte Hung Hang, 108 U. S. 552, 553, 27 L. Ed. 811. See ante, "Nature," I, B.

But it may be admitted that there is some refinement in denominating that an appellate power which is exercised through the instrumentality of a writ of habeas corpus. In re Metzger, 5 How. 176, 191, 12 L. Ed. 104.

28. Of English courts.—In re Sawyer, 124 U. S. 200, 210, 31 L. Ed. 402.

29. Source of—Statutory enactment.—Ex parte Bollman, 4 Cranch 75, 94, 2 L. Ed. 554; In re Neagle, 135 U. S. 1, 78, 34 L. Ed. 55, dissenting opinion; Lamar, J., Fuller, C. J.; Ex parte Parks, 93 U. S. 18, 22, 23 L. Ed. 787.

"This * * * is not to be considered as abridging the power of courts over their own officers, or to protect themselves, and their members, from being disturbed in the exercise of their functions. It extends only to the power of taking cognizance of any question between individuals, or between the government and individuals." Ex parte Bollman, 4 Cranch 75, 94, 2 L. Ed. 554. See In re Neagle, 135 U. S. 1, 34 L. Ed. 55.

The United States courts have no jurisdiction in cases in which it is "not given by the constitution or laws of the United States." In re Metzger, 5 How. 176, 190, 12 L. Ed. 104.

30. Intent of constitutional provision.—Ex parte Yerger, 8 Wall. 85, 101, 19 L. Ed. 332.

31. Fourteenth section of judiciary act.—Ex parte Bollman, 4 Cranch 75, 94, 2 L. Ed. 554; Ex parte Parks, 93 U. S. 18, 22, 23 L. Ed. 787; Ex parte Watkins, 3 Pet. 193, 201, 7 L. Ed. 650.

"The fourteenth section of the judiciary act granted to all the courts power to issue writs of scire facias, habeas corpus, and all other writs necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law; and to the justices and judges, power to grant writs of habeas corpus for the purpose of inquiry into the cause of commitment; but it added a proviso, that the writ should not extend to prisoners in jail, unless in custody under or by color of authority of the United States, or com-

b. *Incidental to Other Jurisdiction.*—The power to award a writ of habeas corpus may arise as incidental and necessary to other powers conferred.[32]

2. ENLARGEMENT OF.—The general spirit and genius of our institutions has tended to the widening and enlarging of the habeas corpus jurisdiction of the courts and judges of the United States.[33] This extension may possibly become a source of danger to such institutions.[34]

3. EXTENT OF—a. *In General.*—The question of the extent of the authority of the courts of the United States to use the writ of habeas corpus as a means of releasing persons held in unlawful custody has always been clouded with more or less doubt and uncertainty.[35]

b. *Where Prisoner Is in Jail*—(1) *Statutory Provision.*—The fourteenth section of the judiciary act of 1789 provides, "that the courts of the United States shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of habeas corpus."[36] And acts supplemental thereto and amendatory thereof provide that "the writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify."[37] The words of the proviso are unambiguous, and that they qualify and restrict the preceding provisions of the section is indisputable.[38]

mitted for trial before some court of the same, or necessary to be brought into court to testify. It was found necessary to relax the limitation contained in this proviso; and this was done in several subsequent laws. See act of 1833 (4 Stat. 634), passed in consequence of nullification proceedings in South Carolina; act of 1842 (5 Stat. 539), passed in consequence of the McLeod Case; and act of 1867 (14 Stat. 44), passed in consequence of the state of things that followed the late rebellion." Ex parte Parks, 93 U. S. 18, 22, 23 L. Ed. 787; Virginia *v.* Rives, 100 U. S. 313, 323, 25 L. Ed. 667.

For fuller statement, see post, "Extent of," IV, C, 3.

32. Incidental to other jurisdiction.—The United States courts have not jurisdiction in all cases to issue the writ of habeas corpus, but they have such jurisdiction when, by reason of some other matter or thing in the case, the court has jurisdiction which it can enforce by means of this writ. In re Burrus, 136 U. S. 586, 597, 34 L. Ed. 500; Ex parte Bollman, 4 Cranch 75, 102, 2 L. Ed. 554.

The power of the courts to issue the writ must be necessary to the exercise of the jurisdiction of the respective courts and agreeable to the principles and usages of law. In re Burrus, 136 U. S. 586, 590, 34 L. Ed. 500. See post, "Circuit Court of Appeals," IV, C, 4, b.

33. Jurisdiction has been continually extended.—Ex parte Yerger, 8 Wall. 85, 102, 19 L. Ed. 332.

34. Danger of too extensive federal jurisdiction.—Ex parte Wells, 18 How. 307, 330, 15 L. Ed. 421, Curtis, J., dissenting. See, also, Ex parte Royall, No. 1, 117 U. S. 241, 251, 29 L. Ed. 868.

35. Not definitely settled.—In re Burrus, 136 U. S. 586, 589, 34 L. Ed. 500.

36. Grant of jurisdiction.—Ex parte Dorr, 3 How. 103, 105, 11 L. Ed. 514; Ex parte Parks, 93 U. S. 18, 22, 23 L. Ed. 787; Mahon *v.* Justice, 127 U. S. 700, 718, 32 L. Ed. 283. See post, "Express Statutory Enactment," IV, C, 1, a.

37. Restrictions upon jurisdiction.—Whitten *v.* Tomlinson, 160 U. S. 231, 239, 40 L. Ed. 406; Talton *v.* Mayes, 163 U. S. 376, 379, 41 L. Ed. 196; Riggs *v.* Johnson County, 6 Wall. 166, 199, 18 L. Ed. 768. See Rev. Stat., § 753.

38. In re Burrus, 136 U. S. 586, 593, 34 L. Ed. 500; Ex parte Dorr, 3 How. 103, 11 L. Ed. 514; Ex parte Bollman, 4 Cranch 75, 2 L. Ed. 554; In re Metzger, 5 How. 176, 190, 12 L. Ed. 104.

(2) *By Color of Authority of United States*—(a) *In General.*—The jurisdiction of the different federal courts extends to cases, among others, of prisoners in jail under or by color of the authority of the United States, or committed for trial before some court thereof.[39] This extension of the power of the federal courts was provided for in the original judiciary act.[40]

(b) *What Amounts to.*—The federal courts and judicial officers are clothed with the power to issue the writ of habeas corpus in all cases, where a party is illegally restrained of his liberty by an officer of the United States, whether such illegality consists in character of the process, the authority of the officer, or the invalidity of the law under which he is held.[41] Detention by the military authority of the United States is included in this provision.[42]

(3) *For Act Done or Omitted in Pursuance of Law, etc.*—The original act of 1789 did not provide for the releasing by this writ of parties held in custody under the laws of the states. But when, during the controversy growing out of the nullification laws of South Carolina, officers of the United States were arrested and imprisoned for the performance of their duties in collecting the revenue of the United States in that state, and held by the state authorities, it became necessary for the congress of the United States to take some action for their relief. Accordingly the act of congress of March 2, 1833, among other remedies for such condition of affairs, provided, by its seventh section, that the federal judges should grant writs of habeas corpus in all cases of a prisoner in jail or confinement, where he should be committed or confined on or by any authority or law, for any act done, or omitted to be done, in pursuance of a law of the United States, or any order, process or decree of any judge or court thereof.[43] Under this enactment, the federal courts have jurisdiction to release, by habeas corpus, United States officers and other persons held in custody by any authority, whether state or national, for doing acts which they are authorized or required to do by the constitution and laws of the United States, and the writ of habeas corpus is the appropriate remedy for that purpose.[44] Any obligation fairly and properly inferable from the Constitution of the United States, or any duty of an officer to be derived from the general scope of his duties under the laws of the United States, is a "law" within the meaning of this phrase.[45] A marshal acting as a bodyguard who kills a person making an assault upon a justice of the supreme court is acting in pursuance of law and may be released from state cus-

39. By color of authority of United States.—Ex parte Terry, 128 U. S. 289, 301, 32 L. Ed. 405; Ex parte Parks, 93 U. S. 18, 23 L. Ed. 787; Ex parte Siebold, 100 U. S. 371, 25 L. Ed. 717; Ex parte Virginia, 100 U. S. 339, 25 L. Ed. 676; Whitten *v.* Tomlinson, 160 U. S. 231, 239, 40 L. Ed. 406; In re Burrus, 138 U. S. 586, 613, 34 L. Ed. 500; Ex parte Kearney, 7 Wheat. 38, 5 L. Ed. 391; Ex parte Bollman, 4 Cranch 75, 2 L. Ed. 554; Mahon *v.* Justice, 127 U. S. 700, 718, 32 L. Ed. 283; United States *v.* Hamilton, 3 Dall. 17, 1 L. Ed. 490; Ex parte Burford, 3 Cranch 448, 449, 2 L. Ed. 495.

40. In original judiciary act.—Mahon *v.* Justice, 127 U. S. 700, 718, 32 L. Ed. 283; Ex parte Yerger, 8 Wall. 85, 101, 19 L. Ed. 332; Whitten *v.* Tomlinson, 160 U. S. 231, 239, 40 L. Ed. 406.

41. What amounts to.—Tarble's Case, 13 Wall. 397, 411, 20 L. Ed. 597. See post, "Under Chinese Exclusion Acts," IV, C, 3, d.

42. Detention by military authority.—Tarble's Case, 13 Wall. 397, 20 L. Ed. 597. See post, "In Particular Instances," IV, F, 3, b, (1), (c), bb.

43. Act done or omitted in pursuance of law, etc.—In re Neagle, 135 U. S. 1, 70, 34 L. Ed. 55. See, also, Mahon *v.* Justice, 127 U. S. 700, 718, 32 L. Ed. 283; Ex parte Parks, 93 U. S. 18, 22, 23 L. Ed. 787; Ex parte Yerger, 8 Wall. 85, 101, 19 L. Ed. 332; Whitten *v.* Tomlinson, 160 U. S. 231, 239, 40 L. Ed. 406. See ante, "In United States," II, C; post, "In Particular Instances," IV, F, 3, b, (1), (c), bb.

44. United States *v.* Lewis, 200 U. S. 1, 50 L. Ed. 343, citing In re Neagle, 135 U. S. 1, 41, 34 L. Ed. 55; Ex parte Yerger, 8 Wall. 85, 101, 19 L. Ed. 332; Virginia *v.* Paul, 148 U. S. 107, 120, 37 L. Ed. 386. See Whitney *v.* Dick, 202 U. S. 132, 141, 50 L. Ed. 963.

Where a soldier of the United States kills a person supposed to be guilty of larceny and fleeing arrest, he does not act in pursuance of the laws of the United States. United States *v.* Lewis, 200 U. S. 1, 8, 50 L. Ed. 343.

45. What is "law" in this connection.—In re Neagle, 135 U. S. 1, 59, 34 L. Ed. 55.

tody by a federal court on habeas corpus, although there is no special act of congress in express terms authorizing the marshal to accompany such justice.[46]

(4) *In Violation of Constitution, Law or Treaty*—(a) *Statutory Provision*—aa. *In General.*—The last extension of the power of the federal courts under the writ of habeas corpus is the act of February 5, 1867,[47] by which the jurisdiction of such courts to issue writs of habeas corpus is extended to prisoners in jail when they are in "custody in violation of the constitution or a law or treaty of the United States."[48]

bb. *Former Acts Not Repealed by.*—This act did not repeal any previous act conferring jurisdiction by habeas corpus, unless by implication.[49]

cc. *Object and Purpose.*—The object of this provision is to protect the citizens of the United States in the enjoyment of the rights, privileges and immunities given by the constitution and laws of the United States, and to secure the paramount authority of the United States.[50]

(b) *Extent of Jurisdiction*—aa. *In General.*—The habeas corpus jurisdiction of every court, and of every judge, extends to every possible case of privation of liberty contrary to the national constitution, treaties or laws.[51]

bb. *Custody of State*—(aa) *Under Law in Violation of United States Constitution.*—The federal jurisdiction extends to the discharge of a person from the custody of state authorities, if their exercise of jurisdiction over his person would be in violation of any rights secured to him by the constitution or laws of the United States.[52]

46. It is the duty of the United States to protect its officers from violence, even to death, in discharge of the duties which its laws impose upon them, and congress has made the writ of habeas corpus one of the means by which this protection is made efficient, and the facts of this case show that the prisoner was acting both under the authority of law, and the directions of his superior officers of the department of justice, therefore the court could see no reason why this writ should not be made to serve its purpose in the present case. In re Neagle, 135 U. S. 1, 72, 34 L. Ed. 55. There was a strong dissent from the prevailing opinion in this case by Fuller, C. J., and Lamar, J. See page 89.

47. **In violation of constitution, etc.**—In re Neagle, 135 U. S. 1, 72, 34 L. Ed. 55; Ex parte Yerger, 8 Wall. 85, 104, 19 L. Ed. 332; Whitten *v.* Tomlinson, 160 U. S. 231, 239, 40 L. Ed. 406.

48. Wildenhus's Case, 120 U. S. 1, 11, 30 L. Ed. 565; Coleman *v.* Tennessee, 97 U. S. 509, 519, 24 L. Ed. 1118; Ex parte Yerger, 8 Wall. 85, 101, 19 L. Ed. 332; In re Wood, 140 U. S. 278, 35 L. Ed. 505; In re Jugiro, 140 U. S. 291, 297, 35 L. Ed. 510; Storti *v.* Massachusetts, 183 U. S. 138, 142, 46 L. Ed. 120; Minnesota *v.* Barber, 136 U. S. 313, 34 L. Ed. 455; Ex parte Fonda, 117 U. S. 516, 29 L. Ed. 994; In re Burrus, 136 U. S. 586, 591, 34 L. Ed. 500; In re Frederich, 149 U. S. 70, 37 L. Ed. 653; Cook *v.* Hart, 146 U. S. 183, 195, 36 L. Ed. 934; Ex parte Royall, No. 1, 117 U. S. 241, 247, 29 L. Ed. 868; Whitten *v.* Tomlinson, 160 U. S. 231, 240, 40 L. Ed. 406; United States *v.* Rauscher, 119 U. S. 407, 431, 30 L. Ed. 425; Ex parte Terry, 128 U. S. 289, 301, 32 L. Ed. 405; Craemer *v.* Washington State, 168 U. S. 124, 127, 42 L. Ed. 407; Tinsley *v.* Anderson, 171 U. S. 101, 104, 106, 43 L. Ed. 91; Rogers *v.* Peck, 199 U. S. 425, 433, 50 L. Ed. 256; Cosgrove *v.* Winney, 174 U. S. 64, 43 L. Ed. 897; Boske *v.* Comingore, 177 U. S. 459, 467, 44 L. Ed. 846.

Federal jurisdiction upon writ of habeas corpus extends to the inquiry into the cause of appellant's commitment, and to the discharge of him, if he be held in custody in violation of the constitution. Ex parte Royall, No. 1, 117 U. S. 241, 250, 29 L. Ed. 868. See post, "In General," V, G, 5, a.

49. **Former acts not repealed by.**—Ex parte Yerger, 8 Wall. 85, 104, 19 L. Ed. 332.

50. **Object and purpose.**—In re Frederich, 149 U. S. 70, 37 L. Ed. 653; In re Burrus, 136 U. S. 586, 591, 34 L. Ed. 500.

51. **Extent of jurisdiction.**—In re Burrus, 136 U. S. 586, 592, 34 L. Ed. 500; Ex parte McCardle, 6 Wall. 318, 18 L. Ed. 810.

But while the power to issue writs of habeas corpus nominally extends to every case where a party "is in custody in violation of the constitution or of a law or treaty of the United States," it is not every such case where the interference of the federal court is expedient, particularly where the state court is executing its own criminal laws, and is asserting a jurisdiction which does not reside elsewhere, to try an accused person for a violation of such laws. Davis *v.* Burke, 179 U. S. 399, 402, 45 L. Ed. 249.

52. **Custody of state—Under law in violation of United States constitution.**—Pettibone *v.* Nichols, 203 U. S. 192, 201, 51 L. Ed. 148; Whitten *v.* Tomlinson, 160 U.

(bb) *Under Law in Violation of State Constitution.*—Whether certain state statutes have or have not binding force, it is for the state to determine, and that determination in itself involves no infraction of the constitution of the United States and raises no federal question, giving the courts of the United States jurisdiction.[53]

(5) *Where Prisoner Is Citizen of Foreign State.*—The act of August 29, 1842, extends the federal jurisdiction to cases where the prisoner "being a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations."[54]

(6) *To Bring Prisoner into Court to Testify.*—The original judiciary act empowered the federal courts to issue the writ of habeas corpus to bring a prisoner into court to testify.[55] And under that act this was the only instance in which

S. 231, 240, 40 L. Ed. 406; Ex parte Royall, No. 1, 117 U. S. 241, 251, 29 L. Ed. 868; Taylor *v.* Carryl, 20 How. 583, 595, 15 L. Ed. 1028; Covell *v.* Heyman, 111 U. S. 176, 182, 28 L. Ed. 390; New York *v.* Eno, 155 U. S. 89, 92, 39 L. Ed. 80; In re Loney, 134 U. S. 372, 376, 33 L. Ed. 949; Coleman *v.* Tennessee, 97 U. S. 509, 534, 24 L. Ed. 1118, dissenting opinion of Clifford, J.

In Wildenhus's Case, 120 U. S. 1, 30 L. Ed. 565, the question was decided on habeas corpus whether an arrest, under authority of a state, of one of the crew of a foreign merchant vessel, charged with the commission of a crime on board of her while in a port within the state, was contrary to the provisions of a treaty between the United States and the country to which the vessel belonged. Whitten *v.* Tomlinson, 160 U. S. 231, 242, 40 L. Ed. 406.

The federal jurisdiction extends to the release of a prisoner held by a state under a void ordinance. Yick Wo *v.* Hopkins, 118 U. S. 356, 365, 30 L. Ed. 220.

53. Same—Under law in violation of state constitution.—In re Duncan, 139 U. S. 449, 454, 35 L. Ed. 219; Andrews *v.* Swartz, 156 U. S. 272, 275, 39 L. Ed. 422; Carfer *v.* Caldwell, 200 U. S. 293, 297, 50 L. Ed. 488; Matter of Moran, 203 U. S. 96, 104, 51 L. Ed. 105; Gut *v.* State, 9 Wall. 35, 19 L. Ed. 573; Storti *v.* Massachusetts, 183 U. S. 138, 142, 46 L. Ed. 120; Kohl *v.* Lehlback, 160 U. S. 293, 302, 40 L. Ed. 432; In re Kemmler, 136 U. S. 436, 449, 34 L. Ed. 519.

54. Where prisoner is citizen of foreign state.—New York *v.* Eno, 155 U. S. 89, 94, 39 L. Ed. 80; Ex parte Royall, No. 1, 117 U. S. 241, 252, 29 L. Ed. 868; Whitten *v.* Tomlinson, 160 U. S. 231, 241, 40 L. Ed. 406; Ex parte Parks, 93 U. S. 18, 22, 23 L. Ed. 787; Mahon *v.* Justice, 127 U. S. 700, 718, 32 L. Ed. 283; Carfer *v.* Caldwell, 200 U. S. 293, 296, 50 L. Ed. 488; In re Burrus, 136 U. S. 586, 591, 34 L. Ed. 500; Andrews *v.* Swartz, 156 U. S. 272, 275, 39 L. Ed. 422; Storti *v.* Massachusetts, 183 U. S. 138, 142, 46 L. Ed. 120. See post, "Aliens," V, L, 1; "In Particular Instances," IV, F, 3, b, (1), (c), bb.

The next extension of the circumstances on which a writ of habeas corpus might issue by the federal judges arose out of the celebrated McLeod case, in which McLeod, charged with murder, in a state court of New York, had pleaded that he was a British subject, and that what he had done was under and by the authority of his government, and should be a matter of international adjustment, and that he was not subject to be tried by a court of New York under the laws of that state. The federal government acknowledged the force of this reasoning, and undertook to obtain from the government of the state of New York the release of the prisoner, but failed. He was, however, tried and acquitted, and afterwards released by the state of New York. This led to an extension of the powers of the federal judges under the writ of habeas corpus, by the act of August 29, 1842, entitled: "An act to provide further remedial justice in the courts of the United States." It conferred upon them the power to issue a writ of habeas corpus in all cases where the prisoner claimed that the act for which he was held in custody was done under the sanction of any foreign power, and where the validity and effect of this plea depended upon the law of nations. In re Neagle, 135 U. S. 1, 71, 34 L. Ed. 55; Mahon *v.* Justice, 127 U. S. 700, 718, 32 L. Ed. 283; Ex parte Yerger, 8 Wall. 85, 101, 19 L. Ed. 332.

55. To bring prisoner into court to testify.—Ex parte Dorr, 3 How. 103, 11 L. Ed. 514; In re Burrus, 136 U. S. 586, 593, 34 L. Ed. 500; Whitten *v.* Tomlinson, 160 U. S. 231, 239, 40 L. Ed. 406.

"And it is immaterial whether the imprisonment be under civil or criminal process." Ex parte Dorr, 3 How. 103, 11 L. Ed. 514. See ante, "The Different Writs of Habeas Corpus," III.

From custody of state officer.—When necessary, though a person is in the custody of a state officer, the federal courts

such courts could issue the writ to bring up a prisoner under commitment of a state magistrate.[56]

c. *Where Prisoner Is in State Custody*—(1) *Under Original Judiciary Act.*—As limited by the original judiciary act of 1789, the federal jurisdiction did not extend to cases of imprisonment after conviction, under sentence of a state court of competent jurisdiction;[57] but the law has since been changed by the acts of 1833, 1842 and 1867.[58]

(2) *Under Subsequent Acts*—(a) *Where State Has Jurisdiction.*—If a state court has jurisdiction to try the case, and jurisdiction over the person of the accused, a federal court should deny the application for a writ of habeas corpus,[59] although the proceedings in the state court may be erroneous.[60]

(b) *Where State Has No Jurisdiction.*—Where the proceeding in the state court is void for want of jurisdiction, the federal jurisdiction may be invoked by habeas corpus.[61] There must be an entire want of jurisdiction in the state courts.[62]

d. *Under Chinese Exclusion Acts.*—There is nothing in the Chinese Restriction Acts of 1882 and 1884 which in any manner affects the jurisdiction of the courts of the United States to issue writs of habeas corpus.[63] A Chinaman held

have power by use of the writ, to bring him into a court of the United States to testify as a witness. New York *v.* Eno, 155 U. S. 89, 94, 39 L. Ed. 80; Ex parte Royall, No. 1, 117 U. S. 241, 251, 252, 29 L. Ed. 868. See post, "In Particular Instances," IV, F, 3, b, (1), (c), bb.

56. Whitten *v.* Tomlinson, 160 U. S. 231, 239, 40 L. Ed. 406.

57. Under act of 1789.—Ex parte Yerger, 8 Wall. 85, 101, 19 L. Ed. 332.

58. Extension of jurisdiction.—See post, "Under Subsequent Acts," IV, C, 3, c, (2).

59. Act of 1867—Where state has jurisdiction.—Valentina *v.* Mercer, 201 U. S. 131, 138, 50 L. Ed. 693; In re Jugiro, 140 U. S. 291, 297, 35 L. Ed. 510; United State *v.* Lewis, 200 U. S. 1, 8, 50 L. Ed. 343.

The state court, having jurisdiction of the offense and of the accused, and having proceeded under a statute not repugnant to the constitution of the United States, the circuit courts of the United States have no authority to interfere, by means of a writ of habeas corpus, with the execution of its sentence. Andrews *v.* Swartz, 156 U. S. 272, 39 L. Ed. 422; New York *v.* Eno, 155 U. S. 89, 98, 39 L. Ed. 80; Bergemann *v.* Backer, 157 U. S. 655, 659, 39 L. Ed. 845.

60. Ex parte Royall, No. 1, 117 U. S. 241, 253, 29 L. Ed. 868; Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872.

"When a state court has entered upon the trial of a criminal case, under a statute not repugnant to the constitution of the United States, and has jurisdiction of the offense and of the accused, no mere error in the conduct of the trial should be made the basis of jurisdiction in a court of the United States to review the proceedings upon writ of habeas corpus." Andrews *v.* Swartz, 156 U. S. 272, 276, 39 L. Ed. 422; Bergemann *v.* Backer, 157 U. S. 655, 39 L. Ed. 845; Harkrader *v.* Wadley, 172 U. S. 148, 163, 43 L. Ed. 399.

To determine former jeopardy.—Ex parte Bigelow, 113 U. S. 328, 331, 28 L. Ed. 1005.

Erroneous exclusion of persons of African race from jury.—In re Wood, 140 U. S. 278, 287, 35 L. Ed. 505.

Of election offenses—Presidential election.—The courts of a state have jurisdiction of an indictment for illegal voting for electors of president and vice president of the United States; and a person sentenced by a state court to imprisonment for such offense cannot be discharged by writ of habeas corpus, although the indictment and sentence include illegal voting for a representative in congress. In re Green, 134 U. S. 377, 33 L. Ed. 951, citing Ex part Crouch, 112 U. S. 178, 28 L. Ed. 690; In re Coy, 127 U. S. 731, 756, 759, 32 L. Ed. 274.

61. Where state has no jurisdiction.—Ex parte Royall, No. 1, 117 U. S. 241, 253, 29 L. Ed. 868; Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872; Valentina *v.* Mercer, 201 U. S. 131, 140, 50 L. Ed. 693; In re Loney, 134 U. S. 372, 33 L. Ed. 949; Whitten *v.* Tomlinson, 160 U. S. 231, 241, 40 L. Ed. 406.

Election offenses—Congressional elections.—A state has no jurisdiction of offenses committed at an election of a member of the house of representatives of the United States; and, if an officer of such state arrests a person, the federal courts have jurisdiction by writ of habeas corpus for his discharge. In re Loney, 134 U. S. 372, 33 L. Ed. 949.

62. In re Jugiro, 140 U. S. 291, 296, 35 L. Ed. 510.

63. The fact that the collector allowed a Chinaman to land, and that a treaty provides for diplomatic action in cases of hardship, does not affect jurisdiction. United States *v.* Jung Ah Lung, 124 U. S. 621, 628, 31 L. Ed. 591.

on board a vessel by the customs authorities is in custody by color of authority of the United States.[64]

e. *In Extradition Cases.*—The federal and state courts have concurrent jurisdiction to inquire into the legality of detention under a governor's warrant in interstate extradition cases.[65]

f. *In Other Cases.*—A court of the United States has no jurisdiction to issue the writ to release a person from imprisonment merely because the imprisonment is wrongful.[66] A district court has no jurisdiction to restore an infant to the custody of its father from the unlawful detention of its grandfather, by habeas corpus.[67]

4. Of the Different United States Courts—a. *Supreme Court*—(1) *In General.*—The federal supreme court cannot issue any writ of habeas corpus, except when it is necessary for the exercise of the jurisdiction, original or appellate, given to it by the constitution or laws of the United States.[68] The power to award writs of habeas corpus is conferred expressly upon the supreme court by the fourteenth section of the judiciary act, and has been repeatedly exercised. No doubt exists respecting the power.[69]

64. United States *v.* Jung Ah Lung, 124 U. S. 621, 626, 31 L. Ed. 591. See the title CHINESE EXCLUSION ACTS, vol. 3, p. 780; ALIENS, vol. 1, p. 255. And see post, "Under Chinese Exclusion Acts," V, L, 1, b, (2).

65. In extradition cases.—Ex parte Reggel, 114 U. S. 642, 29 L. Ed. 250. See the title EXTRADITION, ante, p. 215.

66. In other cases.—Carfer *v.* Caldwell, 200 U. S. 293, 297, 50 L. Ed. 488.

67. To restore infant to parents.—In re Burrus, 136 U. S. 586, 596, 34 L. Ed. 500; New York Foundling Hospital *v.* Gatti, 203 U. S. 429, 438, 51 L. Ed. 254; Barry *v.* Mercein, 5 How. 103, 12 L. Ed. 70; Kurtz *v.* Moffitt, 115 U. S. 487, 495, 29 L. Ed. 458; In re Kaine, 14 How. 103, 14 L. Ed. 345; Duncan *v.* Darst, 1 How. 301, 11 L. Ed. 139; Ex parte Parks, 93 U. S. 18, 22, 23 L. Ed. 787.

Nor does the original jurisdiction of the supreme court extend to such a case. Ex parte Barry, 2 How. 65, 11 L. Ed. 181.

"Although the statutes of the United States * * * enlarged the jurisdiction of the circuit courts by declaring that they shall have original cognizance, concurrent with the courts of the several states, of all civil suits arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, the difficulty is not removed by this provision, for, as we have already said, the custody and guardianship by the parent of his child does not arise under the constitution, laws or treaties of the United States and is not dependent on them." In re Burrus, 136 U. S. 586, 595, 34 L. Ed. 500.

"Whether the diverse citizenship of parties contesting this right to the custody of the child, could, in the courts of the United States, give jurisdiction to those courts to determine that question, has never been decided by this court that we are aware of. Nor is it necessary to decide it in this case." In re Burrus, 136 U. S. 586, 596, 34 L. Ed. 500. See post, "In Particular Cases," IV, C, 4, a, (2), (c).

68. Supreme court.—Ex parte Barry, 2 How. 65, 11 L. Ed. 181. See the title COURTS, vol. 4, p. 1006, et seq.

69. Under fourteenth section of judiciary act.—Ex parte Watkins, 3 Pet. 193, 201, 7 L. Ed. 650; Ex parte Yerger, 8 Wall. 85, 96, 19 L. Ed. 332; Ex parte Terry, 128 U. S. 289, 301, 32 L. Ed. 405; Ex parte Lange, 18 Wall. 163, 182, 21 L. Ed. 872; Holmes *v.* Jennison, 14 Pet. 540, 586, 10 L. Ed. 579.

"It would have been, indeed, a remarkable anomaly if this court, ordained by the constitution for the exercise, in the United States, of the most important powers in civil cases of all the highest courts of England, had been denied, under a constitution which absolutely prohibits the suspension of the writ, except under extraordinary exigencies, that power in cases of alleged unlawful restraint, which the Habeas Corpus Act of Charles II expressly declares those courts to possess." Ex parte Yerger, 8 Wall. 85, 96, 19 L. Ed. 332.

The federal supreme court has authority to issue a habeas corpus, where a person is imprisoned under the warrant or order of any other court of the United States. Ex parte Kearney, 7 Wheat. 38, 5 L. Ed. 391; Ex parte Bollman, 4 Cranch 75, 2 L. Ed. 554.

Co-extensive with that of other federal courts.—"The power to issue this writ being concurrent in this court, the circuit and district courts, and every judge of either, the action upon the writ, when the party is before a court or judge, is directed to the same object, 'for the purpose of inquiring into the cause of commitment,' in order to ascertain whether he shall be remanded to prison, discharged on bail, or without bail; in doing which, this court has no more power than any district judge; the nature of the power and the rules by which it must be ex-

(2) *Original Jurisdiction*—(a) *In General.*—The original jurisdiction of the federal supreme court is limited by the constitution to cases affecting ambassadors, other public ministers and consuls,[70] and where a state is a party;[71] and even in these cases, only when the inferior court has acted without jurisdiction, or has exceeded its powers to the prejudice of the party seeking relief.[72]

(b) *Power of Congress to Alter.*—This original jurisdiction cannot be either extended or curtailed by any act of congress.[73]

(c) *In Particular Cases.*—There is no original jurisdiction in the supreme court to issue a writ of habeas corpus ad subjiciendum to review or reverse the proceedings of a military commission.[74] Nor does it extend to the case of a petition by a private individual, for a habeas corpus to bring up the body of his infant daughter, alleged to be unlawfully detained from him.[75]

(3) *Appellate Jurisdiction.*—The supreme court may issue the writ of habeas corpus in the exercise of its appellate jurisdiction where it has such jurisdiction, which is in all cases not prohibited by law, except those in which it has original jurisdiction only.[76]

(4) *On Reference from Justices in Chambers or Vacation.*—If the justice who issues the writ finds the questions involved to be of great moment and difficulty, and can postpone the case to the supreme court for consideration of the whole court without injury to the petitioner, there is no good reason why he should not do so. It has merely the effect of making the application for a discharge one addressed to the court, instead of one addressed to a single justice.[77]

ercised are the same." Holmes *v.* Jennison, 14 Pet. 540, 586i, 10 L. Ed. 579; Ex parte Bollman, 4 Cranch 75, 96, 102, 2 L. Ed. 554.

70. **Original jurisdiction.**—Ex parte Dorr, 3 How. 103, 104, 11 L. Ed. 514; Osborn *v.* United States Bank, 9 Wheat. 738, 820, 6 L. Ed. 204; Matter of Moran, 203 U. S. 96, 101, 51 L. Ed. 105; Ex parte Vallandigham, 1 Wall. 243, 253, 17 L. Ed. 589; Ex parte Barry, 2 How. 65, 11 L. Ed. 181; Ex parte Siebold, 100 U. S. 371, 374, 25 L. Ed. 717; Ex parte Yerger, 8 Wall. 85, 19 L. Ed. 332; Ex parte Hung Hang, 108 U. S. 552, 27 L. Ed. 811; Ex parte Parks, 93 U. S. 18, 22, 23 L. Ed. 787; Ex parte Clarke, 100 U. S. 399, 25 L. Ed. 715; In re Kaine, 14 How. 103, 119, 120, 14 L. Ed. 345; United States *v.* Hamilton, 3 Dall. 17, 1 L. Ed. 490; Ex parte Burford, 3 Cranch 448, 2 L. Ed. 495; Ex parte Bollman, 4 Cranch 75, 2 L. Ed. 554; Ex parte Kearney, 7 Wheat. 38, 5 L. Ed. 391; Ex parte Watkins, 3 Pet. 193, 7 L. Ed. 650; Ex parte Watkins, 7 Pet. 568, 8 L. Ed. 786; In re Metzger, 5 How. 176, 189, 12 L. Ed. 104, Nelson, J.

71. Ex parte Dorr, 3 How. 103, 104, 11 L. Ed. 514; Ex parte Barry, 2 How. 65, 11 L. Ed. 181. See the title COURTS, vol. 4, p. 1006.

If granting the writ would be an exercise of original jurisdiction, it would seem that it could not be granted, unless the fact that one of the petitioners for the writ in a state makes the cases to differ. This is established by the rulings in Marbury *v.* Madison, 1 Cranch 137, 2 L. Ed. 60. "And it is not readily perceived how the fact that a state applies for the writ to be directed to one of her own citizens can make a case for our original jurisdiction." Ex parte Virginia, 100 U. S. 339, 341, 25 L. Ed. 676.

72. In re Lane, 135 U. S. 443, 446, 34 L. Ed. 219.

73. **Power of congress to alter.**—In re Metzger, 5 How. 176, 191, 12 L. Ed. 104.

74. **Over proceedings of military commission.**—Ex parte Vallandigham, 1 Wall. 243, 253, 17 L. Ed. 589. But see Ex parte Mason, 105 U. S. 696, 697, 26 L. Ed. 1213.

75. **To delivery of child to parent.**—In re Kaine, 14 How. 103, 14 L. Ed. 345; Ex parte Parks, 93 U. S. 18, 22, 23 L. Ed. 787; Ex parte Barry, 2 How. 65, 11 L. Ed. 181. See ante, "In Other Cases," IV, C, 3, f.

76. Ex parte Siebold, 100 U. S. 371, 374, 25 L. Ed. 717. See the title APPEAL AND ERROR, vol. 1, p. 422, for treatment in full.

77. **On reference from justice in chambers or vacation.**—Ex parte Clarke, 100 U. S. 399, 403, 25 L. Ed. 715.

"Of course, under our system, no justice will needlessly refer a case to the court when he can decide it satisfactorily to himself, and will not do so in any case in which injury will be thereby incurred by the petitioner. No injury can be complained of in this case, since the petitioner was allowed to go at large on reasonable bail." Ex parte Clarke, 100 U. S. 399, 403, 25 L. Ed. 715.

An officer of election, at an election for a representative to congress in the city of Cincinnati, was convicted of a misdemeanor in the circuit court of the United States, under § 5515 of the Revised Statutes, for a violation of the law of Ohio, in not conveying the ballot box, after it had been sealed up and delivered to him for that purpose, to the county

b. *Circuit Court of Appeals.*—In the court of appeals act there is no mention of habeas corpus, no language which can be tortured into a grant of power to issue the writ, except in cases where it may be necessary for the exercise of a jurisdiction already existing; accordingly these courts are not authorized to issue original and independent writs of habeas corpus; but cases may arise in which the writ of habeas corpus is necessary to the complete exercise of their appellate jurisdiction.[78] There is no constraining presumption that congress intended to give these courts jurisdiction of habeas corpus.[79]

c. *Circuit and District Courts.*—The circuit and district courts of the United States are authorized by the fourteenth section of the judiciary act to issue writs of habeas corpus, except in cases where the privilege of the writ is suspended, to hear and determine the question, whether the party is entitled to be discharged.[80]

5. Judges and Justices of United States Courts.—The several justices and judges of supreme, circuit and district courts of the United States, within their respective jurisdictions shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty.[81] But it has been held that a single justice of the supreme court cannot issue the writ when the issuance involves an exercise of appellate jurisdiction.[82] A justice of the federal supreme court can exercise the power of issuing the writ of habeas

clerk, and for allowing it to be broken open. Held, in such a case, a habeas corpus for discharge from imprisonment under the conviction was rightfully issued by a justice of the federal supreme court, returnable before himself; and he had the right, if it could be done without injury to the prisoner, to refer the matter to the supreme court for its determination, it being a case which involved the exercise of appellate jurisdiction. Had the case involved original jurisdiction only, the court could not have taken jurisdiction of it. Ex parte Clarke, 100 U. S. 399, 25 L. Ed. 715.

A judge of the court in vacation, at his chambers, has no power to grant a writ of habeas corpus out of the federal supreme court, or to make such a writ returnable before himself, and then adjourn it into term. In re Kaine, 14 How. 103, 118, 14 L. Ed. 345, Mr. Justice Curtis. But see Ex parte Clarke, 100 U. S. 399, 402, 25 L. Ed. 715, distinguishing this case. See post, "Of the Different United States Courts," IV, C, 4.

78. **Circuit court of appeals.**—Whitney *v.* Dick, 202 U. S. 132, 136, 50 L. Ed. 963; Lau Ow Bew *v.* United States, 144 U. S. 47, 58, 36 L. Ed. 340. See the titles APPEAL AND ERROR, vol. 1, p. 810; COURTS, vol. 4, p. 1006.

These courts have power to issue writs not specifically provided for by statute, which may be necessary for the exercise of its jurisdiction and agreeably to the usages and principles of law. In re McKenzie, 180 U. S. 536, 549, 45 L. Ed. 657. See ante, "Incidental to Other Jurisdiction," IV, C, 1, b.

These courts have issued the writ in at least two cases.—Matter of Moran, 203 U. S. 96, 103, 51 L. Ed. 105; Bradford *v.* Southern R. Co., 195 U. S. 243, 250, 49 L. Ed. 178.

79. Whitney *v.* Dick, 202 U. S. 132, 135, 50 L. Ed. 963.

But if the language of the court of appeals act was fairly susceptible of two constructions, one granting and the other omitting to grant power to issue a writ of habeas corpus, the great importance of the writ might justify a construction upholding the grant. This is indicated by the ruling in Ex parte Bollman, 4 Cranch 75, 2 L. Ed. 554. Whitney *v.* Dick, 202 U. S. 132, 136, 50 L. Ed. 963.

80. **Circuit and district courts.**—Ex parte Milligan, 4 Wall. 2, 18 L. Ed. 281; In re Grimley, 137 U. S. 147, 150, 34 L. Ed. 636; Ex parte Yerger, 8 Wall. 85, 95, 101, 19 L. Ed. 332; Baker *v.* Grice, 169 U. S. 284, 42 L. Ed. 748.

81. **Judges and Justices of United States courts.**—Rev. Stat., § 752; Ex parte Lange, 18 Wall. 163, 182, 21 L. Ed. 872; Ex parte Watkins, 3 Pet. 193, 201, 7 L. Ed. 650; In re Burrus, 136 U. S. 586, 590, 34 L. Ed. 500.

The writ may be issued by a justice of the supreme court during vacation. Ex parte Curtis, 106 U. S. 371, 27 L. Ed. 232.

82. "It is not to be doubted, that whatever jurisdiction belongs to the supreme court, under any writ of habeas corpus ad subjiciendum, is appellate. It is equally clear that no part of the appellate jurisdiction of this court can be exercised by a single judge, at his chambers. It is also well settled, that the question, whether such a writ of habeas corpus shall issue from this court, is one upon which the court ought to pass, before the writ issues; the allowance of the writ being an exercise of its limited appellate jurisdiction, which only the court itself has the power to exert." Ex parte Milburn, 9 Pet. 704, 9 L. Ed. 280, Curtis, J.;

corpus in any part of the United States where he happens to be.[83]

D. Of State Courts—1. In General.—The states have the right, by their own courts, or by the judges thereof, to inquire into the grounds upon which any person, within their respective territorial limits, is restrained of his liberty, and to discharge him, if it be ascertained that such restraint is illegal; and this, notwithstanding such illegality may arise from a violation of the constitution or the laws of the United States,[84] provided it does not appear, when the application is made, that the person imprisoned is in custody under the authority of the United States.[85]

2. In Extradition Cases.—So far as the constitution and laws of the United States are concerned, it is competent for the courts of a state or any judges thereof having power, under state laws, to issue writs of habeas corpus, to determine, upon writ of habeas corpus, whether the warrant of arrest and the delivery of the fugitive to the agent of another state were in conformity with the statutes of the United States; if not, to remand him to the custody of the agent.[86]

E. Of Territorial Courts.—The territorial legislatures may confer upon the supreme courts of the territories original and appellate jurisdiction to issue writs of habeas corpus when necessary. Such a law is constitutional.[87]

F. Concurrent and Conflicting Jurisdiction—1. In General.—It is a settled doctrine, that a court of competent jurisdiction having possession of a person cannot be deprived of the right to deal with such person by habeas corpus, until its jurisdiction is exhausted, and that no court of another and independent sovereignty has the right to interfere with such custody.[88] On habeas corpus, the state courts have concurrent jurisdiction with the federal courts of all cases of imprisonment within their territorial jurisdiction, except in the case where the petitioner is in custody under the authority, or claim or color of authority, of the United States.[89]

In re Kaine, 14 How. 103, 118, 14 L. Ed. 345.

83. Ex parte Clarke, 100 U. S. 399, 403, 25 L. Ed. 715; Holmes *v.* Jennison, 14 Pet. 540, 586i, 10 L. Ed. 579; Ex parte Watkins, 3 Pet. 193, 201, 7 L. Ed. 650; Coleman *v.* Tennessee, 97 U. S. 509, 519, 24 L. Ed. 1118; Ex parte Yerger, 8 Wall. 85, 101, 19 L. Ed. 332. See ante, "On Reference from Justices in Chambers or Vacation," IV, C, 4, a, (4).

84. Of state courts.—Robb *v.* Connolly, 111 U. S. 624, 639, 28 L. Ed. 542.

85. Prisoner in custody under federal authority.—Ableman *v.* Booth, 21 How. 506, 523, 16 L. Ed. 169; Tarble's Case, 13 Wall. 397, 409, 20 L. Ed. 597.

The judicial authorities of the state cannot claim and exercise the right, upon habeas corpus, to release persons held in custody in pursuance of the judgment of a court of the United States, Ableman *v.* Booth, 21 How. 506, 16 L. Ed. 169, or by order of a circuit court commissioner, Tarble's Case, 13 Wall. 397, 20 L. Ed. 597, or by officers of the United States in execution of their laws. Ableman *v.* Booth, 21 How. 506, 16 L. Ed. 169; Robb *v.* Connolly, 111 U. S. 624, 635, 28 L. Ed. 542. See post, "Where Writ Issues from State Court," IV, F, 2.

86. In extradition cases.—Robb *v.* Connolly, 111 U. S. 624, 638, 28 L. Ed. 542.

The state and federal courts have concurrent jurisdiction in such cases. Ex parte Reggel, 114 U. S. 642, 29 L. Ed. 250. See the title EXTRADITION, ante, p. 215.

87. Of territorial courts.—Clough *v.* Curtis, 134 U. S. 361, 33 L. Ed. 945. See Gonzales *v.* Cunningham, 164 U. S. 612, 41 L. Ed. 572; New York Foundling Hospital *v.* Gatti, 203 U. S. 429, 437, 51 L. Ed. 254. See the title COURTS, vol. 4, p. 1159.

88. Concurrent and conflicting jurisdiction.—In re Johnson, 167 U. S. 120, 125, 42 L. Ed. 103; Ableman *v.* Booth, 21 How. 506, 16 L. Ed. 169; Tarble's Case, 13 Wall. 397, 20 L. Ed. 597; Robb *v.* Connolly, 111 U. S. 624, 28 L. Ed. 542; Andrews *v.* Swartz, 156 U. S. 272, 276, 39 L. Ed. 422; Ex parte Siebold, 100 U. S. 371, 375, 25 L. Ed. 717; In re Wood, 140 U. S. 278, 290, 35 L. Ed. 505; Pepke *v.* Cronan, 155 U. S. 100, 39 L. Ed. 84. See post, "Admission to Bail by Federal Court," IV, F, 3, a, (5).

89. Concurrent jurisdiction of state and federal courts.—Robb *v.* Connolly, 111 U. S. 624, 633, 28 L. Ed. 542; Ableman *v.* Booth, 21 How. 506, 16 L. Ed. 169; Tarble's Case, 13 Wall. 397, 402, 20 L. Ed. 597.

The sovereignty of the United States and of a state are distinct and independent of each other within their respective spheres of action, although both exist and exercise their powers within the same territorial limits. And a habeas corpus,

2. Where Writ Issues from State Court—a. *In General.*—No state can authorize one of its judges or courts to exercise judicial power, by habeas corpus, within the jurisdiction of another and independent government.[90]

b. *Prisoner Confined within Territory of State*—(1) *In General.*—The state court may issue the writ in any case of imprisonment within the territorial limits of such state to inquire for what cause and by what authority it is exercised,[91] directed to the person exercising such authority, although such person is a federal officer and acting under federal authority.[92] When the writ is served upon him it becomes the duty of the marshal, or other person having the custody of the prisoner, to make known to the judge or court, by a proper return, the authority by which he holds him, in custody.[93] While such federal officer has imposed upon him this duty to make known his authority to the state court, yet he is at the same time to obey and execute the process of the federal courts.[94]

(2) *Under Federal Authority*—(a) *In General.*—But, if it appears either upon the application for the writ or upon the return thereto that the custody is by virtue "of the authority of the United States," the state court can proceed no further.[95]

issued by a state judge or court, has no authority within the limits of the sovereignty assigned by the constitution to the United States. Ableman *v.* Booth, 21 How. 506, 16 L. Ed. 169.

When the prisoner is within the dominion and jurisdiction of the United States government, the writ of habeas corpus, issued under state authority, cannot pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United States. If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress. Ableman *v.* Booth, 21 How. 506, 523, 16 L. Ed. 169.

That the courts and judges of the several states cannot, under any authority conferred by the states, discharge from custody persons held by authority of the courts of the United States, or of commissioners of such courts, or by officers of the general government acting under its laws, results from the supremacy of the constitution and laws of the United States. Ex parte Royall, No. 1, 117 U. S. 241, 249, 29 L. Ed. 868.

Efficient protection in federal courts.—"This limitation upon the power of state tribunals and state officers furnishes no just ground to apprehend that the liberty of the citizen will thereby be endangered. The United States are as much interested in protecting the citizen from illegal restraint under their authority, as the several states are to protect him from the like restraint under their authority, and are no more likely to tolerate any oppression. * * * Certainly there can be no ground for supposing that their action will be less prompt and efficient in such cases than would be that of state tribunals and state officers." Tarble's Case, 13 Wall. 397, 411, 20 L. Ed. 597. See, also, Ableman *v.* Booth, 21 How. 506, 523, 16 L. Ed. 169.

In extradition cases.—See ante, "In Extradition Cases," IV, C, 3, e.

90. Where writ issues from state court.—Tarble's Case, 13 Wall. 397, 405, 20 L. Ed. 597; Ableman *v.* Booth, 21 How. 506, 516, 16 L. Ed. 169. See ante, "Of State Courts," IV, D.

91. Prisoner confined within territory of state.—Ableman *v.* Booth, 21 How. 506, 514, 523, 16 L. Ed. 169; Robb *v.* Connolly, 111 U. S. 624, 631, 28 L. Ed. 542.

92. Ableman *v.* Booth, 21 How. 506, 523, 16 L. Ed. 169.

If the prisoner is held in custody only under color of authority derived from the constitution and laws of the United States, and is entitled to invoke the judgment of the judicial tribunals, whether of the state or of the United States, by the writ of habeas corpus, upon the lawfulness of his arrest and imprisonment, the jurisdiction of the courts of the states is not excluded, as was adjudged by the federal supreme court in the case of Robb *v.* Connolly, 111 U. S. 624, 28 L. Ed. 542, for, although the party is restrained of his liberty under color of authority derived from the laws of the United States, he is not in the custody of, or under restraint by, an officer of the United States. Roberts *v.* Reilly, 116 U. S. 80, 94, 29 L. Ed. 544.

93. Duty of federal officer upon whom served.—Ableman *v.* Booth, 21 How. 506, 514, 523, 16 L. Ed. 169; Robb *v.* Connolly, 111 U. S. 624, 631, 28 L. Ed. 542.

94. "It is at the same time imperatively his duty to obey the process of the United States, to hold the prisoner in custody under it, and to refuse obedience to the mandate or process of any other government." Ableman *v.* Booth, 21 How. 506, 523, 16 L. Ed. 169; Robb *v.* Connolly, 111 U. S. 624, 632, 28 L. Ed. 542; United States *v.* Reese, 92 U. S. 214, 255, 23 L. Ed. 563.

95. Under federal authority.—"No state judge or court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or to

(b) *What Constitutes Federal Authority.*—By federal authority is not meant undisputed lawful authority of the United States, as distinguished from claim or color of such authority.[96] A person is in custody under federal authority, and beyond the scope of state jurisdiction, when he is in the custody of a United States court,[97] of a commissioner of such court,[98] or of an officer of the United States government acting under its laws.[99]

3. WHERE WRIT ISSUES FROM UNITED STATES COURT—a. *Power to Issue Writ*—(1) *Dependent upon Statute.*—The writ can be issued by a United States

require him to be brought before them." Robb *v.* Connolly, 111 U. S. 624, 632, 28 L. Ed. 542; Ableman *v.* Booth, 21 How. 506, 514, 16 L. Ed. 169.

"If such fact appear upon the application, the writ should be refused. If it do not appear, the judge or court issuing the writ has a right to inquire into the cause of imprisonment, and ascertain by what authority the person is held within the limits of the state; and it is the duty of the marshal, or other officer having the custody of the prisoner, to give, by a proper return, information in this respect. His return should be sufficient, in its detail of facts, to show distinctly that the imprisonment is under the authority, or claim and color of the authority, of the United States, and to exclude the suspicion of imposition or oppression on his part. And the process or orders, under which the prisoner is held, should be produced with the return and submitted to inspection, in order that the court or the judge issuing the writ may see that the prisoner is held by the officer, in good faith, under the authority, or claim and color of the authority, of the United States, and not under the mere pretense of having such authority." Tarble's Case, 13 Wall. 397, 409, 20 L. Ed. 597, approved in Covell *v.* Heyman, 111 U. S. 176, 183, 28 L. Ed. 390.

96. **What constitutes federal authority.**—"Some attempt has been made in adjudications, to which our attention has been called, to limit the decision of this court in Ableman *v.* Booth, and the United States *v.* Booth (21 How. 506, 16 L. Ed. 169), to cases where a prisoner is held in custody under undisputed lawful authority of the United States, as distinguished from his imprisonment under claim and color of such authority. But it is evident that the decision does not admit of any such limitation." Tarble's Case, 13 Wall. 397, 410, 20 L. Ed. 597.

"All that is meant by the language used is, that the state judge or state court should proceed no further when it appears, from the application of the party, or the return made, that the prisoner is held by an officer of the United States under what, in truth, purports to be the authority of the United States; that is, an authority, the validity of which is to be determined by the constitution and laws of the United States. If a party thus held be illegally imprisoned it is for the courts or judicial officers of the United States, and those courts or officers alone, to grant him release." Tarble's Case, 13 Wall. 397, 411, 20 L. Ed. 597.

"Questions of this kind must always depend upon the constitution and laws of the United States, and not of a state." Ableman *v.* Booth, 21 How. 506, 516, 16 L. Ed. 169.

97. **Custody of federal court.**—Ex parte Royall, No. 1, 117 U. S. 241, 249, 29 L. Ed. 868.

98. **Court commissioner.**—Ex parte Royall, No. 1, 117 U. S. 241, 249, 29 L. Ed. 868.

99. **Federal officer.**—No judicial officer of a state has jurisdiction to issue a writ of habeas corpus, or to continue proceedings under the writ when issued, for the discharge of a person held under the authority, or claim and color of the authority, of the United States, by an officer of that government. Tarble's Case, 13 Wall. 397, 402, 20 L. Ed. 597; Ex parte Royall, No. 1, 117 U. S. 241, 249, 29 L. Ed. 868; Ableman *v.* Booth, 21 How. 506, 16 L. Ed. 169; Robb *v.* Connolly, 111 U. S. 624, 634, 28 L. Ed. 542.

In this regard there is no distinction between a federal officer and a federal tribunal. Tarble's Case, 13 Wall. 397, 404, 20 L. Ed. 597.

Military officer.—These principles applied to a case where a habeas corpus was issued by a court commissioner of one of the counties of Wisconsin to a recruiting officer of the United States, to bring before him a person who had enlisted as a soldier in the army of the United States, and whose discharge was sought on the alleged ground that he was a minor under the age of eighteen years at the time of his enlistment, and that he enlisted without the consent of his father. The petition for the writ alleging that the prisoner had enlisted as a soldier and been mustered into the military service of the national government, and was detained by the officer as such soldier, the federal supreme court held that the court commissioner had no jurisdiction to issue the writ for the discharge of the prisoner, as it thus appeared upon the petition that the prisoner was detained under claim and color of the authority of the United States by an officer of that government; and that if he was illegally detained, it was for the courts or judicial officers of the United States and for those courts or officers

court to release prisoner from the custody of a state court, only in cases provided for by statute.[1]

(2) *Scope of Statute.*—Under the original judiciary act, the only case in which the writ could so issue was to bring the prisoner before the United States court to be used as a witness;[2] but, by subsequent legislation, the federal jurisdiction has been extended,[3] so that the writ may issue to discharge a person who is in state custody, in violation of the constitution or a law or a treaty of the United States;[4] for an act done or omitted in pursuance of any law of the United States, or any order, process or decrees of any judge or court thereof;[5] and where the person in custody is the subject of a foreign state, and domiciled therein, and is in custody for an act done or omitted under the order, etc., of a foreign state, the validity and effect whereof depend upon the law of nations.[6]

(3) *Custody under Erroneous Ruling of State Court.*—The federal courts

alone to grant him release. Tarble's Case, 13 Wall. 397, 20 L. Ed. 597.

"In Tarble's Case, 13 Wall. 397, 20 L. Ed. 597, the person whose discharge was sought was held as an enlisted soldier of the army, by an officer of that army acting directly under the constitution and laws of the United States." Robb *v.* Connolly, 111 U. S. 624, 634, 28 L. Ed. 542.

1. Where writ issues from United States court.—"The extent of the right of the federal courts to interfere by writ of habeas corpus with the proceedings of courts and other authorities of a state is carefully defined by statute." Rogers *v.* Peck, 199 U. S. 425, 433, 50 L. Ed. 256.

"The prosecution and punishment of crimes and offenses committed against one of the states of the Union appropriately belong to the courts and authorities of the state, and can be interfered with by the circuit court of the United States so far only as congress, in order to maintain the supremacy of the constitution and laws of the United States, has expressly authorized either a removal of the prosecution into the circuit court of the United States for trial, or a dischage of the prisoner by writ of habeas corpus issued by that court or by a judge thereof." Virginia *v.* Paul, 148 U. S. 107, 114, 37 L. Ed. 386; Tennessee *v.* Davis, 100 U. S. 257, 25 L. Ed. 648; Virginia *v.* Rives, 100 U. S. 313, 25 L. Ed. 667; Davis *v.* South Carolina, 107 U. S. 597, 27 L. Ed. 574; In re Neagle, 135 U. S. 1, 34 L. Ed. 55; Huntington *v.* Attrill, 146 U. S. 657, 672, 673, 36 L. Ed. 1123.

2. Scope of original judiciary act.—In re Burrus, 136 U. S. 586, 34 L. Ed. 500; In re Dorr, 3 How. 103, 11 L. Ed. 514; Whitten *v.* Tomlinson, 160 U. S. 231, 239, 40 L. Ed. 406.

3. Scope of subsequent statutes.—See ante, "In United States," II, C; "Enlargement of," IV, C, 2.

4. Custody in violation of constitution.—"While it might appear unseemly that a prisoner, after conviction in a state court, should be set at liberty by a single judge on habeas corpus, there was no escape from the act of 1867, which invested such judge with power to discharge when the prisoner was restrained of his liberty in violation of a law of the United States." Ex parte Royall, No. 1, 117 U. S. 241, 253, 29 L. Ed. 868.

"Undoubtedly, the courts of the United States have the power, under existing legislation, by writ of habeas corpus to discharge from custody any person held by state authorities under criminal proceedings instituted under state enactments, if such enactments are void for repugnancy to the constitution, laws or treaties of the United States." Fitts *v.* McGhee, 172 U. S. 516, 532, 43 L. Ed. 535; United States *v.* Rauscher, 119 U. S. 407, 431, 30 L. Ed. 425; Hallinger *v.* Davis, 146 U. S. 314, 36 L. Ed. 986; In re Kemmler, 136 U. S. 436, 34 L. Ed. 519; Caldwell *v.* Texas, 137 U. S. 692, 34 L. Ed. 816; In re Converse, 137 U. S. 624, 34 L. Ed. 796; McNulty *v.* California, 149 U. S. 645, 37 L. Ed. 882; Lambert *v.* Barrett, 157 U. S. 697, 699, 39 L. Ed. 865.

The courts of Virginia having no jurisdiction of a complaint for perjury in testifying before a notary of the state upon a contested election of a member of congress on which the prisoner was arrested, and he being in custody, in violation of the constitution and laws of the United States, for an act done in pursuance of those laws by testifying in the case of a contested election of a member of congress, law and justice required that he should be discharged from such custody, and he was rightly so discharged by the circuit court on writ of habeas corpus. Ex parte Royall, No. 1, 117 U. S. 241, 29 L. Ed. 868; In re Loney, 134 U. S. 372, 376, 33 L. Ed. 949; In re Jugiro, 140 U. S. 291, 297, 35 L. Ed. 510; Valentina *v.* Mercer, 201 U. S. 131, 50 L. Ed. 693. See ante, "In Violation of Constitution, Law or Treaty," IV, C, 3, b, (4); post, "Discretion to Issue Writ," IV, F, 3, b.

5. Act done or omitted in pursuance of law.—See ante, "For Act Done or Omitted in Pursuance of Law, etc.," IV, C, 3, b, (3).

6. Subject of foreign state.—See ante, "Where Prisoner Is Citizen of Foreign State," IV, C, 3, b, (5).

have no power to discharge a person in custody of a state court of competent jurisdiction, simply because such court has committed an error.[7]

(4) *Where Prisoner Is Not Guilty.*—It is elementary learning that, if a prisoner is in the custody of a state court of competent jurisdiction, not illegally asserted, he cannot be taken from that jurisdiction and discharged on habeas corpus issued by a court of the United States, simply because he is not guilty of the offense for which he is held.[8]

(5) *Admitted to Bail by Federal Court.*—Where a prisoner in state custody had previously been admitted to bail in a federal court, the federal court has power to take him from state authority by habeas corpus.[9]

b. *Discretion to Issue Writ*—(1) *Before Exhaustion of Remedies in State Court*—(a) *In General.*—Although the different courts of the United States, and the several justices and judges thereof, have authority, under existing statutes, to discharge, upon habeas corpus, one held in custody by state authority in violation of the constitution or of any treaty or law of the United States,[10] they are not imperatively required to do so in every case;[11] but may exercise a discretion whether they will discharge the prisoner in advance of his trial and conviction in the state court, or compel the prisoner to proceed by the usual method of error or appeal, after exhausting such remedies as the state gives to test the constitutionality of his detention.[12] This discretion should be exercised in the light

7. **Error of state court.**—If the state court had jurisdiction of the offense and person, a mere error committed in rendering sentence does not justify federal interference. Andrews *v.* Swartz, 156 U. S. 272, 39 L. Ed. 422; New York *v.* Eno, 155 U. S. 89, 98, 39 L. Ed. 80; Bergemann *v.* Backer, 157 U. S. 655, 659, 39 L. Ed. 845. See post, "As Determined by Validity of Proceedings," V, E: "Mere Errors," IX, D. 8, c.

8. **Where prisoner not guilty.**—Ex parte Crouch, 112 U. S. 178, 180, 28 L. Ed. 690. See post, "As Determined by Defenses to Prosecution," V, O: "Guilt or Innocence," IX, D. 3.

9. **Where prisoner had been bailed by federal court.**—Taylor *v.* Taintor, 16 Wall. 366, 21 L. Ed. 287.

10. **Discretion to issue writ.**—Urquhart *v.* Brown, 205 U. S. 179, 181, 51 L. Ed. 760.

11. **Discharge not imperative.**—United States *v.* Lewis, 200 U. S. 1, 8, 50 L. Ed. 343; New York *v.* Eno, 155 U. S. 89, 39 L. Ed. 80; Riggins *v.* United States, 199 U. S. 547, 549, 50 L. Ed. 303; Ex parte Royall, No. 1, 117 U. S. 241, 251, 29 L. Ed. 868; Minnesota *v.* Brundage, 180 U. S. 499, 501, 45 L. Ed. 639; Ex parte Terry, 128 U. S. 289, 302, 32 L. Ed. 405.

In New York *v.* Eno, 155 U. S. 89, 39 L. Ed. 80, it was held that the statute did not imperatively require the circuit court by that writ to wrest the petitioner from the custody of the state officers in advance of his trial in the state court; and that while the circuit court had the power to do so, and could discharge the accused in advance of his trial, if restrained in violation of the constitution, it was not bound in every case to exercise such power immediately upon application being made for the writ. Riggins *v.* United States, 199 U. S. 547, 549, 50 L. Ed. 303.

Congress did not intend obstruction to state administration of law.—"While the courts of the United States have power, upon habeas corpus, to inquire into the cause of the detention of any one claiming to be restrained of his liberty in violation of the constitution, or laws, or treaties of the United States, it was not intended by congress that they should by writs of habeas corpus obstruct the ordinary administration of the criminal laws of the states, through their own tribunals." In re Wood, 140 U. S. 278, 289, 35 L. Ed. 505; McElvaine *v.* Brush, 142 U. S. 155, 160, 35 L. Ed. 971.

Not issued as of course.—"While the writ of habeas corpus is one of the remedies for the enforcement of the right to personal freedom, it will not issue, as a matter of course, and it should be cautiously used by the federal courts in reference to state prisoners." In re Frederich, 149 U. S. 70, 75, 37 L. Ed. 653.

In the exercise of the authority given the federal courts to discharge a prisoner in state custody in violation of the constitution, they are not bound to discharge every such prisoner. Whitten *v.* Tomlinson, 160 U. S. 231, 240, 40 L. Ed. 406.

It is not now the law and never was, that every person held in unlawful imprisonment has a right to invoke the aid of the courts of the United States for his release by the writ of habeas corpus. In re Burrus, 136 U. S. 586, 591, 34 L. Ed. 500.

Due process does not require issuance.—Andrews *v.* Swartz, 156 U. S. 272, 39 L. Ed. 422. And see the title DUE PROCESS OF LAW, vol. 5, p. 499.

Issuance may be delayed.—The court may in its discretion delay issuance. Ex parte Watkins, 3 Pet. 193, 201, 7 L. Ed. 650.

12. Ex parte Royall, No. 1, 117 U. S.

of the relation existing, under our system of government, between the judicial tribunals of the Union and of the states, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict

241, 251, 254, 29 L. Ed. 868; Urquhart *v.* Brown, 205 U. S. 179, 181, 51 L. Ed. 760; Stevens *v.* Ohio, 179 U. S. 680, 45 L. Ed. 384; Pettibone *v.* Nichols, 203 U. S. 192, 201, 51 L. Ed. 148; Ohio *v.* Thomas, 173 U. S. 276, 285, 43 L. Ed. 699; Ex parte Fonda, 117 U. S. 516, 518, 29 L. Ed. 994; New York *v.* Eno, 155 U. S. 89, 96, 39 L. Ed. 80; In re Wood, 140 U. S. 278, 289, 35 L. Ed. 505; In re Frederich, 149 U. S. 70, 75, 76, 37 L. Ed. 653; Pepke *v.* Cronan, 155 U. S. 100, 101, 39 L. Ed. 84; In re Chapman, 156 U. S. 211, 216, 217, 39 L. Ed. 401; Whitten *v.* Tomlinson, 160 U. S. 231, 242, 40 L. Ed. 406; Baker *v.* Grice, 169 U. S. 284, 290, 42 L. Ed. 748; Tinsley *v.* Anderson, 171 U. S. 101, 104, 105, 43 L. Ed. 91; Markuson *v.* Boucher, 175 U. S. 184, 186, 44 L. Ed. 124; Minnesota *v.* Brundage, 180 U. S. 499, 45 L. Ed. 639; Riggins *v.* United States, 199 U. S. 547, 549, 50 L. Ed. 303; In re Lincoln, 202 U. S. 178, 180, 181, 50 L. Ed. 984; In re Duncan, 139 U. S. 449, 454, 35 L. Ed. 219; McElvaine *v.* Brush, 142 U. S. 155, 160, 35 L. Ed. 971; Cook *v.* Hart, 146 U. S. 183, 194, 36 L. Ed. 934; Iasigi *v.* Van De Carr, 166 U. S. 391, 395, 41 L. Ed. 1045; Fitts *v.* McGhee, 172 U. S. 516, 532, 533, 43 L. Ed. 535; Bergemann *v.* Backer, 157 U. S. 655, 656, 39 L. Ed. 845; Ex parte Terry, 128 U. S. 289, 302, 32 L. Ed. 405; Andrews *v.* Swartz, 156 U. S. 272, 39 L. Ed. 422; Kohl *v.* Lehlback, 160 U. S. 293, 40 L. Ed. 432; In re Eckart, 166 U. S. 481, 41 L. Ed. 1085; Davis *v.* Burke, 179 U. S. 399, 45 L. Ed. 249; Gusman *v.* Marrero, 180 U. S. 81, 45 L. Ed. 436; Storti *v.* Massachusetts, 183 U. S. 138, 46 L. Ed. 120; Caldwell *v.* Texas, 137 U. S. 692, 698, 34 L. Ed. 816; In re Jugiro, 140 U. S. 291, 35 L. Ed. 510; In re Boardman, 169 U. S. 39, 44, 42 L. Ed. 653; Rogers *v.* Peck, 199 U. S. 425, 433, 50 L. Ed. 256; Brown *v.* New Jersey, 175 U. S. 172, 44 L. Ed. 119; Ex parte Reggel, 114 U. S. 642, 29 L. Ed. 250; In re Converse, 137 U. S. 624, 34 L. Ed. 796; Allen *v.* Georgia, 166 U. S. 138, 41 L. Ed. 949; Hodgson *v.* Vermont, 168 U. S. 262, 42 L. Ed. 461; Holmes *v.* Jennison, 14 Pet. 540, 586o, 10 L. Ed. 579.

Rule in Ex parte Royall.—"Where a person is in custody, under process from a state court of original jurisdiction, for an alleged offense against the laws of such state, and it is claimed that he is restrained of his liberty in violation of the constitution of the United States, the circuit court has a discretion, whether it will discharge him, upon habeas corpus, in advance of his trial in the court in which he is indicted; that discretion, however, to be subordinated to any special circumstances requiring immediate action. When the state court shall have finally acted upon the case, the circuit court has still a discretion whether, under all the circumstances then existing, the accused, if convicted, shall be put to his writ of error from the highest court of the state, or whether it will proceed by writ of habeas corpus, summarily to determine whether the petitioner is restrained of his liberty in violation of the constitution of the United States." Ex parte Royall, No. 1, 117 U. S. 241, 251, 253, 29 L. Ed. 868. See restatement in Urquhart *v.* Brown, 205 U. S. 179, 181, 51 L. Ed. 760.

Should ordinarily be put to writ of error.—The ordinary procedure for the correction of errors in criminal cases is by writ of error, and that method should be pursued unless there be special circumstances calling for a departure therefrom. In re Lincoln, 202 U. S. 178, 182, 50 L. Ed. 984; Riggins *v.* United States, 199 U. S. 547, 50 L. Ed. 303; Whitney *v.* Dick, 202 U. S. 132, 140, 50 L. Ed. 963; Reid *v.* Jones, 187 U. S. 153, 154, 47 L. Ed. 116; In re Duncan, 139 U. S. 449, 35 L. Ed. 219.

Interference with state courts not encouraged.—"Unless this case be of such an exceptional nature, we ought not to encourage the interference of the federal court below with the regular course of justice in the state court." Baker *v.* Grice, 169 U. S. 284, 291, 42 L. Ed. 748; Cook *v.* Hart, 146 U. S. 183, 195, 36 L. Ed. 934; Storti *v.* Massachusetts, 183 U. S. 138, 141, 46 L. Ed. 120.

"It is recognized, however, that the power to arrest the due and orderly proceedings of the state courts, or to discharge a prisoner after conviction, before an application has been made to the supreme court of the state for relief, is one which should be sparingly exercised, and should be confined to cases where the facts imperatively demand it." Davis *v.* Burke, 179 U. S. 399, 402, 45 L. Ed. 249.

Only when fundamental rights violated.—"The reluctance with which this court will sanction federal interference with a state in the administration of its domestic law for the prosecution of crime has been frequently stated in the deliverances of the court upon the subject. It is only where fundamental rights, specially secured by the federal constitution, are invaded, that such interference is warranted." Rogers *v.* Peck, 199 U. S. 425, 434, 50 L. Ed. 256. See, also, Boske *v.* Comingore, 177 U. S. 459, 44 L. Ed. 846.

Original application to supreme court.—The same rule applies where in addition to the petitions presented to the circuit court of the United States, an original application is made to the federal supreme court for a writ of habeas corpus based upon the same facts as those set forth in the other petitions. New York *v.* Eno.

between courts equally bound to guard and protect rights secured by the constitution.[13]

(b) *When Writ Will Be Denied*—aa. *Rule Stated.*—The general rule, in the absence of circumstances requiring immediate action,[14] is, that the courts and judges or justices of the United States will not interfere by habeas corpus with the custody by state authorities of one claimed to be held in violation of the constitution or laws of the United States until after final action by the state courts in the case in which such custody exists,[15] but that they will deny such applications without prejudice to a renewal of the same after the accused had availed himself of such remedies as the laws of the state afforded for a review of the judgment in the state court of which he complains.[16]

bb. *Basis of Rule.*—This rule grows out of the relations existing under our system of government, between the judicial trubunals of the United States and of the several states,[17] under which it is incumbent upon the state courts, equally

155 U. S. 89, 95, 39 L. Ed. 80; Ex parte Royall, No. 1, 117 U. S. 241, 254, 29 L. Ed. 868.

And federal courts may exercise discretion.—Royall, who was held under state process for trial on an indictment charging an offense against the laws of the state, filed his petition in habeas corpus in the circuit court of the United States praying release from that custody. The circuit court refused to order his discharge, and from its ruling he appealed, and at the same time filed an original petition in this court. The question was fully considered and it was held that while the federal courts, circuit and supreme, had jurisdiction in the premises, there was a discretion whether the writ should be issued. Ex parte Royall, No. 1, 117 U. S. 241, 254, 29 L. Ed. 868; In re Lincoln, 202 U. S. 178, 180, 50 L. Ed. 984.

13. Controlled by dual system of government.—Ex parte Royall, No. 1, 117 U. S. 241, 251, 29 L. Ed. 868.

14. When writ will be denied.—See post, "When Writ Will Be Granted," IV, F, 3, b, (1), (b).

Controlled by circumstances of particular case.—This discretion to interfere, on habeas corpus, for the protection of one alleged to be restrained of his liberty in violation of the constitution or laws of the United States, must often be controlled by the special circumstances of the case. Robb *v.* Connolly, 111 U. S. 624, 637, 28 L. Ed. 542; Pettibone *v.* Nichols, 203 U. S. 192, 201, 51 L. Ed. 148.

Granted only in cases of urgency.—"A prisoner in custody under the authority of a state should not, except in a case of peculiar urgency, be discharged by a court or judge of the United States upon a writ of habeas corpus, in advance of any proceedings in the courts of the state to test the validity of his arrest and detention." Whitten *v.* Tomlinson, 160 U. S. 231, 247, 40 L. Ed. 406.

15. The rule stated.—Ex parte Royall, No. 1, 117 U. S. 241, 251, 29 L. Ed. 868; Boske *v.* Comingore, 177 U. S. 459, 466, 44 L. Ed. 846; New York *v.* Eno, 155 U. S. 89, 39 L. Ed. 80; Whitten *v.* Tomlinson, 160 U. S. 231, 242, 40 L. Ed. 406; Markuson *v.* Boucher, 175 U. S. 184, 44 L. Ed. 124; Urquhart *v.* Brown, 205 U. S. 179, 183, 51 L. Ed. 760. See Reid *v.* Jones, 187 U. S. 153, 154, 47 L. Ed. 116; United States *v.* Sing Tuck, 194 U. S. 161, 168, 48 L. Ed. 917; Baker *v.* Grice, 169 U. S. 284, 290, 42 L. Ed. 748; Minnesota *v.* Brundage, 180 U. S. 499, 502, 45 L. Ed. 639; Rogers *v.* Peck, 199 U. S. 425, 434, 50 L. Ed. 256; In re Jugiro, 140 U. S. 291, 35 L. Ed. 510; In re Wood, 140 U. S. 278, 35 L. Ed. 505; Andrews *v.* Swartz, 156 U. S. 272, 39 L. Ed. 422; In re Duncan, 139 U. S. 449, 454, 35 L. Ed. 219; Ex parte Fonda, 117 U. S. 516, 29 L. Ed. 994.

"The circuit court should not discharge the petitioner until the state court had finally acted upon the case, when it could be determined whether the accused, if convicted, should be put to his writ of error or the question determined on habeas corpus whether he was restrained of his liberty in violation of the constitution of the United States." Riggins *v.* United States, 199 U. S. 547, 549, 50 L. Ed. 303.

On application to single judge.—"The jurisdiction is more delicate, the reason against its exercise stronger, when a single judge is invoked to reverse the decision of the highest court of a state in which the constitutional rights of a prisoner could have been claimed and maybe were rightly decided, or if not rightly decided, could be reviewed and redressed by a writ of error from this court." Markuson *v.* Boucher, 175 U. S. 184, 187, 44 L. Ed. 124.

16. With privilege of renewal.—Minnesota *v.* Brundage, 180 U. S. 499, 500, 45 L. Ed. 639. See post, "After Exhaustion of Remedies in State Courts," IV, F, 3, b, (2).

17. Rule grows out of judicial systems.—As a general rule because of the relations existing, under our system of government, between the judicial tribunals of the Union and of the several states, a federal court or a federal judge will not ordinarily interfere by habeas corpus with the regular course of procedure under

with the courts of the Union, to enforce and protect every right granted or secured by the constitution of the United States, and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them.[18] This duty, it is presumed, the state courts will perform.[19] Another reason for the denial of the writ in the federal courts in the first instance is, that, if the question is determined adversely to the defendants in the highest court of the state in which the decision could be had, the judgment may be re-examined by the federal supreme court upon writ of error.[20]

(c) *When Writ Will Be Granted*—aa. *In General.*—There are recognized

state authority, but will leave the applicant for the writ of habeas corpus to exhaust the remedies afforded by the state of determining whether he is illegally restrained of his liberty. Urquhart *v.* Brown, 205 U. S. 179, 181, 51 L. Ed. 760.

"To adopt a different rule would unduly interfere with the exercise of the criminal jurisdiction of the several states, and with the performance by this court of its appropriate duties." Whitten *v.* Tomlinson, 160 U. S. 231, 247, 40 L. Ed. 406.

Single judge should not discharge.—"The reason for this course is apparent. It is an exceedingly delicate jurisdiction given to the federal courts by which a person under an indictment in a state court and subject to its laws may, by the decision of a single judge of the federal court, upon a writ of habeas corpus, be taken out of the custody of the officers of the state and finally discharged therefrom, and thus a trial by the state courts of an indictment found under the laws of a state be finally prevented." Baker *v.* Grice, 169 U. S. 284, 291, 42 L. Ed. 748, quoted in Markuson *v.* Boucher, 175 U. S. 184, 186, 44 L. Ed. 124, and Urquhart *v.* Brown, 205 U. S. 179, 183, 51 L. Ed. 760.

18. Duty of state court to uphold constitution.—Robb *v.* Connolly, 111 U. S. 624, 637, 28 L. Ed. 542; Cook *v.* Hart, 146 U. S. 183, 195, 36 L. Ed. 934; New York *v.* Eno, 155 U. S. 89, 98, 39 L. Ed. 80; Ex parte Royall, No. 1, 117 U. S. 241, 248, 29 L. Ed. 868; Minnesota *v.* Brundage, 180 U. S. 499, 503, 45 L. Ed. 639.

The state courts are as much bound as the federal courts to see that no man is punished in violation of the constitution or laws of the United States; and ordinarily an error in this particular can better be corrected by the supreme court upon a writ of error to the highest court of the state than by an interference, which is never less than unpleasant, with the procedure of the state courts before the petitioner has exhausted his remedy there. Davis *v.* Burke, 179 U. S. 399, 402, 45 L. Ed. 249.

State can decide constitutional questions.—The state courts are competent to determine constitutional questions and are under a duty to enforce the mandates of the supreme law of the land. Robb *v.* Connolly, 111 U. S. 624, 637, 28 L. Ed. 542; New York *v.* Eno, 155 U. S. 89, 94, 39 L. Ed. 80; Ex parte Royall, No. 1, 117 U. S. 241, 248, 251, 29 L. Ed. 868; Cook *v.* Hart, 146 U. S. 183, 195, 36 L. Ed. 934.

"Whether the offenses described in the indictments against Eno are offenses against the state of New York and punishable under its laws, or are made by existing statutes offenses also against the United States and are exclusively cognizable by courts of the United States; and whether the same acts, upon the part of the accused, may be offenses against both the national and state governments and punishable in the judicial tribunals of each government, without infringing upon the constitutional guaranty against being twice put in jeopardy of limb for the same offense; these are questions which the state court of original jurisdiction is competent to decide in the first instance; and its obligation to render such decision as will give full effect to the supreme law of the land and protect any right secured by it to the accused is the same that rests upon the courts of the United States." New York *v.* Eno, 155 U. S. 89, 98, 39 L. Ed. 80.

19. Presumption that state court will render correct decision.—The federal courts are not at liberty to presume that the decision of the state court will be otherwise than as is required by the fundamental law of the land, or that the state court will disregard the settled principles of constitutional law announced by the supreme court, upon which is clearly conferred the power to decide ultimately and finally all cases arising under the constitution and laws of the United States. New York *v.* Eno, 155 U. S. 89, 94, 39 L. Ed. 80; Ex parte Royall, No. 1, 117 U. S. 241, 251, 29 L. Ed. 868; Robb *v.* Connolly, 111 U. S. 624, 637, 28 L. Ed. 542; Minnesota *v.* Brundage, 180 U S. 499, 503, 45 L. Ed. 639.

It cannot be assumed that the state court will hesitate to enforce any rights secured by that instrument. Minnesota *v.* Brundage, 180 U. S. 499, 503, 45 L. Ed. 639.

20. Existence of remedy by writ of error.—Fitts *v.* McGhee, 172 U. S. 516, 532, 43 L. Ed. 535; Minnesota *v.* Brundage, 180 U. S. 499, 503, 45 L. Ed. 639. See post, "After Exhaustion of Remedies in State Courts," IV, F, 3, b, (2).

The supreme court has the ultimate power to determine constitutional questions. New York *v.* Eno, 155 U. S. 89, 94, 39 L. Ed. 80.

exceptions to the rule, as stated above, in which this discretion should be subordinated to special circumstances requiring immediate action.[21]

bb. *In Particular Instances.*—The exceptional cases, in which a federal court or judge may sometimes appropriately interfere by habeas corpus in advance of final action by the authorities of the state, are those of great urgency that require to be promptly disposed of;[22] such, for instance, as where the prisoner is in custody, by authority of a state, for an act done or omitted to be done in pursuance of a law of the United States, or of an order or process of a court of the United States, or otherwise involving the authority and operations of the general government;[23] or where such person is a citizen or subject of a foreign state and is in

21. **When writ will be granted.**—Ex parte Royall, No. 1, 117 U. S. 241, 254, 29 L. Ed. 868; Urquhart *v.* Brown, 205 U. S. 179, 182, 51 L. Ed. 760, and cases cited to the general rule; New York *v.* Eno, 155 U. S. 89, 96, 39 L. Ed. 80; Boske *v.* Comingore, 177 U. S. 459, 466, 44 L. Ed. 846; Reid *v.* Jones, 187 U. S. 153, 154, 47 L. Ed. 116; Appleyard *v.* Massachusetts, 203 U. S. 222, 225, 51 L. Ed. 161; United States *v.* Sing Tuck, 194 U. S. 161, 168, 48 L. Ed. 917; Whitney *v.* Dick, 202 U. S. 132, 140, 50 L. Ed. 963; Tinsley *v.* Anderson, 171 U. S. 101, 105, 43 L. Ed. 91; Ex parte Fonda, 117 U. S. 516, 29 L. Ed. 994; Cook *v.* Hart, 146 U. S. 183, 194, 36 L. Ed. 934; Whitten *v.* Tomlinson, 160 U. S. 231, 40 L. Ed. 406; Baker *v.* Grice, 169 U. S. 284, 42 L. Ed. 748; Ohio *v.* Thomas, 173 U. S. 276, 284, 43 L. Ed. 699; In re Lincoln, 202 U. S. 178, 181, 50 L. Ed. 984.

"In In re Loney, 134 U. S. 372, 33 L. Ed. 949; In re Neagle, 135 U. S. 1, 34 L. Ed. 55; Ohio *v.* Thomas, 173 U. S. 276, 43 L. Ed. 699, and Boske *v.* Comingore, 177 U. S. 459, 44 L. Ed. 846, writs of habeas corpus were sustained, but in each of these cases the act charged against the petitioner was one for which he was amendable alone to the laws of the United States, or he was exercising some auauthority under those laws, and so they all come within the exceptions noted in Ex parte Royall, No. 1, 117 U. S. 241, 254, 29 L. Ed. 868." In re Lincoln, 202 U. S. 178, 182, 50 L. Ed. 984; Baker *v.* Grice, 169 U. S. 284, 291, 42 L. Ed. 748.

In some instances, as in Medley, Petitioner, 134 U. S. 160, 33 L. Ed. 835, the proceeding by habeas corpus has been entertained, although a writ of error could be prosecuted because of special facts and circumstances. In re Frederich, 149 U. S. 70, 78, 37 L. Ed. 653.

22. Urquhart *v.* Brown, 205 U. S. 179, 182, 51 L. Ed. 760; Boske *v.* Comingore, 177 U. S. 459, 44 L. Ed. 846.

23. **For act done or omitted under federal authority.**—Whitten *v.* Tomlinson, 160 U. S. 231, 241, 40 L. Ed. 406; In re Neagle, 135 U. S. 1, 34 L. Ed. 55; Ex parte Royall, No. 1, 117 U. S. 241, 251, 253, 29 L. Ed. 868; New York *v.* Eno, 155 U. S. 89, 93, 95, 39 L. Ed. 80; Baker *v.* Grice, 169 U. S. 284, 42 L. Ed. 748; Ex parte Siebold, 100 U. S. 371, 394, 395, 25 L. Ed. 717; In re Loney, 134 U. S. 372, 33 L. Ed. 949; Ohio *v.* Thomas, 173 U. S. 276, 43 L. Ed. 699.

Loney case.—It appeared from the record that one Loney was duly summoned to give his deposition in a contested election case pending in the house of representatives of the congress of the United States—a summons he was obliged to obey, unless prevented by sickness or unavoidable accident, under the penalty of forfeiting a named sum to the party at whose instance he was summoned, and of becoming subject to fine and imprisonment, Rev. Stat., § 116; that he appeared before a notary public in obedience to such summons and proceeded to give his deposition; and that while in the office of an attorney for the purpose of completing his testimony, he was arrested under a warrant issued by a justice of the peace and based upon the affidavit of one of the parties to the contested election case charging him with willful perjury committed in his deposition. Having been arrested under that warrant, he sued out a writ of habeas corpus from the circuit court of the United States upon the ground that he was restrained of his liberty in violation of the constitution of the United States. That court, in advance of any trial in the state court for the offense charged against Loney, adjudged that the offense was punishable only under § 5392 of the Revised Statutes and was exclusively cognizable by the courts of the United States. He was discharged, and the judgment was affirmed by the federal supreme court. It is clear from this statement that the case was one of urgency, involving in a substantial sense the authority and operations of the general government. In re Loney, 134 U. S. 372, 375, 33 L. Ed. 949. See New York *v.* Eno, 155 U. S. 89, 98, 39 L. Ed. 80; Minnesota *v.* Brundage, 180 U. S. 499, 501, 45 L. Ed. 639; Ohio *v.* Thomas, 173 U. S. 276, 43 L. Ed. 699.

Custody of United States officer.—"The present case was one of urgency, in that the appellee was an officer in the revenue service of the United States whose presence at his post of duty was important to the public interests, and whose detention in prison by the state authorities might have interfered with the regular and orderly course of the business of the de-

custody for an act done under the authority of his own government;[24] or to bring a person in state custody into a federal court to give testimony;[25] but not, as a rule, where the prisoner claims to be in custody without due process of law,[26] where such custody is voluntary;[27] under erroneous sentence;[28] or that a statute, under which prisoner is in custody, affects the general public interest.[29] It is often an embarrassing question to determine in a particular case whether or not circumstances require immediate action.[30] And in such cases of doubt it is certainly the better practice to put the prisoner to his remedy by writ of error

partment to which he belonged. The district court, therefore, did not err in determining the question of constitutional law raised by the application for a writ of habeas corpus, and rendering final judgment." Boske *v.* Comingore, 177 U. S. 459, 466, 44 L. Ed. 846; Davis *v.* Burke, 179 U. S. 399, 402, 45 L. Ed. 249.

A governor of a soldiers' home providing for and feeding the inmates pursuant to an act of congress, Revised Statutes, §§ 4832 and 4835, is engaged in the performance of a federal duty, and not subject to the jurisdiction of state courts. This is one of the exceptional cases in which it is proper for a federal court to issue the writ of habeas corpus to relieve such person from the custody of a state court, which had imprisoned him for violating a state law in regard to the sale of oleomargarine. Ohio *v.* Thomas, 173 U. S. 276, 284, 43 L. Ed. 699, following Tennessee *v.* Davis, 100 U. S. 257, 25 L. Ed. 648.

24. Where prisoner is citizen of foreign state.—When the petitioner in custody by state authority is a subject or citizen of a foreign state, and domiciled therein, for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; in such and like cases of urgency, involving the obligations of this country to, or its relations with, foreign nations, the courts of the United States have frequently interposed by writs of habeas corpus and discharged prisoners who were held in custody under state authority. New York *v.* Eno, 155 U. S. 89, 94, 39 L. Ed. 80; Ex parte Royall, No. 1, 117 U. S. 241, 252, 29 L. Ed. 868; Whitten *v.* Tomlinson, 160 U. S. 231, 241, 40 L. Ed. 406; Davis *v.* Burke, 179 U. S. 399, 402, 45 L. Ed. 249; Wildenhus's Case, 120 U. S. 1, 30 L. Ed. 565; Minnesota *v.* Brundage, 180 U. S. 499, 501, 45 L. Ed. 639; In re Neagle, 135 U. S. 1, 34 L. Ed. 55.

25. To bring prisoner in court to testify.—It may sometimes be necessary and proper for a federal court to issue the writ to bring a witness before it to testify out of the custody of a state court. Minnesota *v.* Brundage, 180 U. S. 499, 500, 45 L. Ed. 639.

26. Without due process of law.—"The rule is well settled in this court, while there may be a power on the part of the federal courts to issue a writ of habeas corpus where the petitioner insists that he has been deprived of his liberty without due process of law, that power will not ordinarily be exercised until after an appeal made to the state courts has been denied." Davis *v.* Burke, 179 U. S. 399, 401, 45 L. Ed. 249; In re Frederich, 149 U. S. 70, 37 L. Ed. 653.

27. Surrender of bail by surety.—"The surrender of the petitioner by his bail at his request and his consequent imprisonment furnishes in itself no ground of urgency for the interference of a federal court. The imprisonment is entirely voluntary, and while the surrender by his bondsmen may be good for the purpose of avoiding any technical objection to the issuing of the writ founded upon the fact that the petitioner was on bail, yet the fact of imprisonment under such circumstances adds nothing to the strength of his case as calling for the interposition of the federal court." Baker *v.* Grice, 169 U. S. 284, 293, 42 L. Ed. 748.

28. Errors by state court.—An erroneous decision of a state court, out on a motion to quash an indictment, on the ground that negroes were excluded therefrom, does not justify federal interference. In re Wood, 140 U. S. 278, 287, 35 L. Ed. 505.

29. Affecting general business interests.—"It is undoubtedly true that the state enactment in question may in its operation affect the business of many, and in some degree, but indirectly, the rights of the public; but that consideration is not sufficient to justify such interference by the federal court as will interrupt the orderly course of proceedings in the state court. We do not think that the exercise by a federal court of its power upon habeas corpus to discharge one held in custody by the state authorities and charged with a violation of a state enactment should be materially controlled by any consideration of the extent of particular business interests that may be affected by a prosecution instituted in a state tribunal against him, or of the indirect effect of his detention in custody upon the rights of the general public." Minnesota *v.* Brundage, 180 U. S. 499, 504, 45 L. Ed. 639.

30. Often embarrassing question.—Ex parte Royall, No. 1, 117 U. S. 241, 250, 29 L. Ed. 868.

from this court, under § 709 of the Revised Statutes, than to award him a writ of habeas corpus.[31]

(2) *After Exhaustion of Remedies in State Courts.*—When the state courts have finally acted upon the case, the federal courts have still a discretion whether, under all the circumstances then existing, the accused, if convicted, shall be put to his writ of error from the highest court of the state, or whether it will proceed, by writ of habeas corpus, summarily to determine whether the petitioner is restrained of his liberty in violation of the constitution of the United States;[32] for, if the applicant felt that the decision, whether upon writ of error or upon habeas corpus, in the supreme court of the state, was in violation of his rights under the constitution or laws of the United States, he could have brought the case by writ of error directly from that court to the federal supreme court.[33] The federal courts will generally leave the petitioner to his remedy by writ of error from the federal supreme court, except in peculiar and urgent cases.[34] Of course, the discretion here referred to is a legal discretion to be controlled in its exercise by such principles as are applicable to the particular case in hand.[35]

G. Determination of Existence of Jurisdiction.—A court has the power to determine whether or not it has jurisdiction of a writ of habeas corpus.[36]

V. Grounds for Relief.

A. In General.—A summary interruption of the regular order of proceedings, by means of this writ, is not always a matter of right.[37] But the court or judge who is asked to issue such a writ need not be over critical in looking into the petition or application for very clear grounds of the exercise of this right; because, when the prisoner is brought before the court or judge, his power to make full inquiry into the cause of commitment or detention will enable him to correct any errors or defects in the petition under which the writ issued.[38]

B. As Determined by Common-Law Principles.—No law of the United

31. Writ should be denied in doubtful cases.—"For, under proceedings by writ of error, the validity of the judgment against him can be called in question, and the federal court left in a position to correct the wrong, if any, done the petitioner, and at the same time leave the state authorities in a position to deal with him thereafter within the limits of proper authority, instead of discharging him by habeas corpus proceedings, and thereby depriving the state of the opportunity of asserting further jurisdiction over his person in respect to the crime with which he is charged." In re Frederich, 149 U. S. 70, 77, 37 L. Ed. 653.

32. After exhaustion of remedies in state court.—New York *v.* Eno, 155 U. S. 89, 95, 39 L. Ed. 80; Ex parte Royall, No. 1, 117 U. S. 241, 251, 252, 29 L. Ed. 868. See, also, Taylor *v.* Carryl, 20 How. 583, 595, 15 L. Ed. 1028; Covell *v.* Heyman, 111 U. S. 176, 182, 28 L. Ed. 390; Tinsley *v.* Anderson, 171 U. S. 101, 105, 43 L. Ed. 91; In re Lincoln, 202 U. S. 178, 181, 50 L. Ed. 984; Cook *v.* Hart, 146 U. S. 183, 192, 194, 36 L. Ed. 934; Minnesota *v.* Brundage, 180 U. S. 499, 501, 45 L. Ed. 639; Reid *v.* Jones, 187 U. S. 153, 47 L. Ed. 116; Riggins *v.* United States, 199 U. S. 547, 549, 50 L. Ed. 303; Pettibone *v.* Nichols, 203 U. S. 192, 201, 51 L. Ed. 148; In re Frederich, 149 U. S. 70, 77, 37 L. Ed. 653; Ex parte Fonda, 117 U. S. 516, 92 L. Ed. 994.

"After the final disposition of the case by the highest court of the state, the circuit court, in its discretion, may put the party who has been denied a right, privilege or immunity claimed under the constitution or laws of the United States to his writ of error from this court, rather than interfere by writ of habeas corpus." In re Wood, 140 U. S. 278, 290, 35 L. Ed. 505.

33. Reason for rule.—Urquhart *v.* Brown, 205 U. S. 179, 182, 51 L. Ed. 760.

34. Urgent cases.—Baker *v.* Grice, 169 U. S. 284, 290, 42 L. Ed. 748; Whitten *v.* Tomlinson, 160 U. S. 231, 242, 40 L. Ed. 406; United States *v.* Lewis, 200 U. S. 1, 50 L. Ed. 343; Urquhart *v.* Brown, 205 U. S. 179, 183, 51 L. Ed. 760.

35. Controlled by circumstances of particular case.—New York *v.* Eno, 155 U. S. 89, 95, 39 L. Ed. 80. See ante, "Basis of Rule," IV, F, 3, b, (1), (b), bb; "Rule Stated," IV, F, 3, b, (1), (b), aa.

36. Determination of existence of jurisdiction.—Ex parte Watkins, 3 Pet. 193, 202, 7 L. Ed. 650; In re Coy, 127 U. S. 731, 757, 32 L. Ed. 274.

37. Grounds for relief.—United States *v.* Sing Tuck, 194 U. S. 161, 168, 48 L. Ed. 917. But see Holmes *v.* Jennison, 14 Pet. 540, 586o, 10 L. Ed. 579. See ante, "Discretion to Issue Writ," IV, F, 3, b.

38. In re Burrus, 136 U. S. 586, 591, 34 L. Ed. 500.

States prescribes the cases in which this great writ shall be issued. The term is used in the constitution and the judiciary act as one well understood. The general reference there made, without any precise definition of that term, leaves the courts to proceed to issue the writ in such instances as were recognized as grounds for its issuance at common law.[39]

C. As Determined by Materiality.—A petition for habeas corpus ought not to be entertained, unless the court is satisfied that the petitioner can make out at least a prima facie case.[40]

D. As Determined by Conduct of Prosecution—1. DELAY OF TRIAL.—Mere delay in bringing a defendant on for trial does not always constitute sufficient ground for his release on habeas corpus,[41] but a failure of the grand jury to indict at the first subsequent term of court does, under the act of March 3, 1863.[42]

2. ENTRANCE OF NOLLE PROSEQUI.—A prisoner is entitled to his freedom on dismissal of the indictment against him on the entrance of a nolle prosequi.[43]

3. DENIAL OF NEW TRIAL.—The refusal to consider and sustain a motion to set aside the verdict, stay the judgment and grant a new trial does not affect the court's jurisdiction, and, therefore, cannot be reviewed upon habeas corpus.[44]

4. DENIAL OF PROCESS TO COMPEL ATTENDANCE OF WITNESSES.—The denial of compulsory process to compel attendance of witnesses in favor of the prisoner, is not ground for discharge.[45]

E. As Determined by Validity of Proceedings.—Mere error in the judgment or proceedings, under and by virtue of which a party is imprisoned, constitutes no ground for the issuance of the writ,[46] unless, perhaps, where the court

39. **As determined by common law principles.**—Ex parte Watkins, 3 Pet. 193, 201, 7 L. Ed. 650.

"The general principles upon which the writ of habeas corpus is issued in England were well settled by usage and statutes long before the period of our national independence, and must have been in the mind of congress when the power to issue the writ was given to the courts and judges of the United States." Ex parte Parks, 93 U. S. 18, 21, 23 L. Ed. 787. See ante, "Definition, Nature and Object," I.

Under act of 31 Car. II.—The habeas corpus act of 31 Car. II, prescribing the cases in which the writ may issue, merely enforces the then existing common-law grounds. Ex parte Watkins, 3 Pet. 193, 202, 7 L. Ed. 650.

40. **As determined by materiality.**—United States *v.* Sing Tuck, 194 U. S. 161, 170, 48 L. Ed. 917; Craemer *v.* Washington State, 168 U. S. 124, 128, 42 L. Ed. 407; Storti *v.* Massachusetts, 183 U. S. 138, 141, 46 L. Ed. 120; United States *v.* Ju Toy, 198 U. S. 253, 261, 49 L. Ed. 1040.

41. **Delay of trial.**—A mere omission to move the case for trial is all that is set up, coupled with the assertion that defendant was eager and anxious for trial, but showing no action whatever on his part which might render such anxiety and eagerness known to the state authorities. Held, not sufficient ground for discharge on habeas corpus. Baker *v.* Grice, 169 U. S. 284, 293, 42 L. Ed. 748. See, also, United States *v.* Sing Tuck, 194 U. S. 161, 168, 48 L. Ed. 917.

42. **Failure to indict.**—A person arrested after the passage of the act of March 3d, 1863, "relating to habeas corpus and regulating judicial proceedings in certain cases," and under the authority of the said act, was entitled to his discharge if not indicted or presented by the grand jury convened at the first subsequent term of the circuit or district court of the United States for the district. The omission to furnish a list of the persons arrested, to the judges of the circuit or district court as provided in the said act, did not impair the right of such person, if not indicted or presented, to his discharge. Ex parte Milligan, 4 Wall. 2, 18 L. Ed. 281. See the title CONSTITUTIONAL LAW, vol. 4, p. 500.

43. **Entrance of nolle prosequi.**—Ex parte Bain, 121 U. S. 1, 13, 30 L. Ed. 849. See the title DISMISSAL, DISCONTINUANCE AND NONSUIT, vol. 5, p. 393.

44. **Denial of new trial.**—In re Wood, 140 U. S. 278, 290, 35 L. Ed. 505; Storti *v.* Massachusetts, 183 U. S. 138, 46 L. Ed. 120. See the title NEW TRIALS.

45. **Denial of process to compel attendance of witnesses.**—Ex parte Harding, 120 U. S. 782, 30 L. Ed. 824. See, generally, the title WITNESSES.

46. **As determined by validity of proceedings.**—Ex parte Siebold, 100 U. S. 371, 375, 25 L. Ed. 717; Ex parte Terry, 128 U. S. 289, 304, 32 L. Ed. 405; In re Wight, 134 U. S. 136, 33 L. Ed. 865; In re McKenzie, 180 U. S. 536, 546, 45 L. Ed. 657; Ex parte Parks, 93 U. S. 18, 23, 23 L. Ed. 787; Ex parte Bigelow, 113 U. S. 328, 28 L. Ed. 1005; Ex parte Wilson, 114 U. S. 417, 421, 29 L. Ed. 89; Nielsen, Petitioner, 131 U. S. 176, 33 L. Ed. 118; In

has cognizance by writ of error or appeal to review the judgment. In such a case, if the error be apparent and the imprisonment unjust, the appellate court may, perhaps, in its discretion, give immediate relief on habeas corpus, and thus save the party the delay and expense of a writ of error.[47] No distinction is made between state and federal courts in this regard.[48]

F. As Determined by Existence of Other Remedies.—The writ will be refused where the prisoner can be otherwise discharged.[49] Ordinarily, the writ will not lie where there is a remedy by writ of error or appeal; but in rare and

re Schneider (No. 2), 148 U. S. 162, 166, 37 L. Ed. 406; Felts *v.* Murphy, 201 U. S. 123, 129, 50 L. Ed. 689; In re Lennon, 166 U. S. 548, 552, 41 L. Ed. 1110; In re Eckart, 166 U. S. 481, 41 L. Ed. 1085; Reid *v.* Jones, 187 U. S. 153, 47 L. Ed. 116; In re Belt, 159 U. S. 95, 97, 40 L. Ed. 88; Storti *v.* Massachusetts, 183 U. S. 138, 46 L. Ed. 120; In re Tyler, 149 U. S. 164, 167, 37 L. Ed. 689; Cuddy, Petitioner, 131 U. S. 280, 33 L. Ed. 154; In re Jugiro, 140 U. S. 291, 297, 35 L. Ed. 510; In re Coy, 127 U. S. 731, 756, 757, 32 L. Ed. 274; In re Debs, 158 U. S. 564, 600, 39 L. Ed. 1092; In re Swan, 150 U. S. 637, 648, 37 L. Ed. 1207; In re Ayers, 123 U. S. 443, 31 L. Ed. 216; Ex parte Fiske, 113 U. S. 713, 28 L. Ed. 1117; Ex parte Carll, 106 U. S. 521, 522, 27 L. Ed. 288; United States *v.* Pridgeon, 153 U. S. 48, 62, 63, 38 L. Ed. 631; Ornelas *v.* Ruiz, 161 U. S. 502, 508, 40 L. Ed. 787; Terlinden *v.* Ames, 184 U. S. 270, 46 L. Ed. 534; Wright *v.* Henkel, 190 U. S. 40, 57, 47 L. Ed. 948; Bradford *v.* Southern R. Co., 195 U. S. 243, 250, 49 L. Ed. 178; In re Frederich, 149 U. S. 70, 75, 37 L. Ed. 653; In re Lennon, 150 U. S. 393, 400, 37 L. Ed. 1120; Ex parte Reed, 100 U. S. 13, 23, 25 L. Ed. 538; Ex parte Virginia, 100 U. S. 339, 343, 25 L. Ed. 676; Matter of Moran, 203 U. S. 96, 105, 51 L. Ed. 105; Valentina *v.* Mercer, 201 U. S. 131, 138, 50 L. Ed. 693; Riggins *v.* United States, 199 U. S. 547, 549, 50 L. Ed. 303; Ex parte Watkins, 3 Pet. 193, 197, 7 L. Ed. 650; Ex parte Yarbrough, 110 U. S. 651, 28 L. Ed. 274; Savin, Petitioner, 131 U. S. 267, 280, 33 L. Ed. 150; Ex parte Kearney, 7 Wheat. 38, 43, 5 L. Ed. 391; Ex parte Lange, 18 Wall. 163, 205, 21 L. Ed. 872; Ex parte Royall, No. 1, 117 U. S. 241, 29 L. Ed. 868; In re Snow, 120 U. S. 274, 30 L. Ed. 658; Stevens *v.* Fuller, 136 U. S. 468, 477, 478, 34 L. Ed. 461; Crossley *v.* California, 168 U. S. 640, 641, 42 L. Ed. 610; Whitney *v.* Dick, 202 U. S. 132, 50 L. Ed. 963; In re Chapman, 156 U. S. 211, 39 L. Ed. 401; Ex parte Mirzan, 119 U. S. 584, 30 L. Ed. 513; In re Huntington, 137 U. S. 63, 34 L. Ed. 567; In re Lancaster, 137 U. S. 393, 34 L. Ed. 713; Dimmick *v.* Tompkins, 194 U. S. 540, 552, 48 L. Ed. 1110; In re Lane, 135 U. S. 443, 446, 34 L. Ed. 219; In re Wood, 140 U. S. 278, 286, 35 L. Ed. 505; In re Wilson, 140 U. S. 575, 579, 35 L. Ed. 513; Ex parte Bain, 121 U. S. 1, 30 L. Ed. 849; Chapman *v.* United States, 164 U. S. 436, 448, 41 L. Ed. 504; Cross *v.* Burke, 146 U. S. 82, 36 L. Ed. 896; Johnson *v.* United States, 3 McLean, 89; Ex parte Aernam, 3 Blatchford, 160; Barry *v.* Mercein, 5 How. 103, 12 L. Ed. 70; Ex parte Burford, 3 Cranch 448, 2 L. Ed. 495; Davis *v.* Beason, 133 U. S. 333, 341, 33 L. Ed. 637; Ex parte Curtis, 106 U. S. 371, 375, 27 L. Ed. 232; Tinsley *v.* Anderson, 171 U. S. 101, 104, 43 L. Ed. 91; Maxwell *v.* Stewart, 21 Wall. 71, 22 L. Ed. 564; Humphries *v.* District of Columbia, 174 U. S. 190, 195, 43 L. Ed. 944; Anderson *v.* Treat, 172 U. S. 24, 29, 43 L. Ed. 351; Harkrader *v.* Wadley, 172 U. S. 148, 164, 43 L. Ed. 399.

The uncontradicted facts in this case are that the unfortunate defendant has been convicted of the crime of murder and sentenced to imprisonment for life, although he did not hear a word of the evidence that was given upon his trial, because of his almost total deafness, his inability to hear being such that it required a person to speak through his ear trumpet, close to his ear, in order that such person should be heard by him. If there were any irregularities in the trial of the appellant, because of the failure of the state court to see to it that the testimony in the case was repeated to him through the ear trumpet which he had with him, it was at most an error which did not take away from the court its jurisdiction over the subject matter and over the person of the accused. It is to be regretted that the testimony was not read or repeated to him. But that omission did not affect the jurisdiction of the trial court and does not constitute ground for habeas corpus. Felts *v.* Murphy, 201 U. S. 123, 128, 129, 130, 50 L. Ed. 689.

Erroneous instructions.—Crossley *v.* California, 168 U. S. 640, 642, 42 L. Ed. 610.

47. Ex parte Siebold, 100 U. S. 371, 375, 25 L. Ed. 717.

48. No distinction between state and federal courts.—Riggins *v.* United States, 199 U. S. 547, 549, 50 L. Ed. 303.

49. As determined by the existence of other remedies.—Ex parte Alabama (Note), 104 U. S. 618, 26 L. Ed. 866; In re Belt, 159 U. S. 95, 100, 40 L. Ed. 88; Riggins *v.* United States, 199 U. S. 547, 548, 50 L. Ed. 303; In re Chapman, 156 U. S. 211, 215, 39 L. Ed. 401; Ex parte Royall, No. 1, 117 U. S. 241, 29 L. Ed. 868; New York *v.* Eno, 155 U. S. 89, 39 L. Ed. 80; In re Frederich, 149 U. S. 70, 37 L. Ed. 653; In re Tyler, 149 U. S. 164, 180, 37 L. Ed. 689; In re Swan, 150 U. S. 637, 648, 37 L. Ed. 1207.

exceptional cases it may be issued although such remedy exists.[50] And when no writ of error or appeal will lie, though the writ of habeas corpus cannot be used to perform the office of a writ of error or appeal if a petition is imprisoned under a judgment of the circuit court which had no jurisdiction of the person or of the subject matter, or authority to render the judgment complained of, then relief may be accorded.[51]

G. As Determined by Nature of Custody or Restraint—1. In General.—There is no very satisfactory definition to be found in the adjudged cases of the character of the restraint or imprisonment suffered by a party applying for the writ of habeas corpus which will entitle him thereto. This can hardly be expected from the variety of restraints against which it is used to give relief.[52] Obviously, the extent and character of the restraint which justifies the writ must vary according to the nature of the control which is asserted over the party in whose behalf the writ is prayed.[53]

2. Actual Restraint.—There must be actual confinement, or the present means of enforcing it, in order to justify the issuance of the writ of habeas corpus and granting a release thereon.[54] A person released on bail is not in actual custody.[54a]

3. Moral Restraint.—Something more than moral restraint, which does not concern the prisoner's convenience and exercise of free will, is necessary to make a case for habeas corpus.[55]

4. Voluntary Custody.—If the prisoner is in custody by his own voluntary act, the writ will not issue for his release.[56]

50. Where there is remedy by writ of error.—In re Belt, 159 U. S. 95, 100, 40 L. Ed. 88, and cases cited above.

51. Where writ of error does not lie.—In re Frederich, 149 U. S. 70, 37 L. Ed. 653; In re Tyler, 149 U. S. 164, 37 L. Ed. 689; In re Swan, 150 U. S. 637, 648, 37 L. Ed. 1207; Mahon *v.* Justice, 127 U. S. 700, 718, 32 L. Ed. 283.

If a writ of error does not lie to the federal supreme court, and the supreme court of the District of Columbia was absolutely without jurisdiction, the petitioner may then seek his remedy through application for a writ of habeas corpus. Riggins *v.* United States, 199 U. S. 547, 550, 50 L. Ed. 303; In re Chapman, 156 U. S. 211, 39 L. Ed. 401. See ante, "Basis of Rule," IV, F, 3, b, (1), (b), bb.

52. Nature of custody.—Wales *v.* Whitney, 114 U. S. 564, 571, 29 L. Ed. 277.

53. Wales *v.* Whitney, 114 U. S. 564, 571, 29 L. Ed. 277.

54. Actual restraint.—Wales *v.* Whitney, 114 U. S. 564, 572, 29 L. Ed. 277; In re Burrus, 136 U. S. 586, 613, 34 L. Ed. 500; United States *v.* Hamilton, 3 Dall. 17, 1 L. Ed. 490; United States *v.* Johns, 4 Dall. 412, 1 L. Ed. 888; Ex parte Burford, 3 Cranch 448, 2 L. Ed. 495; Ex parte Bollman, 4 Cranch 75, 2 L. Ed. 554; Ex parte Kearney, 7 Wheat. 38, 5 L. Ed. 391; Ex parte Watkins, 3 Pet. 193, 201, 7 L. Ed. 650; Ex parte Milburn, 9 Pet. 704, 9 L. Ed. 280.

The different acts of congress in regard to habeas corpus are to be construed as referring to actual restraint of personal liberty. Wales *v.* Whitney, 114 U. S. 564, 574, 29 L. Ed. 277.

"The class of cases in which a sheriff or other officer, with a writ in his hands for the arrest of a person whom he is required to take into custody, to whom the person to be arrested submits without force being applied, comes under this definition. The officer has the authority to arrest and the power to enforce it. If the party named in the writ resists or attempts to resist, the officer can summon bystanders to his assistance, and may himself use personal violence. Here the force is imminent and the party is in presence of it. It is physical power which controls him, though not called into demonstrative action." Wales *v.* Whitney, 114 U. S. 564, 572, 29 L. Ed. 277.

The secretary of the navy gave the following order to a medical officer under charges for conduct as surgeon general after he had ceased to be in office: "You are placed under arrest and you will confine yourself to the limits of the city of Washington." Held, that there was not such actual restraint of liberty shown as to justify the use of the writ of habeas corpus. Wales *v.* Whitney, 114 U. S. 564, 29 L. Ed. 277.

54a. Release on bail.—Wales *v.* Whitney, 114 U. S. 564, 573, 29 L. Ed. 277.

55. Moral restraint.—Wales *v.* Whitney, 114 U. S. 564, 571, 29 L. Ed. 277. See ante, "Actual Restraint," V, G, 2.

56. Voluntary restraint.—"In McElvaine *v.* Brush, 142 U. S. 155, 35 L. Ed. 971, McElvaine had been sentenced to death, and the judgment was reversed and a new trial granted. He was again convicted and sentenced, and the judgment affirmed on appeal. 125 N. Y. 596. Mc-

5. Illegal Restraint or Custody—a. *In General.*—The writ is usually granted only in cases of illegal imprisonment or wrongful detention of one alleging himself to be unlawfully restrained of his liberty.[57]

b. *Without Probable Cause.*—A prisoner, who has been committed without there being a sufficient cause for his commitment, may be discharged.[58]

c. *In Violation of Constitution*—(1) *In General.*—Where the prisoner has been denied a constitutional right, or an unconstitutional punishment has been inflicted upon him, he may be released on habeas corpus.[59] The absolute right to a discharge from custody in violation of the constitution is not to be confused with the right to insist upon a federal court's acting where it possesses a discretion to grant or refuse the writ.[60]

(2) *Denial of Due Process of Law.*—A person convicted without due process of law, may be discharged on habeas corpus.[61] But the denial of due process of

Elvaine presented his petition for habeas corpus to the circuit court, which was denied, and the case brought to this court. The order was affirmed, and we said, among other things, that 'so far as the confinement had taken place under the first sentence and warrant, that resulted from the voluntary act of the petitioner in prosecuting an appeal.'" Murphy *v.* Massachusetts, 177 U. S. 155, 163, 44 L. Ed. 711.

Surrender of principal by bail.—The surrender of a prisoner by his bail at his request places him in voluntary custody and the writ will not be issued for his discharge. Baker *v.* Grice, 169 U. S. 284, 293, 42 L. Ed. 748.

57. Illegal restraint.—New York Foundling Hospital *v.* Gatti, 203 U. S. 429, 437, 51 L. Ed. 254; Ex parte Clarke, 100 U. S. 399, 404, 25 L. Ed. 715; Ex parte Siebold, 100 U. S. 371, 25 L. Ed. 717; Ex parte Jackson, 96 U. S. 727, 737, 24 L. Ed. 877; Giozza *v.* Tiernan, 148 U. S. 657, 661, 37 L. Ed. 599.

Opressive and unjust.—In re Kemmler, 136 U. S. 436, 34 L. Ed. 519; Howard *v.* Fleming, 191 U. S. 126, 136, 48 L. Ed. 121.

The right of a person to a writ of habeas corpus depends upon the illegality of his detention, not upon original caption. Iasigi *v.* Van De Carr, 166 U. S. 391, 41 L. Ed. 1045. See post, "As Determined by Original Caption," V, H.

58. Without probable cause.—In re Metzger, 5 How. 176, 189, 12 L. Ed. 104. See In re Kaine, 14 How. 103, 126, 14 L. Ed. 345; Ex parte Burford, 3 Cranch 448, 2 L. Ed. 495; United States *v.* Hamilton, 3 Dall. 17, 1 L. Ed. 490.

59. In violation of constitution.—Nielson, Petitioner, 131 U. S. 176, 33 L. Ed. 118; In re Mills, 135 U. S. 263, 271, 34 L. Ed. 107; Ex parte Mirzan, 119 U. S. 584, 585, 30 L. Ed. 513; In re Loney, 134 U. S. 372, 376, 33 L. Ed. 949; Callan *v.* Wilson, 127 U. S. 540, 32 L. Ed. 223; Rogers *v.* Peck, 199 U. S. 425, 433, 50 L. Ed. 256; In re Neagle, 135 U. S. 1, 41, 34 L. Ed. 55; Ex parte Crouch, 112 U. S. 178, 28 L. Ed. 690. See Pearce *v.* Texas, 155 U. S. 311, 39 L. Ed. 164; In re Cross, 146 U. S. 271, 278, 36 L. Ed. 969; Craemer *v.* Washington State, 168 U. S. 124, 127, 42 L. Ed. 407; Dimmick *v.* Tompkins, 194 U. S. 540, 546, 48 L. Ed. 1110; Ex parte Royall, 112 U. S. 181, 28 L. Ed. 690; Ex parte Royall, No. 1, 117 U. S. 241, 29 L. Ed. 868; Mahon *v.* Justice, 127 U. S. 700, 712, 32 L. Ed. 283; In re Burrus, 136 U. S. 586, 591, 34 L. Ed. 500; Ex parte Siebold, 100 U. S. 371, 379, 25 L. Ed. 717; Robb *v.* Connolly, 111 U. S. 624, 637, 28 L. Ed. 542.

If the detention in a penitentiary is in violation of the laws of the United States, the prisoner is entitled to be discharged from the custody of the warden of that institution. In re Mills, 135 U. S. 263, 269, 34 L. Ed. 107; Ex parte Royall, No. 1, 117 U. S. 241, 248, 29 L. Ed. 868.

Under election laws.—The question of the constitutionality of §§ 5515 and 5522, Rev. Stat., providing punishment for crimes committed at elections of members of congress, under § 2016 et seq. Rev. Stat., furnishes good ground for the issuance of the writ of habeas corpus to inquire into the detention of the petitioner under such laws. Ex parte Siebold, 100 U. S. 371, 25 L. Ed. 717.

Under ex post facto law.—The writ will issue where a person is in custody under a law, void because ex post facto. Medley, Petitioner, 134 U. S. 160, 174, 33 L. Ed. 835, distinguished in Holden *v.* Minnesota, 137 U. S. 483, 34 L. Ed. 734. See In re Kemmler, 136 U. S. 436, 34 L. Ed. 519. And see the title CONSTITUTIONAL LAW, vol. 4, p. 524.

Without representation by counsel.—Anderson *v.* Treat, 172 U. S. 24, 43 L. Ed. 351. See the titles CRIMINAL LAW, vol. 5, p. 43; TRIAL.

Denial of equal protection of law.—See the title CIVIL RIGHTS, vol. 3, p. 831.

60. See ante, "Discretion to Issue Writ," IV, F, 3, b.

61. Denial of due process of law.—In re Frederich, 149 U. S. 70, 37 L. Ed. 653; Kohl *v.* Lehlback, 160 U. S. 293, 299, 40 L. Ed. 432; Rogers *v.* Peck, 199 U. S. 425, 50 L. Ed. 256; Tinsley *v.* Anderson, 171 U. S. 101, 106, 43 L. Ed. 91; Bergemann *v.* Backer, 157 U. S. 655, 658, 39 L. Ed. 845; Carfer *v.* Caldwell, 200 U. S. 293, 50 L. Ed. 488; Lambert *v.* Barrett, 159 U. S.

law must not only amount to mere error but be such as to deprive the court of jurisdiction.[62]

(3) *Denial of Jury Trial.*—A person convicted before a judge without a jury, where he has waived such mode of trial, cannot be released on habeas corpus;[63] nor can a person convicted by a jury composed in part of aliens,[64] or where the jury has not been poled, if it is clear that the verdict received the assent of all the jurors.[65]

(4) *Denial of Equal Protection of Law.*—If the laws of a state were so administered by the state court as to discriminate against the prisoner because of his race, the remedy for the wrong done to him is not by a writ of habeas corpus from a court of the United States.[66]

(5) *Denial of Appeal.*—A denial by a state of the right of appellate review constitutes no violation of the constitution of the United States, and the writ of habeas corpus will not issue on that account.[67]

(6) *Compelling Accused to Testify against Himself.*—The fact that the petitioner was compelled to be a witness against himself, contrary to the fifth amendment to the constitution, in that he was compelled to stand up and walk before the jury, and during a recess, the jury was stationed so as to observe his size and walk, does not go to the jurisdiction of the court so as to be available upon a petition for a writ of habeas corpus.[68]

(7) *Infliction of Cruel and Unusual Punishment.*—A sentence to death by electricity is not cruel and unusual and therefore void, and the condemned cannot be released.[69]

(8) *Constitutional Defenses*—(a) *In General.*—A valid defense to the charge, which grows out of a provision in the constitution of the United States, is no

660, 663, 40 L. Ed. 296; Storti *v.* Massachusetts, 183 U. S. 138, 46 L. Ed. 120.

62. In re Wood, 140 U. S. 278, 35 L. Ed. 505; In re Jugiro, 140 U. S. 291, 35 L. Ed. 510.

A prisoner who is too deaf to hear the testimony at the trial, is not deprived of due process of law by a conviction at such trial. Felts *v.* Murphy, 201 U. S. 123, 129, 50 L. Ed. 689. See the title DUE PROCESS OF LAW, vol. 5, p. 499.

63. Denial of jury trial.—The supreme court of the District of Columbia has jurisdiction and authority to determine the validity of the act which authorizes the waiver of a jury and to dispose of the question as to whether the record of a conviction before a judge without a jury, where the prisoner waived trial by jury according to statute, was legitimate proof of a first offense, and this being so, the federal supreme court cannot review the action of that court and the court of appeals in this particular on habeas corpus. In re Belt, 159 U. S. 95, 99, 40 L. Ed. 88; Carter *v.* McClaughry, 183 U. S. 365, 388, 46 L. Ed. 236; In re Eckart, 166 U. S. 481, 485, 41 L. Ed. 1085; Callan *v.* Wilson, 127 U. S. 540, 32 L. Ed. 223.

64. It is contended that petitioner was denied due process of law and the equal protection of the laws in that one of the jurors by whom he was tried was an alien. The court said: "We cannot hold, on this petition that petitioner has been denied due process of law or that protection of the laws accorded to all others similarly situated." Kohl *v.* Lehlback, 160 U. S. 293, 299, 303, 40 L. Ed. 432.

65. "If a trial without a jury, when a jury is a matter of right and no waiver appears of record, is not fatal to the judgment, a fortiori the minor matter of failing to poll the jury when it is clear that the verdict has received the assent of all the jurors, cannot be adjudged a nullity, but must be regarded as simply an error, to be corrected solely by direct proceedings in review." Humphries *v.* District of Columbia, 174 U. S. 190, 195, 43 L. Ed. 944. See the title JURY.

66. Denial of equal protection of law.—In re Jugiro, 140 U. S. 291, 298, 35 L. Ed. 510.

67. Denial of appeal.—Kohl *v.* Lehlback, 160 U. S. 293, 299, 40 L. Ed. 432.

"The refusal of the courts of New Jersey to grant the accused a writ of error or to stay the execution of the sentence passed upon him constituted no reason for interference in his behalf by a writ of habeas corpus issued by a court of the United States." Bergemann *v.* Backer, 157 U. S. 655, 658, 39 L. Ed. 845; Kohl *v.* Lehlback, 160 U. S. 293, 297, 40 L. Ed. 432; McKane *v.* Durston, 153 U. S. 684, 38 L. Ed. 867. See the title APPEAL AND ERROR, vol. 1, p. 375.

68. Compelling accused to testify against himself.—Matter of Moran, 203 U. S. 96, 105, 51 L. Ed. 104; Felts *v.* Murphy, 201 U. S. 123, 50 L. Ed. 689. See the title CONSTITUTIONAL LAW, vol. 4, p. 508.

69. Cruel and unusual punishment.—In re Kemmler, 136 U. S. 436, 34 L. Ed. 519.

ground for a discharge. Whether such defense is sufficient or not, is for the trial court to determine. If, in this determination, errors are committed, they can only be corrected in an appropriate form of proceeding for that purpose.[70]

(b) *Former Jeopardy.*—Former jeopardy is a defense and should be set up at the trial, and is not usually ground for discharge on habeas corpus.[71] But, it has been intimated, that, where such a case appears on the record, the party is entitled to be discharged from imprisonment.[72]

H. As Determined by Original Caption—1. ORIGINAL ARREST.—If sufficient ground for his detention by the government is shown, the petitioner is not to be discharged for defects in the original arrest or commitment.[73] He is not entitled to discharge merely because the person executing the warrant was not authorized so to do.[74]

2. ON SURRENDER BY BAIL.—The surrender of a prisoner by his bail furnishes no ground for the issuance of the writ.[75]

I. As Determined by Duration of Custody.—The restraint must be of such duration that the court can act before its termination. On an application for a writ of habeas corpus, if it appears that before a return to the writ can be made, or other action taken, the restraint of which the petitioner complained will terminate, the application therefor will be denied.[76]

J. As Determined by Nature of Authority—1. WITHOUT JURISDICTION.—The writ of habeas corpus is the appropriate remedy where a person is in custody under an order or judgment of any court,[77] or of any legislative or executive

70. **Constitutional defenses.**—Ex parte Crouch, 112 U. S. 178, 180, 28 L. Ed. 690.

71. **Former jeopardy.**—Ex parte Bigelow, 113 U. S. 328, 330, 28 L. Ed. 1005; In re Eckart, 166 U. S. 481, 41 L. Ed. 1085; Carter *v.* McClaughry, 183 U. S. 365, 390, 46 L. Ed. 236; United States *v.* Ball, 163 U. S. 662, 669, 41 L. Ed. 300; Whitten *v.* Tomlinson, 160 U. S. 231, 243, 40 L. Ed. 406; Ex parte Belt, 159 U. S. 95, 40 L. Ed. 88.

And the action of a trial court in overruling a plea of former jeopardy, cannot be reviewed on this writ. Ex parte Bigelow, 113 U. S. 328, 28 L. Ed. 1005; In re Eckart, 166 U. S. 481, 484, 41 L. Ed. 1085.

72. Nielsen, Petitioner, 131 U. S. 176, 184, 33 L. Ed. 118; In re Snow, 120 U. S. 274, 30 L. Ed. 658.

"In the case of Snow, we laid emphasis on the fact that the double conviction for the same offense appeared on the face of the judgment; but if it appears in the indictment, or anywhere else in the record (of which the judgment is only a part), it is sufficient." Nielsen, Petitioner, 131 U. S. 176, 183, 33 L. Ed. 118; See the title AUTREFOIS, ACQUIT AND CONVICT, vol. 2, p. 762.

73. **As determined by original caption.**—Ekiu *v.* United States, 142 U. S. 651, 35 L. Ed. 1146; Iasigi *v.* Van De Carr, 166 U. S. 391, 395, 41 L. Ed. 1045.

74. It is no ground for discharge that the arrest under a treaty provision between the United States and France was made by a state officer. Dallemagne *v.* Moisan, 197 U. S. 169, 177, 49 L. Ed. 709.

75. **On surrender by bail.**—Baker *v.* Grice, 169 U. S. 284, 293, 42 L. Ed. 748; Ex parte Milburn, 9 Pet. 704, 709, 9 L. Ed. 280.

76. **As determined by duration of custody.**—Ex parte Baez, 177 U. S. 378, 44 L. Ed. 813; Mills *v.* Green, 159 U. S. 651, 40 L. Ed. 293; New Orleans Flour Inspectors *v.* Glover, 160 U. S. 170, 40 L. Ed. 382; Kimball *v.* Kimball, 174 U. S. 158, 50 L. Ed. 932; Jones *v.* Montague, 194 U. S. 147, 48 L. Ed. 913; Cheong Ah Moy *v.* United States, 113 U. S. 216, 28 L. Ed. 983.

In this case, if the writ of habeas corpus had been issued April 9, the next courtday after the petition for the writ was presented to the federal supreme court, the imprisonment of petitioner would have expired six days after the issue of the writ, and fourteen days before the person having him in custody would be required to make his return, and, before the case could be heard upon the writ and return, the prisoner would no longer be in custody. Held, it is well settled that the federal supreme court will not proceed to adjudication where there is no subject matter on which the judgment of the court can operate. And although this application has not as yet reached that stage, still as it is obvious that before a return to the writ can be made, or any other action can be taken, the restraint of which petitioner complains would have terminated, we are constrained to decline to grant leave to file the petition. Ex parte Baez, 177 U. S. 378, 389, 390, 44 L. Ed. 813.

The federal supreme court will not spend its time in deciding a moot case. In re Lincoln, 202 U. S. 178, 179, 50 L. Ed. 984.

77. **Want of jurisdiction.**—Ex parte Terry, 128 U. S. 289, 304, 32 L. Ed. 405; Ex parte Lange, 18 Wall. 163, 21 L. Ed.

officer,[78] not having jurisdiction of both the subject matter and the person in custody.[79]

2. Acquisition of Jurisdiction by Unlawful Means.—When a criminal is brought or is in fact within the jurisdiction and custody of a state, charged with a crime against its laws, he cannot, so far as the constitution and laws of the United States are concerned, have the particular methods employed to bring him into the state inquired into on a writ of habeas corpus,[80] although he may have been abducted and brought into the state by persons acting without authority of law,[81] or the same result may have been accompanied under the forms of law.[82] A circuit court of the United States when asked, upon habeas corpus, to discharge a person held in actual custody by a state for trial in one of its courts under an indictment charging a crime against its laws, cannot properly take into account the methods whereby the state obtained such custody.[83]

3. Private Authority.—Originally the common-law writ was granted solely in cases of arrest and forcible imprisonment under color or claim of warrant of law. As late as 2 James II, the court expressly denied its allowance in a case of detention or restraint by a private person, and the Habeas Corpus Act of Charles II, which is proclaimed as the Magna Charta of British liberty, has relation only to imprisonment on criminal charges.[84] Almost all of the cases in which the writ of habeas corpus has been granted, are those in which life or liberty was invaded by persons assuming to act under the authority of the government.[85]

4. Warrant or Commitment.—The writ of habeas corpus may issue to re-

872; Ex parte Parks, 93 U. S. 18, 21, 23, 23 L. Ed. 787; Ex parte Siebold, 100 U. S. 371, 375, 25 L. Ed. 717; Ex parte Rowland, 104 U. S. 604, 26 L. Ed. 861; Ex part Curtis, 106 U. S. 371, 27 L. Ed. 232; In re Ayers, 123 U. S. 443, 485, 31 L. Ed. 216; In re Sawyer, 124 U. S. 200, 221, 31 L. Ed. 402; Harvey *v.* Tyler, 2 Wall. 328, 345, 17 L. Ed. 871; Ex parte Fiske, 113 U. S. 713, 718, 28 L. Ed. 1117; McClaughry *v.* Deming, 186 U. S. 49, 69, 46 L. Ed. 1049; Bergemann *v.* Backer, 157 U. S. 655, 39 L. Ed. 845; In re Frederich, 149 U. S. 70, 76, 37 L. Ed. 653; In re Mills, 135 U. S. 263, 270, 34 L. Ed. 107; In re Wilson, 140 U. S. 575, 584, 35 L. Ed. 513; Geyger *v.* Stoy, 1 Dall. 135, 1 L. Ed. 70; In re Coy, 127 U. S. 731, 757, 32 L. Ed. 274; In re Wood, 140 U. S. 278, 290, 35 L. Ed. 505; In re Jugiro, 140 U. S. 291, 35 L. Ed. 510; Ex parte Virginia, 100 U. S. 339, 343, 25 L. Ed. 676; Ex parte Burford, 3 Cranch 448, 2 L. Ed. 495; In re Mayfield, 141 U. S. 107, 116, 35 L. Ed. 635; In re Snow, 120 U. S. 274, 30 L. Ed. 658.

78. United States *v.* Sing Tuck, 194 U. S. 161, 168, 48 L. Ed. 917.

79. McClaughry *v.* Deming, 186 U. S. 49, 46 L. Ed. 1049; Ex parte Terry, 128 U. S. 289, 304, 32 L. Ed. 405; In re Swan, 150 U. S. 637, 648, 37 L. Ed. 1207. See post, "For Want of General Jurisdiction," V, J, 6, d, (2); "For Want of Jurisdiction to Render Particular Judgment or Order," V, J, 6, d, (3); "On Unconstitutional Statute," V, J, 6, d, (4); "Courts-Martial," V, J, 7, c; "Jurisdiction," IX, D, 8, b.

80. Acquisition of jurisdiction by unlawful means.—Pettibone *v.* Nichols, 203 U. S. 192, 203, 214, 51 L. Ed. 148; Mahon *v.* Justice, 127 U. S. 700, 706, 712, 32 L. Ed. 283; Ker *v.* Illinois, 119 U. S. 436, 437, 30 L. Ed. 421; Moyer *v.* Nichols, 203 U. S. 221, 51 L. Ed. 160; Appleyard *v.* Massachusetts, 203 U. S. 222, 232, 51 L. Ed. 161.

The fact that a person was brought within the jurisdiction of the court by means of abduction, fraud, or mistake or other improper means, will not authorize his discharge on habeas corpus. Hyatt *v.* Corkran, 188 U. S. 691, 47 L. Ed. 657.

And if the act complained of was done against the law of the foreign state, it was for that state to vindicate its own law. Mahon *v.* Justice, 127 U. S. 700, 708, 32 L. Ed. 283.

81. Thus a person indicted for a crime in one state, forcibly abducted from another state and brought to the state where he was indicted by parties acting without warrant or authority of law, is not entitled under the constitution or laws of the United States to release from detention under the indictment by reason of such forcible and unlawful abduction, by the writ of habeas corpus. Mahon *v.* Justice, 127 U. S. 700, 706, 32 L. Ed. 283.

82. Pettibone *v.* Nichols, 203 U. S. 192, 214, 51 L. Ed. 148.

83. Pettibone *v.* Nichols, 203 U. S. 192, 212, 215, 51 L. Ed. 148; Cook *v.* Hart, 146 U. S. 183, 192, 36 L. Ed. 934. See the title DUE PROCESS OF LAW, vol. 5, p. 669.

84. Private authority.—In re Burrus, 136 U. S. 586, 602, 34 L. Ed. 500; New York Foundling Hospital *v.* Gatti, 203 U. S. 429, 438, 51 L. Ed. 254.

85. United States *v.* Lee, 106 U. S. 196, 218, 27 L. Ed. 171; Tindal *v.* Wesley, 167 U. S. 204, 215, 42 L. Ed. 137; Ex parte Milligan, 4 Wall. 2, 18 L. Ed. 281.

view a commitment under a warrant of a judicial officer;[86] but, to justify a discharge, it must appear upon the face of the record that the order of commitment was void.[87] A prisoner in custody of a state will not be discharged by a writ of habeas corpus from a federal court, where the mittimus under which he is held was issued by a justice of the peace under a state statute, upon the ground that it does not conform to that statute.[88]

5. INDICTMENT OF GRAND JURY—a. *In General.*—If the court has jurisdiction of the person and of the offense and the indictment is not void upon its face, it is not open to collateral attack by habeas corpus.[89]

b. *Form and Sufficiency.*—Any defect of form in the indictment is at most an error, which cannot be reviewed on habeas corpus;[90] and, if an indictment charges enough to show the general character of the crime, and that it is within the jurisdiction of the court to try and to punish for the offense sought to be set forth in the indictment, although the court erroneously held the indictment sufficient to charge the offense, the decision was within its jurisdiction, and cannot be re-examined on habeas corpus.[91] The want of conformity of an indictment to the provisions of a statute cannot be looked into on a writ of habeas corpus.[92] Every question concerning the sufficiency and validity of an indictment and the evidence necessary to support it, is not matter of jurisdiction, authorizing an interference, if error takes place, by a writ of habeas corpus for its correction.[93]

86. Warrant or commitment.—Ex parte Virginia, 100 U. S. 339, 343, 25 L. Ed. 676; United States *v.* Hamilton, 3 Dall. 17, 1 L. Ed. 490; Ex parte Bollman, 4 Cranch 75, 114, 2 L. Ed. 554.

A commitment under a warrant of a justice of the peace, not supported by oath, is ground for discharge. Ex parte Burford, 3 Cranch 448, 449, 2 L. Ed. 495.

In case above, there was no judgment of a court of general jurisdiction. Ex parte Watkins, 3 Pet. 193, 208, 7 L. Ed. 650.

87. Ex parte Karstendick, 93 U. S. 396, 402, 23 L. Ed. 889. See Ex parte Milburn, 9 Pet. 704, 709, 9 L. Ed. 280; Riggins *v.* United States, 199 U. S. 547, 548, 50 L. Ed. 303.

Where the warrant is illegal, because it does not show sufficient cause for detention, the prisoner will be discharged. Ex parte Watkins, 3 Pet. 193, 208, 7 L. Ed. 650; Ex parte Burford, 3 Cranch 448, 2 L. Ed. 495.

88. Whitten *v.* Tomlinson, 160 U. S. 231, 40 L. Ed. 406.

89. Indictment of grand jury.—United States *v.* Pridgeon, 153 U. S. 48, 60, 38 L. Ed. 631; In re Lancaster, 137 U. S. 393, 34 L. Ed. 713; Riggins *v.* United States, 199 U. S. 547, 550, 50 L. Ed. 303; Ex parte Watkins, 3 Pet. 193, 203, 7 L. Ed. 650; Southworth *v.* United States, 151 U. S. 179, 185, 38 L. Ed. 119; Matter of Moran, 203 U. S. 96, 103, 51 L. Ed. 105. See the title INDICTMENTS, INFORMATIONS, PRESENTMENTS AND COMPLAINTS. See post, "Without Indictment," V, J, 6, d, (5).

90. Form and sufficiency.—Ex parte Clarke, 100 U. S. 399, 403, 25 L. Ed. 715.

The fact that the indictment was not indorsed "a true bill" does not furnish ground for the writ of habeas corpus. Whitten *v.* Tomlinson, 160 U. S. 231, 243, 40 L. Ed. 406.

91. Dimmick *v.* Tompkins, 194 U. S. 540, 552, 48 L. Ed. 1110; Munsey *v.* Clough, 196 U. S. 364, 373, 49 L. Ed. 515; Ex parte Reggel, 114 U. S. 642, 29 L. Ed. 250; Pearce *v.* Texas, 155 U. S. 311, 313, 39 L. Ed. 164; Howard *v.* Fleming, 191 U. S. 126, 135, 48 L. Ed. 121; Ex parte Parks, 93 U. S. 18, 23 L. Ed. 787; In re Coy, 127 U. S. 731, 32 L. Ed. 274; In re Eckart, 166 U. S. 481, 41 L. Ed. 1085; Caldwell *v.* Texas, 137 U. S. 692, 698, 34 L. Ed. 816; Bergemann *v.* Backer, 157 U. S. 655, 39 L. Ed. 845; Kohl *v.* Lehlback, 160 U. S. 293, 296, 40 L. Ed. 432; Whitten *v.* Tomlinson, 160 U S. 231, 243, 40 L. Ed. 406.

"A trial court possessing general jurisdiction of the class of offenses within which is embraced the crime sought to be set forth in the indictment is possessed of authority to determine the sufficiency of an indictment, and * * * in adjudging it to be valid and sufficient, acts within its jurisdiction, and a conviction and judgment thereunder cannot be questioned on habeas corpus, because of a lack of certainty or other defect in the statement in the indictment of the facts averred to constitute a crime." In re Eckart, 166 U. S. 481, 485, 41 L. Ed. 1085; In re Coy, 127 U. S. 731, 756, 758, 32 L. Ed. 274.

92. Nonconformity to statute.—Ex parte Yarbrough, 110 U. S. 651, 28 L. Ed. 274; In re Delgado, 140 U. S. 586, 588, 35 L. Ed. 578; Ex parte Parks, 93 U. S. 18, 23 L. Ed. 787; Ex parte Watkins, 3 Pet. 193, 203, 7 L. Ed. 650.

93. Mere error does not deprive of jurisdiction.—In re Coy, 127 U. S. 731, 756,

c. *Sufficiency of Charge.*—An insufficiency in the charge of the offense in an indictment does not furnish ground for habeas corpus.[94]

d. *Misjoinder of Offenses.*—Habeas corpus is the proper remedy for the petitioner, if the crime of adultery with which he was charged is included in the crime of unlawful cohabitation for which he was convicted and punished.[95]

e. *Constitution of Grand Jury.*—The legality or illegality of the grand jury which returned the indictment goes only to the regularity of the proceedings had and not to the jurisdiction of the court, and cannot be taken advantage of on habeas corpus.[96]

f. *Finding of Indictment.*—The fact that the indictment was found by the grand jury by mistake and misconception, is a matter of proper inquiry in the courts of the state, but affords no ground for interposition by the courts of the United States by writ of habeas corpus.[97]

g. *For Act Not Criminal.*—See elsewhere in this title.[98]

h. *Evidence before Grand Jury.*—Neither the quality nor quantity of the evidence before the grand jury will furnish ground for the writ,[99] unless there is an entire lack of evidence to support the accusation.[1] An indictment constitutes prima facie evidence of probable cause, but it is not conclusive.[2]

i. *Amendment of Indictment.*—A prisoner who has been tried, convicted and

32 L. Ed. 274; Ex parte Watkins, 3 Pet. 193, 203, 7 L. Ed. 650; Ex parte Parks, 93 U. S. 18, 23 L. Ed. 787; Ex parte Yarbrough, 110 U. S. 651, 654, 28 L. Ed. 274.

94. Sufficiency of charge.—Howard *v.* Fleming, 191 U. S. 126, 135, 48 L. Ed. 121; Caldwell *v.* Texas, 137 U. S. 692, 698, 34 L. Ed. 816; Davis *v.* Texas, 139 U. S. 651, 653, 35 L. Ed. 300; Bergemann *v.* Backer, 157 U. S. 655, 39 L. Ed. 845; Ex parte Watkins, 3 Pet. 193, 206, 7 L. Ed. 650; United States *v.* Pridgeon, 153 U. S. 48, 59, 38 L. Ed. 631.

Whether an indictment sufficiently charges the crime of murder in the first degree is for the trial court to determine. Caldwell *v.* Texas, 137 U. S. 692, 698, 34 L. Ed. 816; Bergemann *v.* Backer, 157 U. S. 655, 656, 39 L. Ed. 845.

95. Misjoinder of offenses.—Nielsen, Petitioner, 131 U. S. 176, 185, 33 L. Ed. 118.

96. Constitution of grand jury.—Ex parte Harding, 120 U. S. 782, 30 L. Ed. 824; In re Wilson, 140 U. S. 575, 35 L. Ed. 513.

Defect in number of grand jurors.—"A deficiency in the number of grand jurors prescribed by law, there being present and acting a greater number than that requisite for the finding of an indictment, is not such a defect as, though unnoticed by the prisoner until after trial and sentence, vitiates the entire proceedings and compels his discharge on habeas corpus." In re Wilson, 140 U. S. 575, 582, 35 L. Ed. 513. See the title GRAND JURY, ante, p. 570.

Panel not of same race as accused.—The fact that the grand jury was constituted of persons of a different race from the accused is not ground for issuance of the writ. Andrews *v.* Swartz, 156 U. S. 272, 276, 39 L. Ed. 422; In re Wood, 140 U. S. 278, 285, 35 L. Ed. 505. See the title CIVIL RIGHTS, vol. 3, p. 831.

Alien allowed to serve.—The fact that a law of the territory allowed an alien who had declared his intention to become a citizen of the United States to sit on a grand jury, and that an alien did in fact sit on the jury that found the indictment against this petitioner, did not deprive the court of its jurisdiction for his trial under the indictment. The objection, if it be one, goes only to the regularity of the proceedings, not to the jurisdiction of the court and could not be availed of on habeas corpus. Ex parte Harding, 120 U. S. 782, 784, 30 L. Ed. 824. See the title CIVIL RIGHTS, vol. 3, p. 831.

97. Finding of indictment.—Whitten *v.* Tomlinson, 160 U. S. 231, 243, 40 L. Ed. 406; In re Wood, 140 U. S. 278, 35 L. Ed. 505; In re Wilson, 140 U. S. 575, 35 L. Ed. 513.

98. For act not criminal.—See post, "As Determined by Nature of Offense," V, M.

99. Evidence before grand jury.—Harkrader *v.* Wadley, 172 U. S. 148, 169, 43 L. Ed. 399.

1. Hyde *v.* Shine, 199 U. S. 62, 84, 50 L. Ed. 90; Dimond *v.* Shine, 199 U. S. 88, 50 L. Ed. 99.

2. Tinsley *v.* Treat, 205 U. S. 20, 31, 51 L. Ed. 689; Beavers *v.* Henkel, 194 U. S. 73, 48 L. Ed. 882; Benson *v.* Henkel, 198 U. S. 1, 49 L. Ed. 919; Hyde *v.* Shine, 199 U. S. 62, 50 L. Ed. 90; Greene *v.* Henkel, 183 U. S. 249, 46 L. Ed. 177.

The production of the indictment makes at least a prima facie case against the accused, and if evidence was received on his behalf it was for the lower court to say whether upon the whole testimony there was proof of probable cause. In re Cortes, 136 U. S. 330, 34 L. Ed. 464; Bryant *v.* United States, 167 U. S. 104, 42 L. Ed. 94; Hyde *v.* Shine, 199 U. S. 62, 84, 50 L. Ed. 90; Dimond *v.* Shine, 199 U. S. 88, 50 L. Ed. 99.

sentenced to imprisonment by a circuit court of the United States, under an indictment amended by the district attorney, by leave of the court, after it had been returned by the grand jury, is entitled to his discharge under a writ of habeas corpus issued by the federal supreme court on the ground that the proceeding was void.[3]

j. *When No Objection Made in Trial Court.*—If it be a doubtful question, whether the defendant can, after trial and verdict, take advantage of a defect in the indictment by direct challenge, it would clearly seem that it is one not going to the matter of jurisdiction, and one which cannot be taken advantage of by a collateral attack by habeas corpus.[4]

6. Judgment or Order of Court—a. *In General.*—The general rule is, that when the court has jurisdiction by law of the offense charged, and of the party who is so charged, its judgments, sentences, orders or decrees are not nullities and subject to collateral attack by habeas corpus.[5] The judgment of a court is evidence of its own legality,[6] and a person in custody thereunder cannot be released on habeas corpus,[7] unless such judgment is void for want of jurisdiction or other cause.[8] But personal liberty is of so great moment in the eye of the law that the judgment of an inferior court is not deemed so conclusive as to prevent a review of the question of the court's authority to try and imprison the party on habeas corpus by a superior court or judge having authority to award the writ.[9]

b. *At Common Law.*—Before the Habeas Corpus Act was passed, the privilege of the writ was denied to persons imprisoned upon conviction for a crime, or in

3. Amendment of indictment.—Ex parte Bain, 121 U. S. 1, 13, 30 L. Ed. 849; In re Ayers, 123 U. S. 443, 486, 31 L. Ed. 216.

Where there has been a charge in the body of an indictment for a capital or otherwise infamous crime without a resubmission to the grand jury, the prisoner is entitled to be discharged on habeas corpus. Ex parte Bain, 121 U. S. 1, 12, 30 L. Ed. 849.

4. When no objection made in trial court.—In re Wilson, 140 U. S. 575, 582, 585, 35 L. Ed. 513; In re Lancaster, 137 U. S. 393, 395, 34 L. Ed. 713; Ex parte Bain, 121 U. S. 1, 30 L. Ed. 849; Ex parte Watkins, 3 Pet. 193, 7 L. Ed. 650.

5. Judgment or order of court.—Ex parte Bigelow, 113 U. S. 328, 330, 28 L. Ed. 1005; In re Eckart, 166 U. S. 481, 485, 41 L. Ed. 1085; Nielsen, Petitioner, 131 U. S. 176, 182, 33 L. Ed. 118; Ohio *v.* Thomas, 173 U. S. 276, 43 L. Ed. 699.

6. The judgment of the circuit court, in a criminal case, is, of itself, evidence of its own legality, and requires for its support no inspection of the indictment on which it is founded. Ex parte Watkins, 3 Pet. 193, 207, 7 L. Ed. 650; Holmes *v.* Jennison, 14 Pet. 540, 586i, 10 L. Ed. 579.

7. "The general rule is, that a conviction and sentence by a court of competent jurisdiction is lawful cause of imprisonment, and no relief can be given by habeas corpus." Ex parte Siebold, 100 U. S. 371, 375, 25 L. Ed. 717; Ex parte Watkins, 3 Pet. 193, 208, 209, 7 L. Ed. 650; In re Metzger, 5 How. 176, 190, 12 L. Ed. 104; Ex parte Reed, 100 U. S. 13, 23, 25 L. Ed. 538; Ex parte Parks, 93 U. S. 18, 22, 23 L. Ed. 787; Anderson *v.* Treat, 172 U. S. 24, 31, 43 L. Ed. 351.

Persons convicted or in execution could not avail themselves of the writ under 31 Car. II. Ex parte Watkins, 3 Pet. 193, 202, 7 L. Ed. 650.

8. Ex parte Parks, 93 U. S. 18, 23 L. Ed. 787.

"To warrant the discharge of the petitioner, the sentence under which he is held must be not merely erroneous and voidable, but absolutely void." Ex parte Reed, 100 U. S. 13, 23, 25 L. Ed. 538; Ex parte Kearney, 7 Wheat. 38, 5 L. Ed. 391; Ex parte Watkins, 3 Pet. 193, 7 L. Ed. 650; Ex parte Milligan, 4 Wall. 2, 18 L. Ed. 281.

A regular judgment of conviction cannot be questioned collaterally on habeas corpus. But there are exceptions to this rule which have more than once been acted upon by the court. It is firmly established that if the court which renders a judgment has not jurisdiction to render it, either because the proceedings, or the law under which they are taken, are unconstitutional, or for any other reason, the judgment is void and may be questioned collaterally, and a defendant who is imprisoned under and by virtue of it may be discharged from custody on habeas corpus. This was so decided in the cases of Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872, and Ex parte Siebold, 100 U. S. 371, 25 L. Ed. 717. Nielsen, Petitioner, 131 U. S. 176, 182, 33 L. Ed. 118.

9. Ex parte Siebold, 100 U. S. 371, 377, 25 L. Ed. 717. See post, "Excessive Judgment or Sentence," V, J, 6, e.

execution.[10]

c. *Erroneous Judgment or Order*—(1) *In General.*—Imprisonment under an erroneous judgment or sentence is not unlawful and furnishes no ground for habeas corpus.[11] An error in the sentence does not vitiate the verdict, and the federal supreme court sitting in habeas corpus, might remand for resentence one whose conviction was lawful but against whom a judgment, erroneous in part, had been rendered.[12] An error committed by a trial judge in ruling upon the sufficiency of a verdict is no ground for interposition by habeas corpus.[13]

(2) *On Defective Indictment.*—Although the indictment on which founded was fatally defective, yet, if the court had jurisdiction of the cause and of the party, its judgment is not void, but only voidable by writ of error, and until so avoided, cannot be collaterally impeached.[14]

d. *Void Judgment or Order*—(1) *In General.*—The only ground on which the federal supreme court, or any court, without some special statute authorizing it, will give relief on habeas corpus to a prisoner under conviction and sentence of another court, is the want of jurisdiction in such court over the person or the cause, or some other matter rendering its proceedings void.[15]

10. At common law.—Ex parte Parks, 93 U. S. 18, 21, 23 L. Ed. 787.

11. Erroneous judgment or order.—Ex parte Watkins, 3 Pet. 193, 203, 7 L. Ed. 650; In re Metzger, 5 How. 176, 191, 12 L. Ed. 104.

"Judgments of court, whether federal or state, cannot be treated as void and attacked collaterally on habeas corpus, even if error has actually supervened." In re Swan, 150 U. S. 637, 651, 37 L. Ed. 1207; Ex parte Watkins, 3 Pet. 193, 7 L. Ed. 650.

"It has always been held that a mere error in point of law, committed by a court in a case properly subject to its cognizance, can only be reviewed by the ordinary methods of appeal or writ of error." Ex parte Parks, 93 U. S. 18, 21, 23 L. Ed. 787; Ex parte Reed, 100 U. S. 13, 23, 25 L. Ed. 538; Ex parte Watkins, 3 Pet. 193, 7 L. Ed. 650.

The distinction between an erroneous judgment and one that is illegal or void is well illustrated by the two cases of Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872, and Ex parte Parks, 93 U. S. 18, 23 L. Ed. 787. And the following cases: Ex parte Siebold, 100 U. S. 371, 375, 25 L. Ed. 717; Ex parte Bigelow, 113 U. S. 328, 28 L. Ed. 1005; In re Coy, 127 U. S. 731, 32 L. Ed. 274; In re Belt, 159 U. S. 95, 40 L. Ed. 88; In re Eckart, 166 U. S. 481, 41 L. Ed. 1085; Humphries *v.* District of Columbia, 174 U. S. 190, 195, 43 L. Ed. 944.

An omission of a sentence for imprisonment in another state to state the want of a prison in the state of the court, is not ground for discharge. Ex parte Wilson, 114 U. S. 417, 29 L. Ed. 89.

12. Ballew *v.* United States, 160 U. S. 187, 202, 40 L. Ed. 388; In re Bonner, 151 U. S. 242, 262, 38 L. Ed. 149.

13. Ruling upon sufficiency of verdict.—The statutes of the state of Wisconsin justify a conviction of murder in either the first, second or third degree, and it has also been there held that the jury must find the degree in their verdict, in order that the court may impose the proper punishment. The verdict clearly did not acquit him of the crime with which he was charged, but found that he had committed an offense embraced within the accusation upon which he was tried. It was within the jurisdiction of the trial judge to pass upon the sufficiency of the verdict and to construe its legal meaning, and if in so doing he erred, and held the verdict to be sufficiently certain to authorize the imposition of punishment for the highest grade of the offense charged, it was an error committed in the exercise of jurisdiction, and one which does not present a jurisdictional defect, remediable by the writ of habeas corpus. In re Eckart, 166 U. S. 481, 482, 41 L. Ed. 1085.

14. Murphy *v.* Massachusetts, 177 U. S. 155, 159, 44 L. Ed. 711. See post, "Without Indictment," V, J, 6, d, (5).

15. Void judgment or order.—Ex parte Siebold, 100 U. S. 371, 375, 25 L. Ed. 717; Ex parte Parks, 93 U. S. 18, 21, 23 L. Ed. 787; Ex parte Rowland, 104 U. S. 604, 618, 26 L. Ed. 861; Ex parte Virginia, 100 U. S. 339, 343, 25 L. Ed. 676; United States *v.* Hamilton, 3 Dall. 17, 1 L. Ed. 490; Ex parte Burford, 3 Cranch 448, 2 L. Ed. 495; Ex parte Jackson, 96 U. S. 727, 24 L. Ed. 877; Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872; Ohio *v.* Thomas, 173 U. S. 276, 43 L. Ed. 699.

"A habeas corpus proceeding is a collateral attack of a civil nature to impeach the validity of a judgment or sentence of another court in a criminal proceeding, and it should, therefore, be limited to cases in which the judgment or sentence attacked is clearly void by reason of its having been rendered without jurisdiction, or by reason of the court's having exceeded its jurisdiction in the premises." In re Frederich, 149 U. S. 70, 76, 37 L. Ed. 653.

Not authorized by law.—Custody under a judgment of a federal court given with-

(2) *For Want of General Jurisdiction.*—If the court has no general jurisdiction,[16] or exceeds its jurisdiction,[17] custody under its judgment or order will be relieved by habeas corpus.[18]

(3) *For Want of Jurisdiction to Render Particular Judgment or Order.*—A party is entitled to a habeas corpus, not merely where the court is without jurisdiction of the cause, but where it has no constitutional authority or power to condemn the prisoner,[19] or to render the particular judgment or order.[20]

(4) *On Unconstitutional Statute.*—An unconstitutional law is void, and is as no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment. The court has no jurisdiction and relief will be granted by habeas corpus.[21] The same rule is applicable to a conviction under a void ordinance.[22]

(5) *Without Indictment.*—A sentence of a circuit court without an indictment, in case of an infamous crime, is void, and the prisoner will be released on habeas corpus.[23]

out authority of law may be relieved against. Ex parte Virginia, 100 U. S. 339, 343, 25 L. Ed. 676.

16. **For want of general jurisdiction.**—Ex parte Parks, 93 U. S. 18, 22, 23 L. Ed. 787; United States *v.* Pridgeon, 153 U. S. 48, 59, 38 L. Ed. 631; Nielsen, Petitioner, 131 U. S. 176, 33 L. Ed. 118; Felts *v.* Murphy, 201 U. S. 123, 130, 50 L. Ed. 689; In re Swan, 150 U. S. 637, 37 L. Ed. 1207.

A person in custody by virtue of an order or judgment of a court not having general jurisdiction of a person and subject matter, may be discharged under habeas corpus. In re Bonner, 151 U. S. 242, 38 L. Ed. 149.

17. Where the court transcends its power in rendering sentence, custody thereunder is ground for habeas corpus. In re Mills, 135 U. S. 263, 270, 34 L. Ed. 107; In re Bonner, 151 U. S. 242, 38 L. Ed. 149; Ex parte Kearney, 7 Wheat. 38, 5 L. Ed. 391; Ex parte Wells, 18 How. 307, 15 L. Ed. 421; Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872; Ex parte Parks, 93 U. S. 18, 23, 23 L. Ed. 787. See post, "Excessive Judgment or Sentence," V, J, 6, e.

18. Ex parte Parks, 93 U. S. 18, 22, 23 L. Ed. 787. See ante, "Without Jurisdiction," V, J, 1; post, "Courts-Martial," V, J, 7, c.

19. **For want of jurisdiction to render particular judgment or order.**—Nielsen, Petitioner, 131 U. S. 176, 184, 33 L. Ed. 118.

20. Ex parte Watkins, 3 Pet. 193, 7 L. Ed. 650; Nielsen, Petitioner, 131 U. S. 176, 182, 33 L. Ed. 118; In re Bonner, 151 U. S. 242, 38 L. Ed. 149; Ex parte Lange, 18 Wall. 163, 176, 178, 21 L. Ed. 872; Lange *v.* Benedict, 99 U. S. 68, 71, 25 L. Ed. 469; Ex parte Rowland, 104 U. S. 604, 612, 26 L. Ed. 861; In re Coy, 127 U. S. 731, 738, 32 L. Ed. 274; Ex parte Parks, 93 U. S. 18, 23, 23 L. Ed. 787; Ex parte Virginia, 100 U. S. 339, 343, 25 L. Ed. 676; Ex parte Bigelow, 113 U. S. 328, 28 L. Ed. 1005; Ex parte Milligan, 4 Wall. 2, 131, 18 L. Ed. 281; Ex parte Wilson, 114 U. S. 417, 29 L. Ed. 89; In re Snow, 120 U. S. 274, 286, 30 L. Ed. 658.

"There must be jurisdiction to give the judgment rendered, as well as to hear and determine the cause." Ex parte Reed, 100 U. S. 13, 23, 25 L. Ed. 538.

The court may have authority over the case, but no authority to give the particular judgment. Nielsen, Petitioner, 131 U. S. 176, 184, 33 L. Ed. 118; In re Snow, 120 U. S. 274, 30 L. Ed. 658.

To particular punishment.—Howard *v.* Fleming, 191 U. S. 126, 136, 48 L. Ed. 121.

"The prisoner is ordered to be confined in the penitentiary, where the law does not allow the court to send him for a single hour. To deny the writ of habeas corpus in such a case is a virtual suspension of it; and it should be constantly borne in mind that the writ was intended as a protection of the citizen from encroachment upon his liberty from any source—equally as well from the unauthorized acts of courts and judges as the unauthorized acts of individuals." In re Bonner, 151 U. S. 242, 256, 258, 38 L. Ed. 149; Ex parte Lange, 18 Wall. 163, 176, 21 L. Ed. 872; Ex parte Parks, 93 U. S. 18, 23, 23 L. Ed. 787; Ex parte Virginia, 100 U. S. 339, 343, 25 L. Ed. 676; Ex parte Rowland, 104 U. S. 604, 612, 26 L. Ed. 861; In re Coy, 127 U. S. 731, 738, 32 L. Ed. 274; Nielsen, Petitioner, 131 U. S. 176, 182, 33 L. Ed. 118.

21. **Unconstitutionality of statute.**—Ex parte Royall, No. 1, 117 U. S. 241, 248, 29 L. Ed. 868; Ex parte Siebold, 100 U. S. 371, 376, 25 L. Ed. 717; Ex parte Yarbrough, 110 U. S. 651, 654, 28 L. Ed. 274; Nielsen, Petitioner, 131 U. S. 176, 33 L. Ed. 118; In re Coy, 127 U. S. 731, 758, 32 L. Ed. 274; Ex parte Watkins, 3 Pet. 193, 7 L. Ed. 650.

22. **Unconstitutional ordinance.**—A prisoner in custody of a state under a void ordinance may be released on habeas corpus. Yick Wo *v.* Hopkins, 118 U. S. 356, 365, 30 L. Ed. 220.

23. **Without indictment.**—In re Sawyer, 124 U. S. 200, 221, 31 L. Ed. 402; Ex parte

(6) *Upon Verdict of Guilty.*—A judgment upon a verdict of guilty, unreversed, stands good and warrants the punishment of the defendant, and he will not be discharged by a writ of habeas corpus.[24]

(7) *Becoming Void after Rendition.*—If a person is in custody under a judgment, which by virtue of any matter arising ex post facto has become void, may apply for habeas corpus.[25]

e. *Excessive Judgment or Sentence*—(1) *Excessive Severable from Authorized Portion.*—Where a court has jurisdiction of the person and of the offense,[26] the imposition of a judgment or sentence in excess of what the law permits, is an irregularity merely,[27] and does not render the legal or authorized portion of the judgment or sentence void,[28] but leaves that portion only which is excessive open to question and attack on habeas corpus, after the prisoner has fulfilled the authorized portion thereof.[29] The prisoner will not be discharged on habeas corpus until he has performed or offered to perform so much of the order, as it was within the power of the district court to impose,[30] where the excessive portion of such judgment or sentence is separable and may be relieved against

Wilson, 114 U. S. 417, 429, 29 L. Ed. 89. See the title CONSTITUTIONAL LAW, vol. 4, p. 492.

24. Upon verdict of guilty.—United States *v.* Ball, 163 U. S. 662, 670, 41 L. Ed. 300; Kepner *v.* United States, 195 U. S. 100, 130, 49 L. Ed. 114; Murphy *v.* Massachusetts, 177 U. S. 155, 159, 44 L. Ed. 711; Ex parte Parks, 93 U. S. 18, 23, 23 L. Ed. 787; In re Eckart, 166 U. S. 481, 482, 41 L. Ed. 1085; In re Wood, 140 U. S. 278, 285, 35 L. Ed. 505.

But a prisoner under sentence on more than one conviction for one continuous crime may be discharged. In re Snow, 120 U. S. 274, 281, 30 L. Ed. 658.

25. Becoming void after rendition.—Ex parte Wells, 18 How. 307, 15 L. Ed. 421.

26. Excessive judgment—Excessive portion severable from authorized.—United States *v.* Pridgeon, 153 U. S. 48, 62, 38 L. Ed. 631.

27. Excess is mere irregularity.—And is only voidable in proceeding upon a writ of error. United States *v.* Pridgeon, 153 U. S. 48, 62, 38 L. Ed. 631; Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872; In re Graham, 138 U. S. 461, 462, 34 L. Ed. 1051.

"It seems that under the law of Wisconsin a judgment in a criminal case which merely exceeds in the time of punishment prescribed by the sentence that which is authorized by law, is not absolutely void, but only erroneous, and that the error must be corrected on appeal and cannot be corrected by a writ of habeas corpus." In re Graham, 138 U. S. 461, 462, 34 L. Ed. 1051.

28. Legal portion not void.—In re Graham, 138 U. S. 461, 464, 34 L. Ed. 1051.

"When the highest court of a state holds that a judgment of one of its inferior courts imposing punishment in a criminal case is valid and binding to the extent in which the law of the state authorized the punishment, and only void for the excess, we cannot treat it as wholly void (and release the prisoner), there being no principle of federal law invaded in such ruling." In re Graham, 138 U. S. 461, 464, 34 L. Ed. 1051.

29. Authorized portion to be performed before relief granted.—In re Swan, 150 U. S. 637, 653, 37 L. Ed. 1207; United States *v.* Pridgeon, 153 U. S. 48, 63, 38 L. Ed. 631; In re Mills, 135 U. S. 263, 270, 34 L. Ed. 107; In re Bonner, 151 U. S. 242, 255, 38 L. Ed. 149; Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872; Ex parte Parks, 93 U. S. 18, 23, 23 L. Ed. 787; Ballew *v.* United States, 160 U. S. 187, 202, 40 L. Ed. 388; Medley, Petitioner, 134 U. S. 160, 174, 33 L. Ed. 835; McElvaine *v.* Brush, 142 U. S. 155, 159, 35 L. Ed. 971; In re Kemmler, 136 U. S. 436, 34 L. Ed. 519.

30. Tinsley *v.* Anderson, 171 U. S. 101, 107, 43 L. Ed. 91.

Excessive in duration of time.—Where a judgment exceeds in its extent the duration of time prescribed by law, it is considered valid to the extent to which the law allowed it to be entered, and only void for the excess. Therefore, the writ of habeas corpus cannot be invoked for the relief of a party until the time has expired to which the judgment should have been limited. In re Bonner, 151 U. S. 242, 258, 38 L. Ed. 149.

Although the prisoner should not have been sentenced for any time in excess of ten years, yet until that time has expired he has no right to ask the annulment of the entire judgment. Such being the ruling of the state court of Wisconsin and there being nothing in it repugnant to any principle of natural justice, the writ of habeas corpus should be refused. At the end of that time, it is probable the state court will discharge him. In re Graham, 138 U. S. 461, 462, 34 L. Ed. 1051. See, also, Ex parte Lange, 18 Wall. 163, 166, 21 L. Ed. 872; Ex parte Bigelow, 113 U. S. 328, 331, 28 L. Ed. 1005.

Computation of time served.—See Dimmick *v.* Tompkins, 194 U. S. 540, 48 L. Ed. 1110.

without disturbing the valid portion. The excessive portion of a judgment or sentence is separable where it exceeds in its extent the duration of time prescribed by law;[31] where the judgment is lawful but unauthorized costs are imposed;[32] or where the sentence imposes a fine and imprisonment, under a statute authorizing fine or imprisonment.[33] There is no law or justice in giving to a prisoner relief under habeas corpus that is equivalent to an acquittal, when, upon writ of error, he could only have secured relief from that portion of the sentence which was void.[34]

(2) *Excessive and Authorized Portions Entire.*—Where the excessive and the authorized portions of the judgment or sentence are incapable of being separated so that the latter may be performed despite a discharge from the former, the whole must be treated as a nullity subject to be released from on habeas corpus.[35] There is a distinction between those cases in which the judgment is irregular, as being in excess of the time prescribed, and those in which it is void as changing the nature of the punishment from that authorized by the law.[36]

f. *Sentence after Date Set for Execution.*—Confinement in prison after the original day set for execution is not in violation of due process of law.[37] The sentence of death remains in force, and is sufficient authority for holding the convict in confinement after the day fixed has passed. It then becomes the duty of the court to assign, if there had been no other disposition of the case, a new time for execution.[38]

g. *Commuted Sentence.*—The president can constitutionally grant a conditional pardon to a convicted murderer, sentenced to be hanged, offering to change that punishment to imprisonment for life; and, if it is done, and it be accepted by the convict, it is binding upon him, and will justify a court to refuse him a writ of habeas corpus, applied for upon the ground that the pardon is absolute, and the condition of it void.[39]

h. *In Contempt Cases.*—The court will not grant a habeas corpus, where a party has been committed for a contempt adjudged by a court of competent jurisdiction.[40] The finding of a court having full jurisdiction in the premises, of the

31. When judgment severable—Excessive in regard to time.—In re Bonner, 151 U. S. 242, 253, 38 L. Ed. 149.

32. Unauthorized costs on valid judgment.—Even if it was not within the power of the court to require payment of costs, and its judgment to that extent exceeded its authority, yet a prisoner in custody under such judgment cannot be discharged on habeas corpus until he has performed so much of the judgment, or served out so much of the sentence, as it was within the power of the court to impose. United States *v.* Pridgeon, 153 U. S. 48, 63, 38 L. Ed. 631; In re Swan, 150 U. S. 637, 653, 37 L. Ed. 1207.

33. Fine and imprisonment.—Where the sentence is void, in part, as where a court has imposed a fine and imprisonment, where the statute only confers power to punish by fine or imprisonment, and the fine has been paid, the defendant may be discharged from the latter part of the sentence, by habeas corpus. Ex parte Watkins, 3 Pet. 193, 7 L. Ed. 650; Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872.

34. Foundation of rule.—United States *v.* Pridgeon, 153 U. S. 48, 63, 38 L. Ed. 631. See post, "Courts-Martial," V, J, 7, c.

35. Excessive and authorized portions entire.—The general rule is that if the judgment is at variance with the statute in which rendered, either in the character or extent of the punishment, it is void, and the prisoner should be discharged. In re Graham, 138 U. S. 461, 462, 34 L. Ed. 1051.

Where it appears upon the face of the record that a justice has exceeded his jurisdiction, by giving judgment, and issuing an execution, for a greater sum than ten pounds, the whole is a nullity; and, for that reason alone, to discharge the defendant on habeas corpus is proper. Geyger *v.* Stoy, 1 Dall. 135, 1 L. Ed. 70.

36. Nature of punishment changed.—In re Graham, 138 U. S. 461, 462, 34 L. Ed. 1051. See ante, "For Want of Jurisdiction to Render Particular Judgment or Order," V, J, 6, d, (3).

37. Sentence after date set for execution.—Rogers *v.* Peck, 199 U. S. 425, 433, 50 L. Ed. 256; Rooney *v.* North Dakota, 196 U. S. 319, 49 L. Ed. 494; In re Medley, 134 U. S. 160, 33 L. Ed. 835.

38. In re Cross, 146 U. S. 271, 277, 278, 36 L. Ed. 969; McElvaine *v.* Brush, 142 U. S. 155, 159, 35 L. Ed. 971.

39. Commuted sentence.—Ex parte Wells, 18 How. 307, 309, 15 L. Ed. 421.

40. In contempt cases.—Ex parte Kearney, 7 Wheat. 38, 44, 5 L. Ed. 391;

fact of disobedience, is not open to review on habeas corpus in this or any other court.[41] Where, however, the court exceeds its jurisdiction, persons in custody in contempt of its orders, judgments or decrees may be released by habeas corpus.[42] A person in custody for contempt for refusing to answer incriminating questions as a witness may be released on habeas corpus.[43]

Ex parte Watkins, 3 Pet. 193, 7 L. Ed. 650; Ex parte Yarbrough, 110 U. S. 651, 28 L. Ed. 274; Ex parte Terry, 128 U. S. 289, 305, 32 L. Ed. 405; In re Swan, 150 U. S. 637, 37 L. Ed. 1207; United States *v.* Pridgeon, 153 U. S. 48, 38 L. Ed. 631; Ex parte Fiske, 113 U. S. 713, 718, 28 L. Ed. 1117; In re Tyler, 149 U. S. 164, 37 L. Ed. 689; In re Chapman, 156 U. S. 211, 215, 39 L. Ed. 401; In re McKenzie, 180 U. S. 536, 45 L. Ed. 657; Ex parte Rowland, 104 U. S. 604, 26 L. Ed. 861; In re Ayers, 123 U. S. 443, 485, 31 L. Ed. 216; Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872; Ex parte Parks, 93 U. S. 18, 23 L. Ed. 787; Ex parte Siebold, 100 U. S. 371, 25 L. Ed. 717; Ex parte Virginia, 100 U. S. 339, 25 L. Ed. 676; In re Lane, 135 U. S. 443, 34 L. Ed. 219; In re Bonner, 151 U. S. 242, 38 L. Ed. 149; In re Watts, 190 U. S. 1, 16, 47 L. Ed. 933; Bessette *v.* Conkey Co., 194 U. S. 324, 334, 48 L. Ed. 997; In re Belt, 159 U. S. 95, 100, 40 L. Ed. 88. See post, "Commitments for Contempt," IX, D, 8, d. And see the title CONTEMPT, vol. 4, p. 540.

A writ of habeas corpus is not deemed a proper remedy, where a party was committed for a contempt by a court of competent jurisdiction; and that, if granted, the court could not inquire into the sufficiency of the cause of commitment. Ex parte Kearney, 7 Wheat. 38, 44, 5 L. Ed. 391.

"When a court commits a party for a contempt, their adjudication is a conviction, and their commitment, in consequence, is execution." Ex parte Kearney, 7 Wheat. 38, 43, 5 L. Ed. 391.

In such case the writ of habeas corpus should be denied, and, if granted, discharged and the petitioner remanded. Tinsley *v.* Anderson, 171 U. S. 101, 106, 43 L. Ed. 91.

Commitment by legislation.—Carfer *v.* Caldwell, 200 U. S. 293, 50 L. Ed. 488.

41. In re Debs, 158 U. S. 564, 600, 39 L. Ed. 1092.

42. **Void order.**—If a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void, and the order punishing for the contempt is equally void, and the federal supreme court will grant the writ of habeas corpus. In re Ayers, 123 U. S. 443, 485, 31 L. Ed. 216.

Injunction against bringing writ in name of state.—A circuit court has not jurisdiction to enjoin the attorneys of a state from bringing a suit in its name and the attorney will be discharged from a commitment under contempt of such injunction. In re Ayers, 123 U. S. 443, 485, 31 L. Ed. 216.

The attorneys who prosecute a suit for a state will be discharged from custody under punishment for contempt of an injunction against such prosecution, issued by a circuit court which has not jurisdiction under the eleventh amendment to the constitution. In re Ayers, 123 U. S. 443, 485, 31 L. Ed. 216.

Injunction restraining removal of city officials.—The mayor and council of a city in Nebraska cannot be restrained, by a circuit court of the United States, by injunction from removing a city official for malfeasance in office and an order committing the defendants for contempt in disregarding the injunction, is absolutely void, and the writ of habeas corpus will lie for the release of such defendants. In re Sawyer, 124 U. S. 200, 31 L. Ed. 402.

The adjudication that the defendants were guilty of a contempt in disregarding that order is void, their detention by the marshal under that adjudication is without authority of law, and they are entitled to be discharged. In re Sawyer, 124 U. S. 200, 221, 31 L. Ed. 402.

Contempt of writ of mandamus.—If the commitment is for contempt of a writ of mandamus, which the court wrongfully issued, the prisoner will be discharged. Ex parte Rowland, 104 U. S. 604, 615, 26 L. Ed. 861.

In this case, the commissioners of a county in Alabama were, on a writ of habeas corpus, discharged by the federal supreme court from imprisonment to which they had been adjudged in consequence of an alleged contempt of the circuit court of the United States for the middle district of Alabama, in refusing to obey the command of a peremptory writ of mandamus issued by that court requiring them to levy certain taxes. This court said: "If the command of the peremptory writ of mandamus was in all respects such as the circuit court had jurisdiction to make, the proceedings for the contempt are not reviewable here. But if the command was in whole or in part beyond the power of the court, the writ, or so much as was in excess of jurisdiction, was void, and the court had no right in law to punish for any contempt of its unauthorized requirements. Such is the settled rule of decision in this court." Ex parte Rowland, 104 U. S. 604, 612, 26 L. Ed. 861.

43. **Contempt by witnesses.**—Counselman *v.* Hitchcock, 142 U. S. 547, 586, 35 L. Ed. 1110.

Where a prisoner is in custody for

i. *Of De Facto Judge.*—A person convicted by a judge de facto, though not de jure, acting under color of office, and detained in custody in pursuance of his sentence, cannot be properly discharged upon habeas corpus.[44]

7. AUTHORITY OF PARTICULAR PERSONS AND COURTS—a. *Executive and Legislative Branches of Government.*—The writ of habeas corpus has been often used to defend the liberty of the citizen, and even his life, against the assertion of unlawful authority on the part of the executive and the legislative branches of the government.[45]

b. *Military Authorities.*—The writ will be granted for the relief of a person under the authority of military officers only in cases of rare and unusual restraint.[46]

c. *Courts-Martial.*—A court-martial is a court of limited jurisdiction only, whose judgments may be attacked collaterally.[47] Yet, if a court-martial has jurisdiction over the subject matter of the charge against the defendant and of his person, or if such jurisdiction is given by the consent of the defendant, the writ of habeas corpus will afford no relief, for generally, in such case, any error committed by a court-martial regularly organized and with full jurisdiction is not assailable before the civil courts.[48] And the civil courts can relieve a person from imprisonment under an order of such court only by writ of habeas corpus,

contempt of an order of a circuit court to appear and submit to an examination by the adverse party, as is the practice in a state, but which is contrary to § 861, Revised Statutes, he may be discharged on habeas corpus. Ex parte Fiske, 113 U. S. 713, 718, 28 L. Ed. 1117; In re Ayers, 123 U. S. 443, 485, 31 L. Ed. 216.

44. Of de facto judge.—Ex parte Ward, 173 U. S. 452, 455, 43 L. Ed. 765; In re Manning, 139 U. S. 504, 506, 35 L. Ed. 264.

Where a court has jurisdiction of an offense, and of the accused, and the proceedings are otherwise regular, a conviction is lawful, although the judge holding the court be only an officer de facto, and the validity of the title of such judge to the office, or his right to exercise the judicial functions, cannot be determined on a writ of habeas corpus. Nor can the prisoner under conviction be discharged. Ex parte Ward, 173 U. S. 452, 454, 43 L. Ed. 765.

Want of organization of court.—See Matter of Moran, 203 U. S. 96, 103, 51 L. Ed. 105.

45. Executive and legislative branches of government.—United States *v.* Lee, 106 U. S. 196, 220, 27 L. Ed. 171. See Ex parte Milligan, 4 Wall. 2, 18 L. Ed. 281; Kilbourn *v.* Thompson, 103 U. S. 168, 26 L. Ed. 377; Carfer *v.* Caldwell, 200 U. S. 293, 50 L. Ed. 488.

46. Military authorities.—In the case of a person in the military or naval service, where he is, whether as an officer or a private, always more or less subject in his movements, by the very necessity of military rule and subordination, to the orders of his superior officer, it should be made clear that some unusual restraint upon his liberty of personal movement exists to justify the issue of the writ; otherwise every order of the superior officer directing the movements of his subordinate, which necessarily to some extent curtails his freedom of will, may be held to be a restraint of his liberty, and the party so ordered may seek relief from obedience by means of a writ of habeas corpus. Wales *v.* Whitney, 114 U. S. 564, 571, 29 L. Ed. 277. See post, "Infants," V, L, 4.

47. Courts-martial.—McClaughry *v.* Deming, 186 U. S. 49, 68, 46 L. Ed. 1049. See the title MILITARY LAW.

"This court in Wise *v.* Withers, 3 Cranch 331, 2 L. Ed. 457, * * * according to the interpretation given it by Chief Justice Marshall in Ex parte Watkins, 3 Pet. 193, 207, 7 L. Ed. 650, ranked a court-martial as 'one of those inferior courts of limited jurisdiction whose judgments may be questioned collaterally.'" Runkle *v.* United States, 122 U. S. 543, 556, 30 L. Ed. 1167.

48. Ex parte Milligan, 4 Wall. 2, 18 L. Ed. 281; Ex parte Mason, 105 U. S. 696, 697, 26 L. Ed. 1213; McClaughry *v.* Deming, 186 U. S. 49, 53, 46 L. Ed. 1049.

"The court-martial having jurisdiction of the person accused and of the offense charged, and having acted within the scope of its lawful powers, its proceedings and sentence cannot be reviewed or set aside by the civil courts. Swaim *v.* United States, 165 U. S. 553, 561, 41 L. Ed. 823.

Imprisonment of paymaster's clerk.—A court-martial has jurisdiction to punish a paymaster's clerk and habeas corpus will not lie on the ground of want of jurisdiction. Ex parte Reed, 100 U. S. 13, 21, 25 L. Ed. 538.

In naval court-marshal.—This doctrine has been applied by the federal supreme court to the judgment and sentence of a naval general court-martial, which was sought to be reviewed on a writ of habeas corpus. Keyes *v.* United States, 109 U. S. 336, 340, 27 L. Ed. 954; Ex parte Reed, 100 U. S. 13, 25 L. Ed. 538.

and then only when it is made apparent that the court-martial proceeds without jurisdiction,[49] exceeds its powers in pronouncing sentence,[50] or is illegally constituted.[51]

d. *Inspectors of Immigration.*—The decision of an inspector of immigration, that an alien immigrant shall not be permitted to land, cannot be reviewed on habeas corpus, even if it is not shown that the inspector took or recorded any evidence and based his decision thereon.[52]

K. As Determined by Nature of Proceedings—1. CRIMINAL PROCEEDINGS—a. *In General.*—Confinement in criminal proceedings may be relieved against by this writ;[53] but the ordinary procedure, by writ of error, should be pursued, in the absence of special circumstances calling for a more speedy relief.[54]

b. *Treason or Felony Cases.*—The Habeas Corpus Act of Charles II itself excepts from its privileges persons committed or detained for treason or felony expressed in the warrant.[55]

2. CIVIL PROCEEDINGS—a. *In General.*—The writ of habeas corpus is the proper remedy, in a case of arrest under a civil as well as a criminal process,[56] but a person held in prison bounds under a ca. sa. in a civil suit will not be released.[57]

b. *Mandamus.*—A prisoner in custody under a writ of mandamus which the court had no jurisdiction to issue may be discharged.[58]

3. IN EXTRADITION CASES.—See elsewhere for treatment of this subject.[59]

L. As Determined by Character of Person in Custody—1. ALIENS—a. *In General.*—The fact that the prisoner is the subject of a foreign government is not ground for his discharge,[60] nor is that of his ignorance of our laws.[61]

b. *Alien Immigrants*—(1) *In General.*—An alien immigrant, prevented from landing by an inspector of immigration claiming authority to do so under an

49. Wales *v.* Whitney, 114 U. S. 564, 570, 29 L. Ed. 277.

A court-martial has no jurisdiction over a person not belonging to the militia, and custody under an exercise of such unlawful power may be relieved against by habeas corpus. Ex parte Watkins, 3 Pet. 193, 209, 7 L. Ed. 650; Wise *v.* Withers, 3 Cranch 331, 2 L. Ed. 457.

50. Carter *v.* McClaughry, 183 U. S. 365, 46 L. Ed. 236.

The mere fact that the court-martial reconsidered the case and rendered a second decision, before dissolution, is no ground for discharge. Ex parte Reed, 100 U. S. 13, 23, 25 L. Ed. 538.

51. The invalidity of the court-martial can be raised upon a hearing on habeas corpus. Where on the trial of an officer of volunteers, all the members of a court-martial are officers of the regular army, such court is illegal and the objection can be taken on habeas corpus. McClaughry *v.* Deming, 186 U. S. 49, 53, 46 L. Ed. 1049. See the title MILITARY LAW.

52. Inspectors of immigration.—Ekiu *v.* United States, 142 U. S. 651, 35 L. Ed. 1146. See ante, "Under Chinese Exclusion Acts," IV, C, 3, d; post, "Aliens," V, L, 1.

53. Criminal proceedings.—Wales *v.* Whitney, 114 U. S. 564, 571, 29 L. Ed. 277.

54. In re Lincoln, 202 U. S. 178, 183, 50 L. Ed. 984, distinguishing Matter of Heff, 197 U. S. 488, 49 L. Ed. 848.

It is not necessary or proper for the federal supreme court to issue a habeas corpus in every case involving the question of the legality of a sale of liquor to Indians or the bringing of liquor into the Indian country. In re Lincoln, 202 U. S. 178, 183, 50 L. Ed. 984.

55. Treason or felony cases.—Ex parte Parks, 93 U. S. 18, 21, 23 L. Ed. 787. See United States *v.* Hamilton, 3 Dall. 17, 1 L. Ed. 490; Ex parte Watkins, 3 Pet. 193, 207, 7 L. Ed. 650; In re Metzger, 5 How. 176, 189, 12 L. Ed. 104. See post, "Members of Congress," V, L, 2.

56. Civil proceedings.—Ex parte Wilson, 6 Cranch 52, 53, 3 L. Ed. 149; Wales *v.* Whitney, 114 U. S. 564, 571, 29 L. Ed. 277.

57. Ex parte Wilson, 6 Cranch 52, 53, 3 L. Ed. 149.

58. Mandamus.—Ex parte Rowland, 104 U. S. 604, 615, 26 L. Ed. 861. See the title MANDAMUS.

59. In extradition cases.—See the title EXTRADITION, ante, p. 215.

60. As determined by character of person in custody.—In re Jugiro, 140 U. S. 291, 297, 35 L. Ed. 510; Iasigi *v.* Van De Carr, 166 U. S. 391, 41 L. Ed. 1045. See ante, "Where Prisoner Is Citizen of Foreign State," IV, C, 3, b, (5); "In United States," II, C.

61. It may be, as is claimed, that the appellant is unacquainted with our laws and language. But that fact is immaterial upon this inquiry as to the authority of a court of the United States, by a writ of

act of congress, and thereby restrained of his liberty, is doubtless entitled to a writ of habeas corpus to ascertain whether the restraint is lawful.[62]

(2) *Under Chinese Exclusion Acts.*—Congress has power to provide laws for the exclusion of foreigners from the United States,[63] and may commit the enforcement of such laws exclusively to executive officers, without judicial intervention.[64] Under the act of August 18, 1894, the finding of the immigration officers is made final in every case,[65] except on appeal to the secretary of the treasury[66] (now to the secretary of commerce and labor),[67] and the writ of habeas corpus cannot issue from any other tribunal to take such excluded foreigner out of the custody of the immigration officers.[68] The regulations in the

habeas corpus, to review and annul the judgment of a state court administering the criminal laws of a state. In re Jugiro, 140 U. S. 291, 297, 35 L. Ed. 510.

62. Alien immigrants.—Ekiu *v.* United States, 142 U. S. 651, 660, 35 L. Ed. 1146. See the title ALIENS, vol. 1, p. 219.

63. Under Chinese exclusion acts—Power of congress.—Lee Gon Yung *v.* United States, 185 U. S. 306, 46 L. Ed. 921; Fok Yung Yo *v.* United States, 185 U. S. 296, 46 L. Ed. 917. See the title CHINESE EXCLUSION ACTS, vol. 3, p. 769.

64. Delegation of power.—Congress may commit the enforcement of such provisions, conditions and regulations exclusively to executive officers, without judicial intervention. The Japanese Immigrant Case, 189 U. S. 86, 97, 47 L. Ed. 721; Ekiu *v.* United States, 142 U. S. 651, 35 L. Ed. 1146; Fong Yue Ting *v.* United States, 149 U. S. 698, 37 L. Ed. 905; Lem Moon Sing *v.* United States, 158 U. S. 538, 543, 39 L. Ed. 1082; Wong Wing *v.* United States, 163 U. S. 228, 41 L. Ed. 140; Fok Yung Yo *v.* United States, 185 U. S. 296, 305, 46 L. Ed. 917; Iasigi *v.* Van De Carr, 166 U. S. 391, 394, 41 L. Ed. 1045; Chew Heong *v.* United States, 112 U. S. 536, 28 L. Ed. 770; United States *v.* Jung Ah Lung, 124 U. S. 621, 31 L. Ed. 591; Wan Shing *v.* United States, 140 U. S. 424, 35 L. Ed. 503; Lau Ow Bew, Petitioner, 141 U. S. 583, 35 L. Ed. 868; Lee Gon Yung *v.* United States, 185 U. S. 306, 46 L. Ed. 921; Lee Lung *v.* Patterson, 186 U. S. 168, 175, 46 L. Ed. 1108. See the title CHINESE EXCLUSION ACTS, vol. 3, p. 771.

65. Findings of immigration officers.—United States *v.* Williams, 194 U. S. 279, 295, 48 L. Ed. 979; United States *v.* Ju Toy, 198 U. S. 253, 260, 49 L. Ed. 1040; United States *v.* Sing Tuck, 194 U. S. 161, 48 L. Ed. 917; United States, Petitioner, 194 U. S. 194, 48 L. Ed. 931; Fong Yue Ting *v.* United States, 149 U. S. 698, 37 L. Ed. 905; Chin Bak Kan *v.* United States, 186 U. S. 193, 46 L. Ed. 1121; Ah How *v.* United States, 193 U. S. 65, 48 L. Ed. 619; United States *v.* Coe, 196 U. S. 635, 49 L. Ed. 629. See Pearson *v.* Williams, 202 U. S. 281, 285, 50 L. Ed. 1029; Lem Moon Sing *v.* United States, 158 U. S. 538, 547, 39 L. Ed. 1082; Li Sing *v.* United States, 180 U. S. 486, 490, 45 L. Ed. 634.

The sufficiency of the evidence on which he acts cannot be reviewed by any other tribunal, except as permitted by statute. Fong Yue Ting *v.* United States, 149 U. S. 698, 714, 37 L. Ed. 905; In re Metzger, 5 How. 176, 12 L. Ed. 104; Benson *v.* McMahon, 127 U. S. 457, 32 L. Ed. 234; In re Cortes, 136 U. S. 330, 34 L. Ed. 464; Wan Shing *v.* United States, 140 U. S. 424, 35 L. Ed. 503. See the title CHINESE EXCLUSION ACTS, vol. 3, p. 780.

66. Appeal to secretary of commerce and labor.—Ekiu *v.* United States, 142 U. S. 651, 35 L. Ed. 1146.

67. Lem Moon Sing *v.* United States, 158 U. S. 538, 548, 39 L. Ed. 1082, distinguishing Lau Ow Bew *v.* United States, 144 U. S. 47, 36 L. Ed. 340, which was decided under the acts of 1882 and 1884.

"An appeal is provided by the statute. The first mode of attacking his decision is by taking that appeal. If the appeal fails, it then is time enough to consider whether upon a petition showing reasonable cause there ought to be a further trial upon habeas corpus." United States *v.* Sing Tuck, 194 U. S. 161, 167, 48 L. Ed. 917.

68. Exclusive power of immigration officers.—A district court of the United States should not grant a writ of habeas corpus in behalf of a person of Chinese descent held for return to China by the steamship company which brought him therefrom, who, after examination by the immigration officers, was denied admission and ordered deported, which finding and action upon appeal was affirmed by the secretary of commerce and labor. United States *v.* Ju Toy, 198 U. S. 253, 259, 49 L. Ed. 1040.

Acts of collector's subordinates.—"If petitioner had just cause of complaint of the conduct of the collector's subordinates, the remedy is not found in his discharge on habeas corpus." Lee Gon Yung *v.* United States, 185 U. S. 306, 307, 46 L. Ed. 921.

Want of knowledge of English language.—"As no appeal was taken to the secretary from the decision of the immigration inspector, that decision was final and conclusive. If the appellant's want of knowledge of the English language put her at some disadvantage in the investigation conducted by that officer, that was her misfortune, and constitutes no reason,

statute, are intended to effectuate the same purpose as the writ of habeas corpus.[69] The detention during the time necessary for investigation is not unlawful.[70]

2. Members of Congress.—The senators and representatives in congress are, in all cases, except treason, felony and breach of the peace, exempted from arrest, during their attendance at the sessions thereof, and in going to and returning from the same. Congress may enforce this right, by authorizing a writ of habeas corpus, to free them from an illegal arrest, in violation of this clause of the constitution.[71]

3. Persons Acting under Federal Authority.—If a person is held in custody in violation of the constitution or a law of the United States, or for an act done or omitted in pursuance of a law of the United States, he must be discharged.[72]

4. Infants.—It is not important to inquire at what period the writ first was employed to place infant children under the disposal of courts of law and equity. This was clearly so in England anterior to our Revolution, and the practice has been fully confirmed in the continued assertion of the authority by those courts unto the present day—and this indifferently, whether the interposition of the court is demanded by the father or mother.[73] The writ is granted not to determine the right of personal freedom, but to determine to which custodian a child of tender years should be committed.[74] An infant, after enlistment in the military service of the United States, cannot be discharged therefrom by habeas corpus.[75]

5. Husband or Wife.—A wife may be released from the custody of her husband by habeas corpus.[76]

6. Wards.—A ward withheld from its guardian may be released on habeas corpus.[77]

under the acts of congress, or under any rule of law, for the intervention of the court by habeas corpus. We perceive no ground for such intervention—none for the contention that due process of law was denied to appellant." The Japanese Immigrant Case, 189 U. S. 86, 102, 47 L. Ed. 721.

69. Statutory substitute for habeas corpus.—Fok Yung Yo *v.* United States, 185 U. S. 296, 305, 46 L. Ed. 917.

70. Detention during investigation.—United States *v.* Sing Tuck, 194 U. S. 161, 169, 48 L. Ed. 917; Wong Wing *v.* United States, 163 U. S. 228, 235, 41 L. Ed. 140. See the title ALIENS, vol. 1, p. 250.

71. Members of congress.—Prigg *v.* Pennsylvania, 16 Pet. 539, 619, 10 L. Ed. 1060.

72. Persons acting under federal authority.—In re Neagle, 135 U. S. 1, 41, 34 L. Ed. 55. See ante, "For Act Done or Omitted in Pursuance of Law, etc.," IV, C, 3, b, (3); "In Violation of Constitution, Law or Treaty," IV, C, 3, b, (4); "In Violation of Constitution," V, G, 5, c.

73. Infants.—New York Foundling Hospital *v.* Gatti, 203 U. S. 429, 438, 51 L. Ed. 254; In re Burrus, 136 U. S. 586, 34 L. Ed. 500; Kurtz *v.* Moffitt, 115 U. S. 487, 495, 29 L. Ed. 458; Wales *v.* Whitney, 114 U. S. 564, 571, 29 L. Ed. 277.

"In respect to married women or other adults, held in detention by private individuals, the sovereign, through this writ, acts as conservator pacis and custos morum, and, in regard to infant children, as parens patriæ, taking, in these high capacities, summary order that the party be forthwith set at liberty, if improperly and wrongfully detained." In re Burrus, 136 U. S. 586, 604, 34 L. Ed. 500. See ante, "In Other Cases," IV, C, 3, f.

74. "It is the settled doctrine that in such cases the court exercises a discretion in the interest of the child to determine what care and custody are best for it in view of its age and requirements. Such cases are not decided on the legal right of the petitioner to be relieved from unlawful imprisonment or detention, as in the case of an adult, but upon the court's view of the best interests of those whose welfare requires that they be in custody of one person or another. In such cases the question of personal freedom is not involved except in the sense of a determination as to which custodian shall have charge of one not entitled to be freed from restraint." New York Foundling Hospital *v.* Gatti, 203 U. S. 429, 439, 51 L. Ed. 254.

75. In military service.—In re Morrissey, 137 U. S. 157, 34 L. Ed. 644.

76. Husband or wife.—Wales *v.* Whitney, 114 U. S. 564, 571, 29 L. Ed. 277; In re Burrus, 136 U. S. 586, 604, 34 L. Ed. 500. See the title HUSBAND AND WIFE.

77. Wards.—Wales *v.* Whitney, 114 U. S. 564, 571, 29 L. Ed. 277. See the title GUARDIAN AND WARD, ante, p. 599.

M. As Determined by Nature of Offense—1. Offense Not Criminal.—A person in custody under the charge of the commission of an act which does not constitute a crime may be released on habeas corpus.[78] This rule, when applied to imprisonment under conviction and sentence, is confined to cases of clear and manifest want of criminality in the matter charged, such as in effect to render the proceedings void.[79]

2. Determination of Criminality.—The question whether the act charged is or is not a crime is one which the trial court was competent to decide, and which cannot be reviewed upon a writ of habeas corpus.[80] Whether a matter for which a party is indicted in a circuit or district court is, or is not, a crime against the laws of the United States, is a question within the jurisdiction of that court, which it must decide. Its decision will not be reviewed here by habeas corpus.[81]

N. As Determined by Object of Writ—1. To Admit to Bail.—The writ may be availed of to bring the prisoner into court to admit him to bail.[82]

2. To Bring into Court to Testify.—For treatment of this subject, see elsewhere in this title.[83]

3. To Serve Purpose of Writ of Error.—The writ of habeas corpus is not to be used to perform the office of a writ of error or appeal; but when no writ of error or appeal will lie, if a petitioner is imprisoned under a judgment of the circuit court, which had no jurisdiction of the person or of the subject matter, or authority to render the judgment complained of, then relief may be accorded.[84]

4. As Ancillary Proceeding.—A writ of habeas corpus cum causa may be issued by the clerk of the circuit court, as ancillary to a removal of the prosecution into that court.[85]

O. As Determined by Defenses to Prosecution.—For treatment of this

78. **For act not criminal.**—Ex parte Bollman, 4 Cranch 75, 2 L. Ed. 554; Ex parte Watkins, 3 Pet. 193, 208, 7 L. Ed. 650; Ex parte Siebold, 100 U. S. 371, 376, 25 L. Ed. 717; Hyde *v.* Shine, 199 U. S. 62, 50 L. Ed. 90; Ex parte Parks, 93 U. S. 18, 23 L. Ed. 787; In re Lancaster, 137 U. S. 393, 395, 34 L. Ed. 713; Ex parte Bigelow, 113 U. S. 328, 330, 28 L. Ed. 1005; In re Neagle, 135 U. S. 1, 34 L. Ed. 55.

79. Ex parte Siebold, 100 U. S. 371, 376, 25 L. Ed. 717.

Under unconstitutional law.—Ex parte Siebold, 100 U. S. 371, 376, 25 L. Ed. 717.

80. **Determination of criminality.**—Hyde *v.* Shine, 199 U. S. 62, 83, 50 L. Ed. 90, followed in Dimond *v.* Shine, 199 U. S. 88, 50 L. Ed. 99; Benson *v.* Henkel, 198 U. S. 1, 49 L. Ed. 919; Ex parte Watkins, 3 Pet. 193, 206, 7 L. Ed. 650; Ex parte Parks, 93 U. S. 18, 23 L. Ed. 787.

"It would be an assumption of authority for this court, by means of the writ of habeas corpus, to review every case in which the defendant attempts to controvert the criminality of the offense charged in the indictment." Ex parte Parks, 93 U. S. 18, 20, 23 L. Ed. 787.

81. Ex parte Parks, 93 U. S. 18, 23 L. Ed. 787; Ex parte Watkins, 3 Pet. 193, 7 L. Ed. 650; In re Lancaster, 137 U. S. 393, 395, 34 L. Ed. 713.

82. To admit to bail.—Ex parte Royall, 117 U. S. 181, 182, 28 L. Ed. 690; Holmes *v.* Jennison, 14 Pet. 540, 586h, 10 L. Ed. 579. See post, "Custody Pending Hearing," X.

A person committed on warrant of a district judge may be released to bail on habeas corpus. United States *v.* Hamilton, 3 Dall. 17, 1 L. Ed. 490.

Commitment by another court.—"A court possessing the power to bail prisoners, not committed by itself, may award a writ of habeas corpus for the exercise of that power." Ex parte Bollman, 4 Cranch 75, 100, 2 L. Ed. 554.

In cases of treason.—In United States *v.* Hamilton, 3 Dall. 17, 1 L. Ed. 490, a prisoner committed for treason was brought before the court and held to bail on habeas corpus. In re Metzger, 5 How. 176, 189, 12 L. Ed. 104; Ex parte Burford, 3 Cranch 448, 2 L. Ed. 495.

In extradition cases.—Wright *v.* Henkel, 190 U. S. 40, 62, 47 L. Ed. 948.

83. **To bring into court to testify.**—See ante, "The Different Writs of Habeas Corpus," III; "To Bring Prisoner into Court to Testify." IV, C, 3, b, (6).

84. **To serve purpose of writ of error.**—Ex parte Parks, 93 U. S. 18, 23 L. Ed. 787; Ex parte Terry, 128 U. S. 289, 32 L. Ed. 405; Nielsen, Petitioner, 131 U. S. 176, 33 L. Ed. 118; In re Tyler, 149 U. S. 164, 180, 37 L. Ed. 689. See ante, "Nature." I, B; "As Determined by the Validity of Proceedings," V, E. And see the title APPEAL AND ERROR, vol. 1, p. 399.

85. **As ancillary proceeding.**—Virginia *v.* Paul, 148 U. S. 107, 123, 37 L. Ed. 386. See ante, "The Different Writs of Habeas Corpus," III.

subject, see elsewhere in this title.[86]

P. As Determined by Effect of Writ.—The writ will not be awarded if it appear upon the showing made by the petitioner, that if brought into court, and the cause of his commitment inquired into, he would be remanded to prison.[87]

VI. Application for Writ.

A. Statutory Provision.—The statute requires the application for a writ of habeas corpus to set forth the facts concerning the detention of the party restrained, in whose custody he is detained and by virtue of what claim or authority, if known.[88]

B. To Whom Made.—The supreme court may entertain an original application for a writ of habeas corpus without requiring the petitioner to apply, in the first instance, to the proper circuit or district court.[89]

C. By Whom Made.—A mere stranger has no right to come into court without the request or authority of a person in custody and ask that such person, who is not suggested to be coerced or to be incapable of making such request or granting such authority, may be brought up by habeas corpus to be discharged from restraint,[90] merely because he sympathizes with the prisoner or has concern for the constitutionality of a state law.[91] One bringing up a person on habeas corpus without his request or authority, may be sued in an action on the case by the person thus brought up.[92]

D. At What Time Made.—Applications may be made in vacation.[93]

E. Form and Requisites—1. WRITING.—It is necessary that there be a petition in writing.[94]

2. SIGNATURE AND VERIFICATION.—The petition is required to be signed by, and verified by the oath of the person for whose relief it is intended.[95]

86. As determined by defenses to prosecution.—See ante, "In General," V, G, 5, c, (8), (a); "Former Jeopardy," V, G, 5, c, (8), (b).

87. As determined by effect of writ.—Ex parte Terry, 128 U. S. 289, 301, 32 L. Ed. 405; Ex parte Kearney, 7 Wheat. 38, 45, 5 L. Ed. 391; Ex parte Watkins, 3 Pet. 193, 201, 7 L. Ed. 650; Ex parte Milligan, 4 Wall. 2, 111, 18 L. Ed. 281; Ex parte Milburn, 9 Pet. 704, 706, 9 L. Ed. 280; Ex parte Bollman, 4 Cranch 75, 2 L. Ed. 554; In re Burrus, 136 U. S. 586, 601, 34 L. Ed. 500; In re Boardman, 169 U. S. 39, 34, 42 L. Ed. 653; Ex parte Virginia, 100 U. S. 339, 349, 25 L. Ed. 676; Ex parte Parks, 93 U. S. 18, 23, 23 L. Ed. 787.

88. Statutory provision.—Cuddy, Petitioner, 131 U. S. 280, 283, 33 L. Ed. 154; Terlinden *v.* Ames, 184 U. S. 270, 278, 46 L. Ed. 534; Ex parte Terry, 128 U. S. 289, 301, 32 L. Ed. 405. See Rev. Stat., § 754.

89. To whom made.—In Ex parte Jackson, 96 U. S. 727, 24 L. Ed. 877, the federal supreme court considered the case without regard to the fact that there had been no application for habeas corpus in the court below. Ex parte Virginia, 100 U. S. 339, 343, 25 L. Ed. 676.

No habeas corpus was sued out either in the district or circuit court, which would have been a more regular proceeding. However, this is not indispensable. Ex parte Virginia, 100 U. S. 339, 342, 25 L. Ed. 676, citing United States *v.* Hamilton, 3 Dall. 17, 1 L. Ed. 490; Ex parte Burford, 3 Cranch 448, 2 L. Ed. 495; Ex parte Jackson, 96 U. S. 727, 24 L. Ed. 877; Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872.

But in the two cases below "the application proceeded upon the ground that the circuit court itself had made the order by which he was alleged to have been deprived of his liberty in violation of the constitution of the United States." Ex parte Terry, 128 U. S. 289, 302, 32 L. Ed. 405; In re Sawyer, 124 U. S. 200, 31 L. Ed. 402.

90. By whom made.—Ex parte Dorr, 3 How. 103, 104, 11 L. Ed. 514. See Ex parte Terry, 128 U. S. 289, 301, 32 L. Ed. 405.

91. Gusman *v.* Marrero, 180 U. S. 81, 87, 45 L. Ed. 436.

However friendly he may be to the doomed man and sympathetic for his situation; however concerned he may be lest unconstitutional laws be enforced, and however laudible such sentiments are, the grievance he suffers and feels is not special enough to empower him to apply for a writ of habeas corpus. Gusman *v.* Marrero, 180 U. S. 81, 87, 45 L. Ed. 436; Davis *v.* Burke, 179 U. S. 399, 45 L. Ed. 249.

92. Ex parte Dorr, 3 How. 103, 104, 11 L. Ed. 514.

93. At what time made.—Ex parte Curtis, 106 U. S. 371, 27 L. Ed. 232. See ante, "On Reference from Justices in Chambers or Vacation," IV, C, 4, a, (4).

94. Form and requisites.—Ex parte Terry, 128 U. S. 289, 301, 32 L. Ed. 405.

95. Signature and verification.—Ex

3. PRAYER.—The prayer of a petition for a writ of habeas corpus is, that the petitioner may be discharged from custody.[96]

4. STATEMENT OF FACTS—a. *In General.*—Averments of mere conclusions of law, and not of matters of fact, are inadequate.[97]

b. *To Show Jurisdiction.*—An application for the writ made to a federal court must set out facts showing jurisdiction in such court.[98]

c. *To Show Prima Facie Case for Discharge.*—The writ does not issue as a matter of course; and, if no sufficiency or probable cause for a discharge is shown and it is apparent that the prisoner must be remanded if brought up, it will be denied.[99]

d. *Nature of Custody*—(1) *Illegality.*—If the petitioner desires his release on the ground of the illegality of his custody, such fact should be set forth in his petition.[1]

(2) *Want of Probable Cause.*—The petition should set forth the evidence relied upon to show a want of probable cause.[2]

e. *Nature of Authority.*—Where the petitioner claims he is in custody without authority, the judgment, order or process under which he is held and which he contends is invalid, should be set out substantially in the petition or annexed thereto,[3] else the petition is insufficient.[4]

f. *Name of Custodian.*—The petition must set forth the name of the person in whose custody petitioner is if known.[5]

parte Terry, 128 U. S. 289, 301, 32 L. Ed. 405; Kohl *v.* Lehlback, 160 U. S. 293, 296, 40 L. Ed. 432.

This requirement grows out of § 754 of the Revised Statutes. Whitten *v.* Tomlinson, 160 U. S. 231, 40 L. Ed. 406.

96. Prayer.—In re Snow, 120 U. S. 274, 280, 30 L. Ed. 658.

97. Statement of facts.—In Whitten *v.* Tomlinson, 160 U. S. 231, 40 L. Ed. 406, it was said: "The general allegations in the petition, that the petitioner is detained in violation of the constitution and laws of the United States, and of the constitution and laws of the particular state, and is held without due process of law, are averments of mere conclusions of law, and not of matters of fact." Kohl *v.* Lehlback, 160 U. S. 293, 296, 40 L. Ed. 432; Cuddy, Petitioner, 131 U. S. 280, 286, 33 L. Ed. 154; Craemer *v.* Washington State, 168 U. S. 124, 128, 42 L. Ed. 407; In re Burrus, 136 U. S. 586, 571, 34 L. Ed. 500.

98. To show jurisdiction.—In re Burrus, 136 U. S. 586, 591, 34 L. Ed. 500.

99. To show prima facie case.—Ex parte Terry, 128 U. S. 289, 301, 32 L. Ed. 405. See ante, "As Determined by Materiality," V, C.

Probable cause for issuance must be shown. Ex parte Milligan, 4 Wall. 2, 18 L. Ed. 281.

1. Nature of custody.—Storti *v.* Massachusetts, 183 U. S. 138, 142, 46 L. Ed. 120; Craemer *v.* Washington State, 168 U. S. 124, 128, 42 L. Ed. 407. See ante, "Illegal Restraint or Custody," V, G, 5.

In violation of the constitution.—Whitten *v.* Tomlinson, 160 U. S. 231, 242, 40 L. Ed. 406.

2. Want of probable cause.—Terlinden *v.* Ames, 184 U. S. 270, 279, 46 L. Ed. 534; Craemer *v.* Washington State, 168 U. S. 124, 128, 42 L. Ed. 407; Hyde *v.* Shine, 991 U. S. 62, 85, 50 L. Ed. 90, followed in Dimond *v.* Shine, 199 U. S. 88, 50 L. Ed. 99; Ex parte Milligan, 4 Wall. 2, 18 L. Ed. 281.

"The evidence which was taken before the commissioner and which was before the district judge upon the question of the existence of probable cause was not annexed to the petition and forms no part of the proceeding before the circuit court upon the application for the writ of habeas corpus." Greene *v.* Henkel, 183 U. S. 249, 259, 46 L. Ed. 177. See ante, "Without Probable Cause," V, G, 5, b.

3. Nature of authority.—"The general rule is undoubted that if the detention is claimed to be unlawful by reason of the invalidity of the process or proceedings under which the party is held in custody, copies of such process or proceedings must be annexed to or the essential parts thereof set out in the petition, and mere averments of conclusions of law are necessarily inadequate." Craemer *v.* Washington State, 168 U. S. 124, 128, 42 L. Ed. 407; Whitten *v.* Tomlinson, 160 U. S. 231, 40 L. Ed. 406; Kohl *v.* Lehlback, 160 U. S. 293, 40 L. Ed. 432; Ex parte Terry, 128 U. S. 289, 301, 32 L. Ed. 405.

The petition was insufficient in not setting forth the proceedings, or the essential parts thereof, prior to the day it was presented. Craemer *v.* Washington State, 168 U. S. 124, 128, 42 L. Ed. 407; Anderson *v.* Treat, 172 U. S. 24, 29, 43 L. Ed. 351.

4. Craemer *v.* Washington State, 168 U. S. 124, 129, 42 L. Ed. 407. See ante, "As Determined by Nature of Authority," V, J; post, "Annexing Copy of Process, etc.," VI, F.

5. Name of custodian.—Ex parte Terry,

g. *In Extradition Cases.*—For treatment of this subject, see elsewhere.[6]

F. Annexing Copy of Process, etc.—Copies of the information, the verdict, and the judgment thereon may be annexed to the petition instead of essential parts being stated therein.[7]

G. Amendment of Application.—The petition may be amended to show the diverse citizenship of the parties.[8]

H. Operation and Effect of Application—1. As Evidence.—In a petition for a writ of habeas corpus, verified by the oath of the petitioner, facts duly alleged may be taken to be true, unless denied by the return, or controlled by other evidence; but no allegation of fact in the petition can be assumed to be admitted, unless distinct and unambiguous.[9]

2. As Institution of Suit.—The petition for a writ of habeas corpus, duly presented, is the institution of a cause on behalf of the petitioner.[10]

VII. Issuance.

A. Statutory Provision.—It is the duty of the court to "forthwith award a writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto."[11]

B. Necessity for.—The usual course of proceeding is for the court, on the application of the prisoner for a writ of habeas corpus, to issue the writ, and on its return to hear and dispose of the case; but, where the cause of imprisonment is fully shown by the petition, the court may, without issuing the writ, consider and determine whether, upon the facts presented in the petition, the prisoner, if brought before the court, would be discharged;[12] and, where the order of a court under which a marshal holds a person in custody is a nullity and the parties are willing, an order of discharge may be entered without further proceedings.[13]

C. Time of Issuance—1. In Vacation.—The writ may be issued during vacation.[14]

2. At Discretion of Court.—The court may at its discretion refuse to issue the writ immediately upon the filing of the petition.[15]

3. As Determining Priority.—The priority in issuance of a writ of habeas corpus gives it precedence over a writ of certiorari subsequently issued.[16]

D. To Whom Issued.—The writ should be issued to the person who has the immediate custody of the petitioner with the power to produce the body of such party before the court or judge.[17]

128 U. S. 289, 301, 32 L. Ed. 405. See ante, "Authority of Particular Persons and Courts," V, J, 7.

6. **In extradition cases.**—See the title EXTRADITION, ante, p. 215.

7. **Annexing copy of process, etc.**—Craemer *v.* Washington State, 168 U. S. 124, 129, 42 L. Ed. 407; Greene *v.* Henkel, 183 U. S. 249, 259, 46 L. Ed. 177.

8. **Amendment of petition.**—In re Burrus, 136 U. S. 586, 596, 34 L. Ed. 500.

9. **As evidence.**—Kohl *v.* Lehlback, 160 U. S. 293, 296, 40 L. Ed. 432; Whitten *v.* Tomlinson, 160 U. S. 231, 40 L. Ed. 406.

10. **As institution of suit.**—Ex parte Milligan, 4 Wall. 2, 18 L. Ed. 281.

11. **Issuance.**—Ex parte Terry, 128 U. S. 289, 301, 32 L. Ed. 405; Terlinden *v.* Ames, 184 U. S. 270, 278, 46 L. Ed. 534; Whitten *v.* Tomlinson, 160 U. S. 231, 240, 40 L. Ed. 406; Rev. Stat., §§ 754, 755.

12. **Necessity for.**—Ex parte Milligan, 4 Wall. 2, 18 L. Ed. 281.

13. Ex parte Rowland, 104 U. S. 604, 618, 26 L. Ed. 861. See post, "Rule to Show Cause," VII, H.

14. **Time of issuance.**—Ex parte Curtis, 106 U. S. 371, 27 L. Ed. 232.

15. **At discretion of court.**—If it is apparent upon the petition, that the writ if issued ought not, on principles of law and justice, to result in the immediate discharge of the accused from custody, the court is not bound to award it as soon as the application is made. Ex parte Watkins, 3 Pet. 193, 201, 7 L. Ed. 650; Ex parte Milligan, 4 Wall. 2, 111, 18 L. Ed. 281; Ex parte Royall, No. 1, 117 U. S. 241, 250, 29 L. Ed. 868. See post, "Discretion to Issue," VII, F.

16. **As determining priority.**—"In this case, the defendant not having affected delay, but proceeded in the usual course, having taken out the first writ, and delivered it as soon as was usual, his writ should take preference; and the court accordingly order the return to be made on the habeas corpus." Steiner *v.* Fell, 1 Dall. 22, 23, 1 L. Ed. 20.

17. **To whom issued.**—Wales *v.* Whitney, 114 U. S. 564, 574, 29 L. Ed. 277. See ante, "Name of Custodian," VI, E, 4, f.

E. To What Place Issued.—The federal supreme court may issue the writ to any part of the United States.[18]

F. Discretion to Issue.—In determining whether the petitioner has shown a good cause for his discharge and whether the writ shall issue, the court acts at their discretion.[19]

G. Mandamus to Compel Issuance.—In exercising the proper discretion in regard to the issuance of the writ of habeas corpus, the inferior federal courts cannot be controlled by mandamus. It is only in cases of excess or abuse of discretion that the latter writ will lie.[20]

H. Rule to Show Cause.—The court, on the filing of the petition, may issue a rule on the marshal, or on any person in whose custody the prisoner may be found, to show cause why the writ of habeas corpus should not issue for his release.[21]

I. Issuance with Certiorari.—Petitions for habeas corpus are frequently accompanied by applications for certiorari as ancillary thereto, and both are awarded or denied together.[22]

J. In Extradition Cases.—In extradition cases, the writ of habeas corpus may be issued before the commissioner enters upon the examination.[23]

K. Waiver of Issuance.—The issuance of the writ may be waived by the government.[24]

VIII. Return of Writ.

A. In General.—It is to be presumed that a return will be made.[25]

B. Time Allowed for Return.—It is provided by the Revised Statutes that any person to whom the writ of habeas corpus is directed shall make due return thereof within three days thereafter, unless the party be detained beyond the distance of twenty miles; and, if beyond that distance and not beyond the distance of a hundred miles, within ten days; and, if beyond the distance of a hundred miles, within twenty days.[26]

C. Recitals of Facts.—The return of the sheriff to the writ of habeas corpus should set forth the ground for the detention of the prisoner.[27]

18. To what place issued.—Ex parte Clarke, 100 U. S. 399, 25 L. Ed. 715.

19. Discretion to issue.—Ex parte Royall, No. 1, 117 U. S. 241, 29 L. Ed. 868; Ex parte Terry, 128 U. S. 289, 32 L. Ed. 405. See ante, "Discretion to Issue," VII, F.

But it had formally been held that the allowance or refusal of the writ is matter of law and not of discretion. Ex parte Milligan, 4 Wall. 2, 18 L. Ed. 281.

20. Mandamus to compel issuance.—Virginia *v.* Rives, 100 U. S. 313, 323, 25 L. Ed. 667; Virginia *v.* Paul, 148 U. S. 107, 123, 37 L. Ed. 386. See the title MANDAMUS.

21. Rule to show cause.—Ex parte Yarbrough, 110 U. S. 651, 652, 28 L. Ed. 274; Virginia *v.* Paul, 148 U. S. 107, 123, 37 L. Ed. 386. See ante, "Necessity for," VII, B.

22. Issuance with certiorari.—Hyde *v.* Shine, 199 U. S. 62, 85, 50 L. Ed. 90, followed in Dimond *v.* Shine, 199 U. S. 88, 50 L. Ed. 99. See, also, Ex parte Burford, 3 Cranch 448, 2 L. Ed. 495; Ex parte Bollman, 4 Cranch 75, 100, 2 L. Ed. 554. See post, "Habeas Corpus and Certiorari," IX, D, 8, c, (2).

Contrary holding in former case.—"The proceedings on a habeas corpus are de novo; on a certiorari, the court proceed on the state returned. Therefore, both writs cannot issue in the same cause; for the court cannot proceed de novo, and on the old record, too; which, upon the idea of returning both writs, must be done." Steiner *v.* Fell, 1 Dall. 22, 1 L. Ed. 20.

23. In extradition cases.—Terlinden *v.* Ames, 184 U. S. 270, 46 L. Ed. 534. See the title EXTRADITION, ante, p. 215.

24. Waiver of issuance.—Ex parte Baez, 177 U. S. 378, 389, 44 L. Ed. 813. See ante, "Necessity for," VII, B.

25. Return of writ.—Ex parte Baez, 177 U. S. 378, 389, 44 L. Ed. 813.

26. Time allowed for return.—See Rev. Stat., § 756.

This section was taken almost literally from the Habeas Corpus Act, chap. 2 of the 31st Car. II, which was designated to remedy procrastination and trifling with the writ. Prior to that act the mode of compelling a return was by taking out an alias, and then a pluries writ, and thereafter issuing an attachment. A reasonable time has always been allowed for making the return and is not to be presumed that one will not be made. Ex parte Baez, 177 U. S. 378, 388, 44 L. Ed. 813.

27. Recitals of facts.—Whitten *v.* Tomlinson, 160 U. S. 231, 245, 40 L. Ed. 406; Cuddy, Petitioner, 131 U. S. 280, 283, 33 L. Ed. 154.

D. Presumption of Verity.—At common law, no evidence was necessary to support the return. It was deemed to import verity until impeached. And this rule is not changed by any statute of the United States.[28]

E. Contradicting Return.—Ordinarily where the return fails to set forth a true state of facts, it may be contradicted;[29] but this cannot be done where the case is heard upon exceptions or demurrer to the return. Its averments must be taken as true.[30]

F. Amending Return.—The return may be amended with leave of court.[31]

IX. Hearing and Determination.

A. Nature of Proceeding.—It is provided by act of congress that in all proceedings on habeas corpus, the court or justice or judge shall proceed in a summary way to determine the facts of the case by hearing, testimony or arguments, and thereupon to dispose of the party as law and justice require.[32]

B. Rule of Decision.—The requirement that the usual mode of process adopted in the state shall be pursued in the arrest and examination of an accused person has no bearing upon the independent proceeding before the circuit court upon habeas corpus.[33]

C. Presence of Petitioner.—The petitioner need not be present in the supreme court on the hearing, where the return shows he is in custody under conviction in a federal court;[34] and, by agreement between the attorney for the prosecution and the petitioner for the prisoner, the federal supreme court may enter a rule and proceed with the hearing and determination in the absence of the prisoner.[35]

D. Extent of Inquiry—1. In General.—The inquiry upon a writ of habeas corpus extends to the questions of the illegality of the detention in restraint of

28. Presumption of verity.—Crowley *v.* Christensen, 137 U. S. 86, 94, 34 L. Ed. 620; Whitten *v.* Tomlinson, 160 U. S. 231, 40 L. Ed. 406.

29. Contradicting return.—The return must specify the true cause of detention, and petitioner, or the party imprisoned, "may deny any of the facts set forth in the return, or may allege any other facts that may be material in the case." Such denials or allegations must be under oath, so that thereby the material facts may be ascertained, and the matter disposed of as law and justice require. Cuddy, Petitioner, 131 U. S. 280, 283, 33 L. Ed. 154; Rev. Stat., §§ 757, 760, 761.

30. Crowley *v.* Christensen, 137 U. S. 86, 94, 34 L. Ed. 620.

31. Amending return.—Cuddy, Petitioner, 131 U. S. 280, 283, 33 L. Ed. 54.

32. Nature of proceedings on the hearing.—"Proceedings in habeas corpus are to be disposed of in a summary way. The interests of both the public and the petitioner require promptness; that if he is unlawfully restrained of his liberty it may be given to him as speedily as possible; that if not, all having anything to do with his restraint be advised thereof, and the mind of the public be put at rest, and also that if further action is to be taken in the matter it may be taken without delay. Especially is this true when the habeas corpus proceedings are had in the courts of a jurisdiction different from that in pursuance of whose mandate he is detained. This matter of promptness is not peculiar to these cases in federal courts, but is the general rule which obtains wherever the common law is in force. It is one of those things which give to such proceedings their special value, and is enforced by statutory provisions, both state and federal. The command of the section is 'to dispose of the party as law and justice require.' All the freedom of equity procedure is thus prescribed; and substantial justice, promptly administered, is ever the rule in habeas corpus." Storti *v.* Massachusetts, 183 U. S. 138, 143, 46 L. Ed. 120.

This provision is applicable to the federal supreme court, when exercising either its original or appellate jurisdiction. Storti *v.* Massachusetts, 183 U. S. 138, 46 L. Ed. 120. See § 761, Rev. Stat.

33. Rule of decision.—Hyde *v.* Shine, 199 U. S. 62, 84, 50 L. Ed. 90, followed in Dimond *v.* Shine, 199 U. S. 88, 50 L. Ed. 99.

34. Presence of petitioner.—Ex parte Yarbrough, 110 U. S. 651, 653, 28 L. Ed. 274.

"Petitions of the kind when presented here are heard in the first place ex parte." Ex parte Lange, 131 U. S., appx ccvii, ccviii, 21 L. Ed. 872.

35. Ex parte Baez, 177 U. S. 378, 389, 44 L. Ed. 813; Medley, Petitioner, 134 U. S. 160, 162, 33 L. Ed. 835; In re Burrus, 136 U. S. 586, 34 L. Ed. 500; Ex parte Milligan, 4 Wall. 2, 117, 18 L. Ed. 281.

liberty,[36] and the sufficiency and lawfulness of the cause of detention.[37] Where, however, a district judge has determined that probable cause exists, such determination cannot be revised on habeas corpus.[38]

2. Statutory Provision.—By act of congress, the federal courts are empowered, and it is their duty, to inquire into the cause of the restraint of liberty.[39]

3. Guilt or Innocence.—Upon the writ of habeas corpus, upon which it is to be determined whether the prisoner shall be discharged or held to bail,[40] it is not proper to inquire into the prisoner's guilt or innocence.[41] The inquiry under this writ is always distinct from the question whether the prisoner shall be convicted or acquitted;[42] but it would seem that the supreme court, in at least one case, did not restrain itself to this rule of law.[43] This question being distinct from the question involved in the cause itself, may be decided by a different court.[44]

36. Extent of inquiry.—Ex parte Fiske, 113 U. S. 713, 718, 28 L. Ed. 1117; Wales *v.* Whitney, 114 U. S. 564, 571, 29 L. Ed. 277; Ex parte Tom Tong, 108 U. S. 556, 559, 27 L. Ed. 826; Ex parte Royall, No. 1, 117 U. S. 241, 251, 29 L. Ed. 868; United States *v.* Rauscher, 119 U. S. 407, 431, 30 L. Ed. 425; Ableman *v.* Booth, 21 How. 506, 16 L. Ed. 169.

37. United States *v.* Williams, 194 U. S. 279, 295, 48 L. Ed. 979; Wales *v.* Whitney, 114 U. S. 564, 571, 29 L. Ed. 277; New York Foundling Hospital *v.* Gatti, 203 U. S. 429, 437, 51 L. Ed. 254.

The court can undoubtedly inquire into the sufficiency of the cause of commitment. Ex parte Watkins, 3 Pet. 193, 202, 7 L. Ed. 650.

"Upon a habeas corpus, we are only to inquire whether the warrant of commitment states a sufficient probable cause to believe, that the person charged has committed the offense stated." United States *v.* Johns, 4 Dall. 412, 413, 1 L. Ed. 888.

The case on a habeas corpus is "a mere inquiry, whether the accused shall be discharged or held to bail." The law which gives authority to issue the writ, defines its object, "for the purpose of inquiring into the cause of commitment, its legality, and the sufficiency of that cause." Holmes *v.* Jennison, 14 Pet. 540, 586o, 10 L. Ed. 579; Ex parte Watkins, 3 Pet. 193, 202, 7 L. Ed. 650.

The inquiry upon a writ of habeas corpus is limited to the sufficiency of the statement of probable cause for detention in the warrant of commitment. United States *v.* Johns, 4 Dall. 412, 413, 1 L. Ed. 888.

38. Tinsley *v.* Treat, 205 U. S. 20, 32, 51 L. Ed. 689.

39. Statutory provision.—Ex parte Fiske, 113 U. S. 713, 718, 28 L. Ed. 1117; United States *v.* Pridgeon, 153 U. S. 48, 63, 38 L. Ed. 631. See § 752, Rev. Stat.

But no law of the United States prescribes the power of the supreme court over the party brought up by habeas corpus. Ex parte Watkins, 3 Pet. 193, 201, 7 L. Ed. 650.

40. Guilt or innocence.—"This being a mere inquiry, which, without deciding upon guilt, precedes the institution of a prosecution, the question to be determined is, whether the accused shall be discharged or held to trial and if the latter, in what place they are to be tried, and whether they shall be confined or admitted to bail." Ex parte Bollman, 4 Cranch 75, 125, 2 L. Ed. 554; Ex parte Crouch, 112 U. S. 178, 28 L. Ed. 690; United States *v.* Lewis, 200 U. S. 1, 8, 50 L. Ed. 343.

41. Habeas corpus is not the proper proceeding to try the question of the guilt or innocence of the accused. Hyatt *v.* Corkran, 188 U. S. 691, 710, 47 L. Ed. 657; Holmes *v.* Jennison, 14 Pet. 540, 548, 586h, 10 L. Ed. 579; Ex parte Bollman, 4 Cranch 75, 100, 125, 2 L. Ed. 554; Pettibone *v.* Nichols, 203 U. S. 192, 206, 51 L. Ed. 148; Benson *v.* McMahon, 127 U. S. 457, 651, 32 L. Ed. 234; In re Cortes, 136 U. S. 330, 335, 34 L. Ed. 464; Bryant *v.* United States, 167 U. S. 104, 108, 42 L. Ed. 94.

Resort to this writ sometimes becomes necessary, because of what is done to enforce laws for the punishment of crimes, but the judicial proceeding under it is not to inquire into the criminal act which is complained of, but into the right to liberty notwithstanding the act. Ex parte Tom Tong, 108 U. S. 556, 559, 27 L. Ed. 826.

42. Inquiry distinct from that of guilt. —Ex parte Bollman, 4 Cranch 75, 100, 125, 2 L. Ed. 554; Holmes *v.* Jennison, 14 Pet. 540, 586p, 10 L. Ed. 579; Ex parte Watkins, 7 Pet. 568, 8 L. Ed. 786.

43. But in the case of In re Neagle, 135 U. S. 1, 34 L. Ed. 55, a marshal of the United States who had killed a person in defending a justice of the supreme court, was on habeas corpus discharged and delivered from any trial or further inquiry in any court. See dissenting opinion of Lamar, J., and Fuller, C. J., in In re Neagle, 135 U. S. 1, 76, 34 L. Ed. 55, quoting Ex parte Crouch, 112 U. S. 178, 180, 28 L. Ed. 690.

44. Ex parte Bollman, 4 Cranch 75, 101,

4. Motive of Prosecution.—On the writ of habeas corpus the motive of the prosecution in acquiring evidence will not be inquired into, even though the object is to detect or entrap the party into criminal practices.[45]

5. Criminality of Offense.—An inquiry into the criminality of an offense charged in the indictment is improper.[46]

6. Weight and Sufficiency of Evidence.—The inquiry upon the writ of habeas corpus does not extend to questions arising in regard to the evidence presented to sustain the charge.[47]

7. Custody in Violation of Constitution.—Custody in violation of the constitution or laws or treaties of the United States may be inquired into.[48]

8. Custody under Judgments or Orders of Court—a. *In General.*—As a general rule no inquiry can be made in regard to a commitment by a court of competent jurisdiction;[49] for the finding of such court is conclusive and cannot

2 L. Ed. 554; Holmes *v.* Jennison, 14 Pet. 540, 586o, 10 L. Ed. 579; Ex parte Tom Tong, 108 U. S. 556, 560, 27 L. Ed. 826. See ante, "For Act Not Criminal," V, J, 5, g.

45. Motive of prosecution.—Thus the motive of a person who entrusts a letter to a letter carrier will not be inquired into. In re Wright, 134 U. S. 136, 33 L. Ed. 865.

46. Criminality of offense.—In re Coy, 127 U. S. 731, 757, 32 L. Ed. 274; Ex parte Watkins, 3 Pet. 193, 7 L. Ed. 650.

It was not proper on the writ of habeas corpus, to determine the question as to whether a certain scheme alleged in an indictment constituted a lottery. Horner *v.* United States, 147 U. S. 449, 467, 37 L. Ed. 237; Horner *v.* United States, No. 2, 143 U. S. 570, 577, 36 L. Ed. 266; In re Cortes, 136 U. S. 330, 34 L. Ed. 464; Stevens *v.* Fuller, 136 U. S. 468, 34 L. Ed. 461; In re Fassett, 142 U. S. 479, 483, 484, 35 L. Ed. 1086. See ante, "As Determined by Nature of Offense," V, M.

47. Weight and sufficiency of evidence.—"We have nothing to do with questions arising on the evidence presented to sustain the charge." Ex parte Carll, 106 U. S. 521, 523, 27 L. Ed. 288; Hyde *v.* Shine, 199 U. S. 62, 84, 50 L. Ed. 90; Dimond *v.* Shine, 199 U. S. 88, 50 L. Ed. 99. But see Ex parte Bollman, 4 Cranch 75, 114, 2 L. Ed. 554.

The federal supreme court cannot inquire "whether the evidence established the fact alleged, that the defendant was a member of an order or organization known as the Mormon Church, called the Church of Jesus Christ of Latter-Day Saints, or the fact that the order or organization taught and counseled its members and devotees to commit the crimes of bigamy and polygamy as duties arising from membership therein. On this hearing we can only consider whether, these allegations being taken as true, an offense was committed of which the territorial court had jurisdiction to try the defendant." Davis *v.* Beason, 133 U. S. 333, 341, 33 L. Ed. 637.

48. Custody in violation of constitution.—Ex parte Royall, 112 U. S. 181, 28 L. Ed. 690; Ex parte Royall, No. 1, 117 U. S. 241, 29 L. Ed. 868; Mahon *v.* Justice, 127 U. S. 700, 718, 32 L. Ed. 283.

It is upon the hearing to be finally determined by the tribunal before whom the prisoner is brought whether his imprisonment or custody is in violation of the constitution or laws or treaties of the United States. In re Burrus, 136 U. S. 586, 591, 34 L. Ed. 500. See Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872.

"And, as the laws of congress are only valid when they are within the constitutional power of that body, the validity of the statute under which a prisoner is held in custody may be inquired into under a writ of habeas corpus as affecting the jurisdiction of the court which ordered his imprisonment. And if their want of power appears on the face of the record of his condemnation, whether in the indictment or elsewhere, the court which has authority to issue the writ is bound to release him." In re Coy, 127 U. S. 731, 758, 32 L. Ed. 274; Ex parte Siebold, 100 U. S. 371, 25 L. Ed. 717. See ante, "In Violation of Constitution," V, G, 5, c.

49. Custody under judgments or orders of court.—On an application for a writ of habeas corpus, after judgment on an indictment for an offense within the jurisdiction of the circuit court, the federal supreme court cannot revise such a judgment, or the proceedings which led to it, or set it aside, and discharge the prisoner. Ex parte Kearney, 7 Wheat. 38, 43, 5 L. Ed. 391.

A commitment by the judgment of a court of competent jurisdiction is a sufficient answer to a writ of habeas corpus intended to effect his discharge, said Ex parte Watkins, 3 Pet. 193, 7 L. Ed. 650. In re Coy, 127 U. S. 731, 756, 32 L. Ed. 274.

Where a prisoner shows that he is held under a judgment of a federal court, made without authority of law, the supreme court will, by writs of habeas corpus and certiorari, look into the record so far as to ascertain that fact, and if it is found to be so, will discharge the prisoner. Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872.

be questioned upon habeas corpus;[50] but, where personal liberty is concerned, the judgment of an inferior court affecting it is not so conclusive but that the question of its authority to try and imprison the party may be reviewed on habeas corpus by a superior court or judge having power to award the writ.[51]

b. *Jurisdiction.*—Where a person is in custody under the judgment, sentence or order of any inferior court or magistrate of the United States, the inquiry into such restraint of liberty on the writ of habeas corpus is restricted to the one question whether or not such court or magistrate has jurisdiction of the offense and of the person.[52] This rule applies in review of the rulings of the district[53] and circuit courts,[54] circuit court of appeals,[55] courts-martial,[56] and

See ante, "Judgment or Order of Court," V, J, 6.

50. Where a court, in passing sentence of imprisonment in the penitentiary, finds that, in the district or territory where the court is holden, there is no penitentiary suitable for the confinement of convicts, or available therefor, such finding is conclusive, and cannot be reviewed here upon a petition for habeas corpus. Ex parte Karstendick, 93 U. S. 396, 23 L. Ed. 889.

51. Ex parte Siebold, 100 U. S. 371, 377, 25 L. Ed. 717.

52. Jurisdiction.—Ex parte Lange, 18 Wall. 163, 166, 21 L. Ed. 872; Ex parte Rowland, 104 U. S. 604, 26 L. Ed. 861; Ex parte Carll, 106 U. S. 521, 522, 27 L. Ed. 288; Davis *v.* Beason, 133 U. S. 333, 341, 33 L. Ed. 637; Ornelas *v.* Ruiz, 161 U. S. 502, 40 L. Ed. 787; Terlinden *v.* Ames, 184 U. S. 270, 46 L. Ed. 534; Wright *v.* Henkel, 190 U. S. 40, 57, 47 L. Ed. 948; Ex parte Siebold, 100 U. S. 371, 25 L. Ed. 717; United States *v.* Hamilton, 3 Dall. 17, 1 L. Ed. 490; Ex parte Burford, 3 Cranch 448, 2 L. Ed. 495; Ex parte Bollman, 4 Cranch 75, 2 L. Ed. 554; Ex parte Watkins, 3 Pet. 193, 7 L. Ed. 650; Ex parte Watkins, 7 Pet. 568, 8 L. Ed. 786; In re Metzger, 5 How. 176, 12 L. Ed. 104; In re Kaine, 14 How. 103, 14 L. Ed. 345; Ex parte Wells, 18 How. 307, 329, 15 L. Ed. 421; Ex parte Milligan, 4 Wall. 2, 18 L. Ed. 281; Ex parte McCardle, 6 Wall. 318, 18 L. Ed. 816; Ex parte McCardle, 7 Wall. 506, 19 L. Ed. 264; Ex parte Yerger, 8 Wall. 85, 19 L. Ed. 332; In re Coy, 127 U. S. 731, 758, 32 L. Ed. 274; Ex parte Virginia, 100 U. S. 339, 343, 25 L. Ed. 676; Bessette *v.* Conkey Co., 194 U. S. 324, 335, 48 L. Ed. 997; Horner *v.* United States, 143 U. S. 207, 214, 36 L. Ed. 126; Callan *v.* Wilson, 127 U. S. 540, 32 L. Ed. 223; Nielsen, Petitioner, 131 U. S. 176, 183, 185, 33 L. Ed. 118; Ex parte Kearney, 7 Wheat. 38, 43, 5 L. Ed. 391; Ex parte Parks, 93 U. S. 18, 23 L. Ed. 787; Ex parte Yarbrough, 110 U. S. 651, 653, 28 L. Ed. 274; Ex parte Curtis, 106 U. S. 371, 375, 27 L. Ed. 232; United States *v.* Pridgeon, 153 U. S. 48, 62, 63, 38 L. Ed. 631; In re Wight, 134 U. S. 136, 148, 33 L. Ed. 865; Horner *v.* United States, No. 2, 143 U. S. 570, 578, 36 L. Ed. 266; Ex parte Mason, 105 U. S. 696, 26 L. Ed. 1213; Ex parte Wilson, 114 U. S. 417, 420, 29 L. Ed. 89; Wales *v.* Whitney, 114 U. S. 564, 29 L. Ed. 277; Ex parte Harding, 120 U. S. 782, 783, 30 L. Ed. 824; Benson *v.* McMahon, 127 U. S. 457, 32 L. Ed. 234; In re Cortes, 136 U. S. 330, 34 L. Ed. 464; Chappell *v.* United States, 160 U. S. 499, 40 L. Ed. 510; Press Pub. Co. *v.* Monroe, 164 U. S. 105, 41 L. Ed. 367; Huntington *v.* Laidley, 176 U. S. 668, 44 L. Ed. 630; Storti *v.* Massachusetts, 183 U. S. 138, 143, 46 L. Ed. 120; Stevens *v.* Fuller, 136 U. S. 468, 477, 478, 34 L. Ed. 461; In re Burrus, 136 U. S. 586, 589, 34 L. Ed. 500; Ex parte Crouch, 112 U. S. 178, 28 L. Ed. 690; Ex parte Bigelow, 113 U. S. 328, 28 L. Ed. 1005; In re Chapman, 156 U. S. 211, 218, 39 L. Ed. 401.

"Our inquiries in this class of cases are limited to such objections as relate to the authority of the court to render the judgment by which the prisoner is held." Ex parte Curtis, 106 U. S. 371, 375, 27 L. Ed. 232.

"Upon this writ the question for our determination is simply one of jurisdiction. If that were not lacking at the time of the trial and if it continued all through, then the application for the writ was properly denied by the circuit court." Felts *v.* Murphy, 201 U. S. 123, 129, 50 L. Ed. 689.

"In all such cases, when the question of jurisdiction is raised, the point to be decided is, whether the court has jurisdiction of that class of offenses." In re Coy, 127 U. S. 731, 758, 32 L. Ed. 274.

53. District court.—"The district court had plenary jurisdiction, both of the person, the place, the cause, and everything about it. To review the decision of that court by means of a writ of habeas corpus would be to convert that writ into a mere writ of error, and to assume an appellate power which has never been conferred upon this court." In re Coy, 127 U. S. 731, 759, 32 L. Ed. 274; Ex parte Parks, 93 U. S. 18, 23, 23 L. Ed. 787.

54. Circuit court.—Harkrader *v.* Wadley, 172 U. S. 148, 162, 43 L. Ed. 399.

55. Circuit court of appeals.—The circuit court of appeals having jurisdiction in the matter of the appeal herein involved, its decrees and orders in the premises are not void and cannot be revised on habeas corpus. In re McKenzie, 180 U. S. 536, 45 L. Ed. 657.

56. Courts-martial.—Carter *v.* McClaughry, 183 U. S. 365, 390, 46 L. Ed. 236; Ex parte Mason, 105 U. S. 696, 697, 26 L. Ed. 1213.

A district court of the United States may inquire into the jurisdiction of a

courts of equity.[57] Such inquiry may involve an examination of facts outside of but not inconsistent with the record.[58]

c. *Mere Errors*—(1) *In General.*—Mere errors committed at the trial in the court below cannot be inquired into upon a writ of habeas corpus.[59]

(2) *Habeas Corpus and Certiorari.*—In all cases where a circuit court of the United States has, in the exercise of its original jurisdiction, caused a prisoner to be brought before it, and has, after inquiring into the cause of detention, remanded him to the custody from which he was taken, the federal supreme court, in the exercise of its appellate jurisdiction, may, by the writ of habeas corpus, aided by the writ of certiorari, revise the decision of the circuit court, and if it be found unwarranted by law, relieve the prisoner from the unlawful restraint to which he has been remanded.[60]

d. *Commitments for Contempt.*—The inquiry in this case extends merely to

court-martial, and if it appears that the party condemned was not amenable to its jurisdiction, may discharge him from the sentence. In re Grimley, 137 U. S. 147, 150, 34 L. Ed. 636.

By habeas corpus the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial; and no mere errors in their proceedings are open to consideration. The single inquiry, the test, is jurisdiction. That being established, the habeas corpus must be denied and the petitioner remanded. That wanting, it must be sustained and the petitioner discharged. In re Grimley, 137 U. S. 147, 150, 34 L. Ed. 636.

57. Court of equity.—The jurisdiction of a court of equity to enjoin prosecution of a crime may be inquired into on hearing the writ. Harkrader *v.* Wadley, 172 U. S. 148, 169, 43 L. Ed. 399.

58. Examination of facts outside of record.—"This court * * * had power to inquire with regard to the jurisdiction of the inferior court, either in respect to the subject matter or to the person, even if such inquiry involved an examination of facts outside of, but not inconsistent with, the record. Ex parte Yerger, 8 Wall. 85, 19 L. Ed. 332; Ex parte Virginia, 100 U. S. 339, 25 L. Ed. 676; Ex parte Carll, 106 U. S. 521, 27 L. Ed. 288; Ex parte Yarbrough, 110 U. S. 651, 28 L. Ed. 274; Ex parte Bigelow, 113 U. S. 328, 28 L. Ed. 1005; Nielsen, Petitioner, 131 U. S. 176, 33 L. Ed. 118; Savin, Petitioner, 131 U. S. 267, 33 L. Ed. 150." In re Mayfield, 141 U. S. 107, 116, 35 L. Ed. 635. See ante, "Without Jurisdiction," V, J, 1; "Acquisition of Jurisdiction by Unlawful Means," V, J, 2; "Judgment or Order of Court," V, J, 6.

59. Mere errors.—"The general rule is well established that a writ of habeas corpus cannot be used to perform the office of a writ of error, and that this doctrine applies not only to original writs of habeas corpus issued by this court, but on appeals to it from courts below in habeas corpus proceedings." Gonzales *v.* Cunningham, 164 U. S. 612, 621, 41 L. Ed. 572; In re Schneider (No. 2), 148 U. S. 162, 37 L. Ed. 406; Benson *v.* McMahon, 127 U. S. 457, 461, 462, 32 L. Ed. 234; Stevens *v.* Fuller, 136 U. S. 468, 478, 34 L. Ed. 461; In re Coy, 127 U. S. 731, 758, 759, 32 L. Ed. 274; Nielsen, Petitioner, 131 U. S. 176, 182, 184, 33 L. Ed. 118; Savin, Petitioner, 131 U. S. 267, 279, 33 L. Ed. 150; Cuddy, Petitioner, 131 U. S. 280, 285, 33 L. Ed. 154. See ante, "As Determined by Validity of Proceedings," V, E.

Error of jurisdiction.—"The argument of counsel assumes that in this proceeding, by writ of habeas corpus, we can inquire into and correct nearly all errors which may have been committed by the district court in the control of the case originally. This has been so often denied by this court, and the proposition is so clear, that in a writ of habeas corpus nothing can be inquired into but the jurisdiction of the court, that it is unnecessary to pursue the entire line of argument of counsel for appellant." In re Wight, 134 U. S. 136, 148, 33 L. Ed. 865.

"We have no power under this writ to inquire into mere errors committed by the district court, save as to the error of the assumption of jurisdiction." In re Burrus, 136 U. S. 586, 589, 34 L. Ed. 500.

Not considered as on demurrer.—A case on habeas corpus is not considered as on a demurrer before trial. In re Coy, 127 U. S. 731, 758, 32 L. Ed. 274.

What constitutes mere error.—Where the authorities all concede that neither irregularities nor error, so far as they were within the jurisdiction of the court, can be inquired into upon a writ of habeas corpus—they differ widely as to what constitutes error, and what should be regarded as rendering the judgment or proceedings void. United States *v.* Pridgeon, 153 U. S. 48, 63, 38 L. Ed. 631.

60. Habeas corpus and certiorari.—Ex parte Yerger, 8 Wall. 85, 19 L. Ed. 332; Ex parte Royall, 117 U. S. 181, 182, 28 L. Ed. 600; Barry *v.* Mercein, 5 How. 103, 12 L. Ed. 70; In re Kaine, 14 How. 103, 14 L. Ed. 345; Ex parte Wells, 18 How. 307, 329, 15 L. Ed. 421.

As to extent of hearing on certiorari to send up record of privileges on habeas corpus, see the title CERTIORARI, vol. 3, p. 651. And see Ex parte Dugan, 2 Wall. 134, 17 L. Ed. 871.

the question of the jurisdiction of the committing magistrate or court.[61] In determining the question of jurisdiction, facts not contradictory to the record may be inquired into,[62] but the sufficiency of the cause of commitment cannot be inquired into.[63] The truth of the specific facts recited in the order of commitment, as constituting the contempt, cannot be examined.[64] The validity of a state law and the sentences of her courts thereunder in commitments for contempt may be inquired into by the supreme court.[65]

E. Evidence and Presumptions on Hearing.—Facts alleged in the petition for the writ of habeas corpus, forfeited by the oath of the petitioner, unless denied by the return, or contradicted by other evidence, if distinct and unambiguous, are taken to be admitted.[66] Facts not contradictory to the record, going to show want of jurisdiction, may be shown;[67] but the facts in the record cannot be disputed.[68] It will not be presumed that a prisoner has been kept in custody in pursuance of a statute not applicable to the particular case.[69]

61. Commitments for contempt.—The attack upon the contempt proceedings by habeas corpus is in a collateral way and the inquiry is limited to the question of jurisdiction. In re Delgado, 140 U. S. 586, 588, 35 L. Ed. 578; Ex parte Watkins, 3 Pet. 193, 203, 7 L. Ed. 650; Ex parte Parks, 93 U. S. 18, 23 L. Ed. 787; Ex parte Yarbrough, 110 U. S. 651, 28 L. Ed. 274; Cuddy, Petitioner, 131 U. S. 280, 285, 286, 33 L. Ed. 154; In re Wilson, 140 U. S. 575, 35 L. Ed. 513; In re Swan, 150 U. S. 637, 652, 37 L. Ed. 1207.

There is no distinction between custody under commitments for contempts and custody under sentence in other cases; for when a court commits a party for a contempt, their adjudication is a conviction, and their commitment, in consequence, is execution. Ex parte Kearney, 7 Wheat. 38, 43, 5 L. Ed. 391.

62. Inquiry outside of record.—"In Cuddy, Petitioner, 131 U. S. 280, 33 L. Ed. 154, it was held directly, that where the petitioner had been committed for a contempt, he was at liberty, upon application for a writ of habeas corpus, to allege and prove facts not contradictory to the record, which went to show that the court was without jurisdiction." In re Mayfield, 141 U. S. 107, 116, 35 L. Ed. 635.

63. Cause of commitment.—Ex parte Kearney, 7 Wheat. 38, 44, 5 L. Ed. 391; Ex parte Terry, 128 U. S. 289, 306, 32 L. Ed. 405.

64. Facts contrary to record.—The question of jurisdiction, it must be here observed, does not involve an inquiry into the truth of the specific facts recited in the order of commitment, as constituting the contempt. As the writ of habeas corpus does not perform the office of a writ of error or an appeal, these facts cannot be re-examined or reviewed in this collateral proceeding. Ex parte Terry, 128 U. S. 289, 305, 32 L. Ed. 405.

This court cannot, in this proceeding, in virtue of any power conferred upon it by existing legislation, go behind the determination of a circuit court as to whether the prisoner was or was not guilty of contempt. It can deal only with such defects in the proceedings as render them, not simply erroneous or irregular but absolutely void. Ex parte Terry, 128 U. S. 289, 306, 32 L. Ed. 405; Ex parte Robinson, 19 Wall. 505, 511, 22 L. Ed. 205; Ex parte Kearney, 7 Wheat. 38, 43, 5 L. Ed. 391; Cuddy, Petitioner, 131 U. S. 280, 33 L. Ed. 154.

The determination of the circuit court that a constable was in contempt for seizing and persisting in holding certain property contrary to its orders is not open to inquiry here. In re Swan, 150 U. S. 637, 652, 37 L. Ed. 1207.

"The only question which can properly be raised upon this writ is whether the circuit court exceeded its jurisdiction in holding the petitioner for a contempt and in imposing upon him a fine therefor. We are not at liberty to consider the testimony, or to inquire whether the facts, as they appeared upon the hearing, justified the action of the circuit court. It is only upon the theory that the proceedings and judgment of the court were nullities that we are authorized to reverse its action." In re Lennon, 166 U. S. 548, 552, 41 L. Ed. 1110.

65. Constitutionality of state law.—Pepke *v.* Cronan, 155 U. S. 100, 101, 39 L. Ed. 84. See ante, "In Contempt Cases," V, J, 6, h.

66. Evidence and presumptions on hearing.—Whitten *v.* Tomlinson, 160 U. S. 231, 242, 40 L. Ed. 406.

67. Facts outside of record.—In re Mayfield, 141 U. S. 107, 116, 35 L. Ed. 635; Cuddy, Petitioner, 131 U. S. 280, 33 L. Ed 154.

68. Parties to the collateral proceeding by habeas corpus are bound by the jurisdictional averments in the record, and will not be permitted to dispute them except so far as they may have contained a false recital with respect to such parties. In re Lennon, 166 U. S. 548, 552, 553, 41 L. Ed. 1110. See ante, "Commitments for Contempt," IX, D, 8, d.

69. Presumptions.—It will not be presumed that the prisoner was kept in solitary confinement in pursuance of a statute not applicable to the case of the prisoner.

F. Decision on Hearing—1. In General.—Under the Habeas Corpus Act of Charles II, it was the regular course to take bail and recognizance of the party to appear in the King's Bench or assizes; though the judge would discharge absolutely, if the case was clearly one of illegal imprisonment.[70] Under the act of congress, it is the duty of the court, justice or judge, granting the writ, on hearing, "to dispose of the party as law and justice may require."[71] If it appears that the court under whose authority the prisoner is held is without jurisdiction to proceed against him,[72] that no crime has been committed,[73] or that the suspicion entertained of the prisoner was wholly groundless, he should be discharged.[74] Otherwise he should be remanded to the custody of the proper officer,[75] or admitted to bail.[76] If the prisoner is detained under a conviction and sentence by a court having jurisdiction of the cause, the general rule is that he will be instantly remanded.[77]

2. Providing for Delivery of Infant to Parent.—See elsewhere in this title.[78]

3. Providing for Rearrest on Discharge.—Under the writ of habeas corpus, the federal supreme court cannot do anything else than discharge the prisoner from the wrongful confinement.[79] In some cases, no correction can be made of the judgment, as where the court had under the law no jurisdiction of the case—that is, no right to take cognizance of the offense alleged, and the prisoner must then be entirely discharged;[80] but in other cases, as where the court merely exceeds its jurisdiction, it is in the interest of justice and to prevent its defeat, that the discharge of the petitioner should be delayed for such reasonable time as may be necessary to have him taken before the court where the judgment was rendered, that the defects which are the subject of complaint in that judgment may be corrected.[81]

4. Effect of Decision of Discharge.—The discharge of a party, under a writ of habeas corpus, from the process under which he is imprisoned, discharges him from any further confinement under the process; but not under

Holden *v.* Minnesota, 137 U. S. 483, 491, 34 L. Ed. 734; Crowley *v.* Christensen, 137 U. S. 86, 89, 34 L. Ed. 620.

70. Decision on hearing—Act of Car. II.—Ex parte Clarke, 100 U. S. 399, 403, 25 L. Ed. 715.

71. Under act of congress.—Iasigi *v.* Van De Carr, 166 U. S. 391, 41 L. Ed. 1045; Ekiu *v.* United States, 142 U. S. 651, 35 L. Ed. 1146; In re Boardman, 169 U. S. 39, 43, 42 L. Ed. 653. See Rev. Stat., § 761.

72. When discharged—Want of jurisdiction.—Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872; Ex parte Rowland, 104 U. S. 604, 26 L. Ed. 861; Ex parte Fiske, 113 U. S. 713, 724, 28 L. Ed. 1117; In re Coy, 127 U. S. 731, 733, 32 L. Ed. 274; In re Bonner, 151 U. S. 242, 262, 38 L. Ed. 149; Medley, Petitioner, 134 U. S. 160, 174, 33 L. Ed. 835; Savage, Petitioner, 134 U. S. 176, 33 L. Ed. 842; McClaughry *v.* Deming, 186 U. S. 49, 69, 46 L. Ed. 1049; Ex parte Virginia, 100 U. S. 339, 343, 25 L. Ed. 676; United States *v.* Hamilton, 3 Dall. 17, 1 L. Ed. 490; Ex parte Burford, 3 Cranch 448, 2 L. Ed. 495; Ex parte Jackson, 96 U. S. 727, 24 L. Ed. 877; Coleman *v.* Tennessee, 97 U. S. 509, 519, 24 L. Ed. 1118; Ex parte Yerger, 8 Wall. 85, 101, 19 L. Ed. 332; New York Foundling Hospital *v.* Gatti, 203 U. S. 429, 437, 51 L. Ed. 254.

73. No crime committed.—See ante, "As Determined by Nature of Offense," V, M.

74. Held under groundless suspicion.—Ex parte Bollman, 4 Cranch 75, 125, 2 L. Ed. 554; Wales *v.* Whitney, 114 U. S. 564, 571, 29 L. Ed. 277.

75. When remanded.—Wales *v.* Whitney, 114 U. S. 564, 571, 29 L. Ed. 277; Ex parte Tom Tong, 108 U. S. 556, 560, 27 L. Ed. 826; United States *v.* Pridgeon, 153 U. S. 48, 64, 38 L. Ed. 631.

76. When admitted to bail.—Ex parte Bollman, 4 Cranch 75, 125, 2 L. Ed. 554.

77. Remanded if court has jurisdiction.—Ex parte Siebold, 100 U. S. 371, 375, 25 L. Ed. 717.

Awarding damages.—See the title FALSE IMPRISONMENT, ante, p. 242.

78. Delivery of infant to parent.—See ante, "Infants," V, L, 4.

Wife and husband.—See ante, "Husband or Wife," V, L, 5.

Ward to guardian.—See ante, "Wards," V, L, 6.

79. Providing for rearrest on discharge.—Medley, Petitioner, 134 U. S. 160, 173, 33 L. Ed. 835, followed in Savage, Petitioner, 134 U. S. 176, 33 L. Ed. 842.

80. In re Bonner, 151 U. S. 242, 262, 38 L. Ed 149.

81. Delay of discharge.—Where the error or excess of jurisdiction consists in ordering the prisoner confined in a penitentiary contrary to law, justice requires that

any other process, which may be issued against him, under the same indictment.[82]

X. Custody Pending Hearing.

Pending the examination or hearing, the prisoner, in all cases, on the return of the writ, is detained, not on the original warrant, but under the authority of the writ of habeas corpus. He may be bailed on the return de die in diem, or be remanded to the same jail whence he came, or to any other place of safe-keeping under the control of the court, or officer issuing the writ, and by its order brought up from time to time, till the court or officer determines whether it is proper to discharge or remand him absolutely.[83] The entire responsibility for the safe-keeping of the prisoner rests with the officer before whom the prisoner is brought pursuant to the writ.[84]

jurisdiction of the prisoner should be reassumed and defects corrected by the court that imposed the sentence. The discharge of the prisoner on habeas corpus should be delayed for such reasonable time as may be necessary to have him taken before the court where the judgment was rendered. In re Bonner, 151 U. S. 242, 261, 38 L. Ed. 149.

"What disposition shall we now make of the prisoner, who is entitled to his discharge from the custody of the warden of the penitentiary under the order and judgment of the court, because, within the language of § 753, he is in custody in violation of the constitution of the United States, but who is, nevertheless, guilty, as the record before us shows, of the crime of murder in the first degree? We do not think that we are authorized to remand the prisoner to the custody of the sheriff of the proper county to be proceeded against," app. in Savage, Petitioner, 134 U. S. 176, 33 L. Ed. 842. "Upon the whole, after due deliberation, we have come to the conclusion that the attorney general of the state of Colorado shall be notified by the warden of the penitentiary of the precise time when he will release the prisoner from his custody under the present sentence and warrant at least ten days beforehand, and after doing this, and at that time, he shall discharge the prisoner from his custody; and such will be the order of this court." Medley, Petitioner, 134 U. S. 160, 174, 33 L. Ed. 835.

82. Effect of decision.—Ex parte Milburn, 9 Pet. 704, 710, 9 L. Ed. 280; Holmes *v.* Jennison, 14 Pet. 540, 586, 10 L. Ed. 579; Skillern *v.* May, 4 Cranch 137, 2 L. Ed. 574.

George Milburn was imprisoned in the jail of the county of Washington, upon a bench warrant, issued by the circuit court of the United States for the District of Columbia, to answer an indictment pending against him for keeping a faro bank, an offense which, by an act of congress, is punishable by imprisonment at hard labor in the penitentiary of the district. He had been arrested on a former capias, issued on the same indictment, upon which he gave a recognizance of bail, with sureties, in the sum of one hundred pounds, Maryland currency, according to the statute of Maryland, conditioned to appear in court at the return day of the process, etc.; he did not appear, and the recognizance was forfeited, and a scire facias was issued against him, and his sureties, returnable to December term, 1833. At the same term, another writ of capias was issued against him, returnable immediately, and returned non est inventus; at June vacation, 1834, another writ of capias was issued against him, returnable to November term, 1834, on which he was arrested, and from which arrest he was discharged on a habeas corpus, by the chief justice of the circuit court, on the ground that the writ of capias improperly issued; on a return of this discharge by the marshal, a bench warrant was issued by order of a majority of the judges of the circuit court, and on which he was in custody. He applied for a writ of habeas corpus to this court, to obtain his discharge. Held, that he was properly in custody. The rule for the habeas corpus was refused. Ex parte Milburn, 9 Pet. 704, 9 L. Ed. 280.

83. Custody pending hearing.—In re Kaine, 14 How. 103, 133, 14 L. Ed. 345, Nelson, J.

"When a prisoner is brought into court upon the return of a habeas corpus ad subjiciendum, he is then in the power and under the control of the court; but until the court makes some order changing the custody, it remains. The court may, in some cases, admit to bail, and may also take order for the future production of the prisoner, without bail; but in all cases, until the court makes some order changing the custody, either for the care or security of the prisoner, or funded on the illegality of his commitment, the original custody continues." In re Kaine, 14 How. 103, 122, 14 L. Ed. 345.

"The award of the capias ad satisfaciendum must be considered as the act of the circuit court, it being judicial process issuing under the authority of the court. The party is in custody under that process. He is then in custody in contemplation of law, under the award of process by the court." In re Kaine, 14 How. 103, 126, 14 L. Ed. 345; Ex parte Watkins, 7 Pet. 568, 572, 8 L. Ed. 786.

84. Responsibility for safe-keeping of

XI. Suspension of Writ.

A. Power of Suspension.—It is essential to the safety of every government that, in a great crisis, there should be a power somewhere of suspending the writ of habeas corpus. In every war, there are men of previously good character, wicked enough to counsel their fellow citizens to resist the measures deemed necessary by a good government to sustain its just authority and overthrow its enemies; and their influence may lead to dangerous combinations. In such an emergency an immediate public investigation according to law may not be possible; yet the peril to the country may be too imminent to suffer such persons to go at large. In this exigency if the government should see fit in the exercise of a proper discretion to make arrests, it should not be required to produce the persons arrested in answer to a writ of habeas corpus.[85] Hence, the second clause of § 9, art. 1, of the constitution of the United States, provides: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."[86] The two questions arising thereunder are: By whom may the writ be suspended, and when does public safety require it to be suspended? As it is a political question,[87] the first has been considered, though probably not finally decided, as abiding originally within the implied powers of the legislative branch of the government,[88] which may be delegated to the executive branch of the gov-

prisoner.—Barth *v.* Clise, 12 Wall. 400, 403, 20 L. Ed. 393.

Thus, when a sheriff, in obedience to a writ of habeas corpus, makes a proper return and brings his prisoner before the court which issued the writ, the safe-keeping of the prisoner while he is before it is entirely under the control and direction of the court to which the return is made. The sheriff is accordingly not responsible for escape of the prisoner while thus in the custody of the court, and before a remand or other order placing new duties on him. Barth *v.* Clise, 12 Wall. 400, 20 L. Ed. 393.

"By the common law, upon the return of a writ of habeas corpus and the production of the body of the party suing it out, the authority under which the original commitment took place is superseded. After that time, and until the case is finally disposed of, the safe-keeping of the prisoner is entirely under the control and direction of the court to which the return is made. The prisoner is detained, not under the original commitment, but under the authority of the writ of habeas corpus. Pending the hearing he may be bailed de die in diem, or be remanded to the jail whence he came, or be committed to any other suitable place of confinement under the control of the court. He may be brought before the court from time to time by its order until it is determined whether he shall be discharged or absolutely remanded." Barth *v.* Clise, 12 Wall. 400, 402, 20 L. Ed. 393.

85. Suspension of writ.—Ex parte Milligan, 4 Wall. 2, 125, 18 L. Ed. 281.

86. Constitutional provision.—Fisher *v.* Baker, 203 U. S. 174, 179, 51 L. Ed. 142; Luther *v.* Borden, 7 How. 1, 12 L. Ed. 581.

The constitution, by this provision, added to the exalted estimate in which the writ has always been held in this country and in England. In re Burrus, 136 U. S. 586, 589, 34 L. Ed. 500.

But, despite this exalted esteem, it may be worthy of observation, that this is the only constitutional safeguard of civil liberty that is voidable and subject to suspension. See Ex parte Milligan, 4 Wall. 2, 18 L. Ed. 281.

In the Philippine Island.—"The seventh paragraph of § 5 of the act of congress of July 1, 1902, 32 Stat., c. 1369, pp. 691, 692, reads: 'That the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion, insurrection, or invasion the public safety may require it, in either of which events the same may be suspended by the president, or by the governor, with the approval of the Philippine commission, wherever during such period the necessity for such suspension shall exist.'" Fisher *v.* Baker, 203 U. S. 174, 179, 51 L. Ed. 142.

87. Who may suspend.—"If at any time the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for the legislature to say so. That question depends on political considerations, on which the legislature is to decide. Until the legislative will be expressed, this court can only see its duty, and must obey the laws." Ex parte Bollman, 4 Cranch 75, 101, 2 L. Ed. 554.

88. Congress.—The constitution declares that the privilege of the writ of habeas corpus shall not be suspended, unless, when in cases of rebellion or invasion, the public safety may require it. No express power is given to congress to secure this invaluable right in the non-enumerated cases, or to suspend the writ in cases of rebellion or invasion. And

ernment,[89] as was in fact done by the act of March 3, 1863.[90] As yet, the decisions have gone no further than to answer the second question in the terms of the constitution itself[91] except to declare that it is a judicial question.[92] This is not a restraint upon the judiciary.[93] The provisions of the federal constitution relating to the writ of habeas corpus has no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country.[94]

B. Effect of Suspension.—The suspension of the privilege of the writ of habeas corpus does not suspend the writ itself. The writ issues as a matter of course; and, on the return made to it, the court decides whether the party applying is denied the right of proceeding any further with it.[95] Under the act of March 3, 1863, it will be granted where the prisoner is detained without trial an unnecessary long time.[96] Its suspension simply denies to one arrested the privilege of this writ in order to obtain his liberty, and does not authorize the arrest of anyone,[97] nor does it authorize the denial of a trial in a civil

yet it would be difficult to say, since this great writ of liberty is usually provided for by the ordinary functions of legislation, and can be effectually provided for only in this way, that it ought not to be deemed, by necessary implication, within the scope of the legislative power of congress. Prigg *v.* Pennsylvania, 16 Pet. 539, 619, 10 L. Ed. 1060. See Mills *v.* Green, 159 U. S. 651, 40 L. Ed. 293.

In Fisher *v.* Baker, 203 U. S. 174, 51 L. Ed. 142, as the suspension had been revoked before appeal to the federal supreme court, the question was a mooted one and not decided.

89. **Delegation of power to president.**—"I do not believe it within the power of congress to give to ministerial officers a final adjudication of the right to liberty or to oust the courts from the duty of inquiry respecting both law and facts." United States *v.* Williams, 194 U. S. 279, 925, 48 L. Ed. 979, opinion of Mr. Justice Brewer.

90. **Act of March 3, 1863.**—The president was authorized by the act of March 3, 1863, to suspend the privilege of the writ of habeas corpus, whenever, in his judgment, the public safety required; and he did, by proclamation, bearing date the 15th of September, 1863, reciting, among other things, the authority of this statute, suspend it. Ex parte Milligan, 4 Wall. 2, 115, 18 L. Ed. 281.

91. **Propriety of suspension.**—Ex parte Royall, No. 1, 117 U. S. 241, 249, 29 L. Ed. 868; Mitchell *v.* Clark, 110 U. S. 633, 649, 28 L. Ed. 279; Ex parte Milligan, 4 Wall. 2, 18 L. Ed. 281.

92. **Judicial question.**—In re Burrus, 136 U. S. 586, 610, 34 L. Ed. 500.

93. "It is in restraint of executive and legislative powers, and no further affects the judiciary than to impose on them the necessity, if the privilege of habeas corpus is suspended by any authority, to decide whether the exigency demanded by the constitution exists to sanction the act." In re Burrus, 136 U. S. 586, 610, 34 L. Ed. 500.

94. **In cases arising in foreign country.**—Neely *v.* Henkel, No. 1, 180 U. S. 109, 122, 45 L. Ed. 448.

95. **Effect of suspension.**—Ex parte Milligan, 4 Wall. 2, 130, 18 L. Ed. 281.

96. **Under act of March 3, 1863.**—The second and third sections of the act of March 3, 1863, are explicit, plain and direct, and the meaning of congress cannot be mistaken. "The public safety demanded, if the president thought proper to arrest a suspected person, that he should not be required to give the cause of his detention on return to a writ of habeas corpus. But it was not contemplated that such person should be detained in custody beyond a certain fixed period, unless certain judicial proceedings, known to the common law, were commenced against him. The secretaries of state and war were directed to furnish to the judges of the courts of the United States, a list of the names of all parties, not prisoners of war, resident in their respective jurisdictions, who then were or afterwards should be held in custody by the authority of the president, and who were citizens of states in which the administration of the laws in the federal tribunals was unimpaired. After the list was furnished, if a grand jury of the district convened and adjourned, and did not indict or present one of the persons thus named, he was entitled to his discharge; and it was the duty of the judge of the court to order him brought before him to be discharged, if he desired it. The refusal or omission to furnish the list could not operate to the injury of any who was not indicted or presented by the grand jury; for, if twenty days had elapsed from the time of his arrest and the termination of the session of the grand jury, he was equally entitled to his discharge as if the list were furnished; and any credible person, on petition verified by affidavit, could obtain the judge's order for that purpose." Ex parte Milligan, 4 Wall. 2, 115, 18 L. Ed. 281.

97. **Does not authorize arrests.**—Ex parte Milligan, 4 Wall. 2, 115, 18 L. Ed. 281.

court.[98] The suspension in no respect affects the claims of private citizens against each other arising out of contracts between them, or the means of their enforcement. The constitution does not forbid, during such suspension or by reason of it, the institution of suits for such claims, or authorize congress to forbid it.[99]

XII. Compelling Obedience to Writ.

Sections 763, 766, U. S. Rev. Stat., provide, in substance, that any proceeding against a person imprisoned or confined or restrained of his liberty, in any state court, or by authority of any state, pending the proceedings or appeal in habeas corpus cases in the federal courts, and until final judgment therein, and after final judgment of discharge, shall be null and void.[1]

XIII. Costs and Fees.

Fees may be allowed by the court to the district attorney for services in defending habeas corpus cases, and should be accounted for by him as fees and emoluments of his office.[2]

XIV. Appeal.

See elsewhere.[3]

XV. Removal of Cause.

Writs of habeas corpus are not removable from a state court into a circuit court of the United States under the act of March 3, 1875, ch. 137, § 2.[4]

HABENDUM.—See the title DEEDS, vol. 5, p. 257.
HABIT.—See note 5.

98. Does not authorize denial of civil trial.—A citizen not connected with the military service and resident in a state where the courts are open and in the proper exercise of their jurisdiction cannot, even when the privilege of the writ of habeas corpus is suspended, be tried, convicted, or sentenced otherwise than by the ordinary courts of law. Ex parte Milligan, 4 Wall. 2, 18 L. Ed. 281.

99. Does not forbid private suits.—Mitchell *v.* Clark, 110 U. S. 633, 649, 28 L. Ed. 279, dissenting opinion, Field, J.

1. Compelling obedience to writ.—Rogers *v.* Peck, 199 U. S. 425, 435, 50 L. Ed. 256.

The statute aims to entirely prevent action which shall interfere with the perfect freedom of the federal courts to inquire into the case and make such orders and render such judgment as they shall see fit. Rogers *v.* Peck, 199 U. S. 425, 436, 50 L. Ed. 256.

The object of Rev. Stat., §§ 763, 764, 765, "was—in cases where the applicant was held in custody under the authority of a state court or by the authority of a state—to stay the hands of such court or state, while the question as to whether his detention was in violation of the constitution, laws or treaties of the United States was being examined by the courts of the Union having jurisdiction in the premises. But the jurisdiction of the state courts in the cases specified is restrained only pending the proceedings in the courts of the United States, and until final judgment therein." In re Jugiro, 140 U. S. 291, 295, 35 L. Ed. 510.

2. Costs and fees.—Hilborn *v.* United States, 163 U. S. 342, 41 L. Ed. 183. See Green *v.* MacDougall, 199 U. S. 601, 50 L. Ed. 328; Wimbish *v.* Jamison, 199 U. S. 599, 50 L. Ed. 327.

3. Appeal.—See the title APPEAL AND ERROR, vol. 1, pp. 381, 531.

4. Removal of cause.—Kurtz *v.* Moffitt, 115 U. S. 487, 498, 29 L. Ed. 458.

5. Habit.—"When we speak of the habits of a person, we refer to his customary conduct, to pursue which he has acquired a tendency, from frequent repetition of the same acts. It would be incorrect to say that a man has a habit of anything from a single act. A habit of early rising, for example, could not be affirmed of one because he was once seen on the streets in the morning before the sun had risen; nor could intemperate habits be imputed to him because his appearance and actions on that occasion might indicate a night of excessive indulgence. The court did not, therefore, err in instructing the jury that if the habits of the insured, 'in the usual, ordinary, and everyday routine of his life, were temperate,' the representations made are not untrue, within the meaning of the policy, although he may have had an attack of delirium tremens from an exceptional overindulgence." Insurance Co. *v.* Foley, 105 U. S. 350, 354, 26 L. Ed. 1055. See, also, Northwestern Life Ins. Co. *v.* Muskegon Bank, 122 U. S. 501, 512, 30 L. Ed. 1100. And see, also, the titles EVIDENCE, vol. 5, p. 1024; INSURANCE.

HABITUAL CRIMINALS.—See the titles CONSTITUTIONAL LAW, vol. 4, pp. 392, 520; SENTENCE AND PUNISHMENT.

HABITUAL INTEMPERANCE.—If one is addicted to the excessive use of alcoholic stimulants, he is habitually intemperate; and to use them often or daily is, according to the ordinarily acception of those words, to use them habitually.[1]

HACK.—As to whether negligence of driver of public hack is imputable to passenger riding therein, see the title NEGLIGENCE. As to cab and hack privileges at stations, see the title CARRIERS, vol. 3, p. 577.

HAIR.—See note 2.

HALF-BREED SCRIP.—See the title PUBLIC LANDS.

HALF PILOTAGE.—In the law of shipping, half pilotage is compensati for services which the pilot has put himself in readiness to perform by lab risk, and cost, and which he has actually offered to perform.[3]

HANDWRITING.

BY JOHN CALLAN BROOKS.

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2. Hair.—See Authur *v.* Butterfield, 125 U. S. 70, 75, 31 L. Ed. 643. See, generally, the title REVENUE LAWS.

Hair seating.—See Arthur *v.* Butterfield, 125 U. S. 70, 73, 31 L. Ed. 643.

3. Steamship Company *v.* Portwardens, 6 Wall. 31, 34, 18 L. Ed. 749. See Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 211, 29 L. Ed. 158. And see, generally, the title PILOTS.

CROSS REFERENCES.

See the titles ANCIENT DOCUMENTS, vol. 1, p. 313; BEST AND SECONDARY EVIDENCE, vol. 3, p. 214; COURTS, vol. 4, p. 861; DOCUMENTARY EVIDENCE, vol. 5, p. 431; EXPERT AND OPINION EVIDENCE, ante, p. 200; IDENTITY.

As to antiquity of deed affecting its admissibility, see the title DOCUMENTARY EVIDENCE, vol. 5, p. 467. As to proof of instrument having subscribing witnesses, see the title DOCUMENTARY EVIDENCE, vol. 5, p. 465. As to admissibility of deed to prove forgery, see the title DOCUMENTARY EVIDENCE, vol. 5, p. 450. As to necessity for other confirmatory evidence than proof of handwriting to establish validity of claim, see, generally, the title PUBLIC LANDS. As to admissibility of entries in book of account, see the title DOCUMENTARY EVIDENCE, vol. 5, p. 462. As to mode of proof where witnesses are not within the jurisdiction of the court, see the title DOCUMENTARY EVIDENCE, vol. 5, p. 465. As to mode of proof where witnesses are otherwise incapable of being produced, see the title DOCUMENTARY EVIDENCE, vol. 5, p. 465. As to presumption that witness would not have subscribed to a false attestation, see the title DOCUMENTARY EVIDENCE, vol. 5, p. 465. As to mode of proof where there are no subscribing witnesses, see the title DOCUMENTARY EVIDENCE, vol. 5, p. 467. As to foundation for introduction of evidence, see the title DOCUMENTARY EVIDENCE, vol. 5, p. 464. As to power of attorney authenticated before a regidor being admissible in evidence, see the title DOCUMENTARY EVIDENCE, vol. 5, p. 469. As to admissibility of copies of deeds into evidence, see the title DOCUMENTARY EVIDENCE, vol. 5, p. 468.

I. Definition.

Handwriting is a physical matter and does not in itself represent any characteristics of the writer as to composition or general style, or as to his literary or legal attainments. It is to be seen and the characters recognized by the eye.[1]

II. When Proof of Handwriting May Be Resorted to.

See, generally, the title DOCUMENTARY EVIDENCE, vol. 5, p. 431, and the specific references given at the head of this title.

III. Modes of Proof.

A. By Nonexpert Witnesses—1. WHO HAVE SEEN PARTY WRITE.—The man being ascertained, it is competent to prove that a signature in question is his by those who have seen him write and know his handwriting.[2]

Who Saw Party Write but Once.—If a person has seen another write but once, he can testify as to the genuineness of his signature.[3]

2. WHO HAVE PERSONALLY COMMUNICATED WITH HIM BY LETTER.—A person is competent to testify as to the genuineness of another's signature, if he has personally communicated with him by letter, although he has never seen him write at all.[4]

3. COMPETENCY AND OPINION OF WITNESSES—a. *Preliminary Examination.*—If the court on the preliminary examination of a witness can see that he has that degree of knowledge of the party's handwriting which will enable him to judge of its genuineness, he should be permitted to give to the jury his opinion on the subject.[5]

b. *Familiarity through Official Position.*—Witnesses, who, in the course of administration of the duties of an official position, have acquired a familiarity with a certain signature, although they had never seen the party write and had

1. **Definition.**—Throckmorton *v.* Holt, 180 U. S. 552, 569, 45 L. Ed. 663.

2. **Who have seen party write.**—Hardy *v.* Harbin, 154 U. S., appx., 568, 598, 604, 22 L. Ed. 378.

3. **Who saw party write but once.**—Rogers *v.* Ritter, 12 Wall. 317, 322, 20 L. Ed. 417, cited in United States *v.* Ortiz, 176 U. S. 422, 429, 44 L. Ed. 529.

4. **Personal communication by letter.**—Rogers *v.* Ritter, 12 Wall. 317, 322, 20 L. Ed. 417, cited in United States *v.* Ortiz, 176 U. S. 422, 429, 44 L. Ed. 529.

5. **Preliminary examination of witness.**—

never corresponded with him, are competent to express an opinion on the subject of the genuineness of a signature purporting to have been made by that person.[6]

c. *Familiarity with Attainments.*—The court cannot permit witnesses to give an opinion as to the genuineness of handwriting founded partly upon knowledge and familiarity with the legal attainments, the style and composition of the individual whose handwriting was in controversy and as corroborative of their opinion from knowledge of handwriting alone.[7]

B. By Comparison of Handwriting—1. Definition and Distinction.—"All evidence of handwriting, * * * except where the witness sees the document written, is in its nature comparison. It is the belief which a witness entertains upon comparing the writing in question with an exemplar in his mind derived from some previous knowledge." There is an obvious distinction between comparison by juxtaposition of an admitted or established writing and the disputed writing, and comparison of the latter with an image in the mind's eye, but in either instance papers prepared for the purpose of having the comparison made are objectionable.[8]

2. In Absence of Statute—a. *In General.*—**Rule at Common Law.**—By the general rule of the common law, the genuineness of a signature cannot be determined by comparing it with other handwriting of the party, either by the court or a jury.[9] And evidence by comparison of hands is not admissible where the witness has had no previous knowledge of the handwriting, but is called upon to testify merely from a comparison of hands.[10]

Exceptions to Common-Law Rule.—The general rule of the common law, disallowing a comparison of handwriting as proof of signature has exceptions equally as well settled as the rule itself. One of those exceptions is, that if a paper admitted to be in the handwriting of the party or to have been subscribed by him, is in evidence for some other purpose in the cause, the signature or paper

Rogers *v.* Ritter, 12 Wall. 317, 322, 20 L. Ed. 417, cited in United States *v.* Ortiz, 176 U. S. 422, 429, 44 L. Ed. 529.

6. **Familiarity through official position.**—Rogers *v.* Ritter, 12 Wall. 317, 322, 20 L. Ed. 417, cited in United States *v.* Ortiz, 176 U. S. 422, 429, 44 L. Ed. 529.

7. **Familiarity with attainments.**—Throckmorton *v.* Holt, 180 U. S. 552, 570, 45 L. Ed. 663.

Evidence competent as rebuttal.—The main issue in this case was the proving of an alleged will of Judge Advocate General Holt; the witness, P. Tecumseh Sherman, had been called by the proponents of the will for the purpose of proving the signature of his mother, Mrs. Ellen B. E. Sherman, and had stated that in his opinion the signature on the paper was genuine. He did not testify as to the genuineness of the signature of his father, as Senator John Sherman, the brother of the General, had testified that in his opinion the signature was genuine. Subsequently, when the case was with them, the contestants called as a witness John B. Randolph, who, testified that he was familiar with the signature of General Sherman, and that in his opinion the signature was not that of General Sherman, because in the genuine signatures of the General, the upper and lower lines in the long quirl on the capital T meet. The proponents in rebuttal called as a witness P. Tecumseh Sherman, who had already been sworn in relation to the handwriting of his mother, and by him they offered to prove that this failure of the lines to meet in the letter T was by no means an unusual feature in the signature of his father, General Sherman, and that it was frequently, if not habitually, found therein, and also that the loops at the bottom of the S, as large as that in the signature to the paper, were also usually found. The court held that this evidence was competent as rebuttal, and should be received. Throckmorton *v.* Holt, 180 U. S. 552, 563, 45 L. Ed. 663.

8. **Definition and distinction.**—Hickory *v.* United States, 151 U. S. 303, 307, 38 L. Ed. 170. See post, "Signatures Made on Occasion," III, B, 4, d.

9. **Comparison not allowed at common law.**—Moore *v.* United States, 91 U. S. 270, 273, 24 L. Ed. 346, cited in Stokes *v.* United States, 157 U. S. 187, 194, 39 L. Ed. 667; Hickory *v.* United States, 151 U. S. 303, 305, 38 L. Ed. 170, citing Rogers *v.* Ritter, 12 Wall. 317, 320, 20 L. Ed. 417.

10. **Necessity for previous knowledge of handwriting.**—Strother *v.* Lucas, 6 Pet. 763, 767, 8 L. Ed. 573, cited in Rogers *v.* Ritter, 12 Wall. 317, 321, 20 L. Ed. 417, and in Williams *v.* Conger, 125 U. S. 397, 414, 31 L. Ed. 778; Hickory *v.* United States, 151 U. S. 303, 305, 38 L. Ed. 170.

in question may be compared with it by the jury.[11]

General Rule in United States.—There has been a great diversity of opinion, in the different courts of this country, in relation to this species of evidence.[12] But the rule at common law is the general rule in this country although the courts of a few states have allowed it, and the legislature of a few others have authorized it.[13]

b. *Ancient Writings.*—There may be cases where, from the antiquity of the writing, it is impossible for any living witness to swear that he ever saw the party write; comparison of handwriting with documents known to be in his handwriting has been admitted. But these are extraordinary instances, arising from the necessity of the case.[14]

3. Under Statutes.—**Law in England.**—In England this rule of the common law has been abrogated by the legislature in 1854, so that in the courts there, at the present day, the witness can compare two writings with each other, in order to ascertain whether they were both written by the same person.[15] In the United States, Missouri has passed a statute in the very words of the English Act of 1854,[16] and evidence by comparison is also admissible in Oregon.[17]

4. Standard of Comparison—a. *In General.*—It is the result of the weight of authority that papers cannot be produced in a cause for the mere purpose of enabling the jury to institute a comparison of handwriting, said papers not being competent for any other purpose. But where other writings admitted or proved to be genuine are properly in evidence for other purposes, the handwriting of

11. Exceptions to common-law rule.—Moore *v.* United States, 91 U. S. 270, 274, 24 L. Ed. 346, cited in Stokes *v.* United States, 157 U. S. 187, 194, 39 L. Ed. 667; Hickory *v.* United States, 151 U. S. 303, 305, 38 L. Ed. 170.

12. Diversity of opinion in United States.—Rogers *v.* Ritter, 12 Wall. 317, 320, 20 L. Ed. 417, cited in Hickory *v.* United States, 151 U. S. 303, 305, 38 L. Ed. 170; Thompson *v.* Missouri, 171 U. S. 380, 388, 43 L. Ed. 204.

13. General rule at common law, general rule in United States.—Moore *v.* United States, 91 U. S. 270, 273, 24 L. Ed. 346, cited in Stokes *v.* United States, 157 U. S. 187, 194, 39 L. Ed. 667. See post, "Under Statutes," III, B, 3.

14. Ancient writings.—Strother *v.* Lucas, 6 Pet. 763, 767, 8 L. Ed. 573. See, generally, the title ANCIENT DOCUMENTS, vol. 1, p. 314.

15. Law in England.—"By acts of Parliament it is now provided in England, as to all courts of judicature, as well criminal as others, * * * that comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by the witnesses; and such writings and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute." 17, 18 Vict. c. 125; 28, 29 Vict. c. 18. Under these statutes it has been decided that any writings of the genuineness of which the judge is satisfied upon the proof, may be used for the purposes of comparison, although they may not be admissible for any other purpose in the cause. And that the comparison may be made either by witnesses or without the intervention of any witnesses at all, by the jury themselves. But in the absence of statute, papers irrelevant to the issues on the record were held not receivable in evidence at the trial for the mere purpose of enabling the jury or witnesses to institute a comparison of hands. Hickory *v.* United States, 151 U. S. 303, 305, 38 L. Ed. 170; Rogers *v.* Ritter, 12 Wall. 317, 322, 20 L. Ed. 417.

16. Law in Missouri.—The general assembly of Missouri passed an act which became operative in July, 1895, providing that "comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the court and the jury as evidence of the genuineness or otherwise of the writing in dispute." Laws Missouri, April 8, 1895, p. 284. This statute is in the very words of § 27 of the English Common Law Procedure Act of 1854, 17 and 18 Vict., c. 125, and by the 28 Vict., c. 18, §§ 1, 8, the provisions of that act were extended to criminal cases. Thompson *v.* Missouri, 171 U. S. 380, 381, 43 L. Ed. 204.

17. Law in Oregon.—An Oregon statute provides that evidence respecting the handwriting may also be given by a comparison made by a witness skilled in such matters, or the jury, with writings admitted or treated as genuine by the party against whom the evidence is offered. 1 Hill's Ann. Laws of Oregon, § 765. Holmes *v.* Goldsmith, 147 U. S. 150, 153, 37 L. Ed. 118.

such instruments may be compared by the jury with that of the instrument or signature in question, and its genuineness inferred from such comparison.[18]

b. *Standard Must Be Proved to Be Genuine.*—It is a rule that a paper used as a standard of comparison must either be proved to be genuine, or admitted to be in the handwriting of the party, or he must be estopped from denying it to be so.[19] But papers whose genuineness has never been challenged and were officially treated as authentic, can be admitted as standards of comparison in absence of any suggestion of proof of their nongenuineness.[20]

c. *Use of Enlarged Photographs of Signatures.*—Enlarged photographs of the signature of an official to an alleged grant, and a signature existing on one of the documents offered as a standard of comparison, may be admitted in evidence after proving by the photographer by whom the photographs were made the accuracy of the method pursued and the results obtained by him.[21]

d. *Signature Made on Occasion.*—"A signature made for the occasion post litem motam and for use at the trial ought not to be taken as a standard of genuineness. * * * It would, * * * open too wide a door for fraud, if a witness was allowed to corroborate his own testimony by a preparation of specimens of his writing for the purpose of comparison."[22]

18. Standard of comparison generally.—Williams *v.* Conger, 125 U. S. 397, 413, 31 L. Ed. 778, cited in Stokes *v.* United States, 157 U. S. 187, 194, 39 L. Ed. 667; Hickory *v.* United States, 151 U. S. 303, 38 L. Ed. 170. See ante, "In Absence of Statute," III, B, 2.

19. Estopped from denying signature.—In that case the paper referred to as the standard of comparison was the claimant's power of attorney given to his attorney in fact, by virtue of which the latter presented his case to the court of claims. It was held that he was estopped from denying that the signature to the power was in his handwriting. Moore *v.* United States, 91 U. S. 270, 24 L. Ed. 346, cited in Williams *v.* Conger, 125 U. S. 397, 414, 31 L. Ed. 778

Standard of comparison must be proved genuine.—"The plaintiff himself claims title under the very application of Rabago, the signature to which is claimed to be a proper standard of comparison of Rabago's handwriting. Is he not estopped from denying it to be Rabago's hand? His counsel say that at that period of time the application did not require the party's signature. Even if this be so, still it is proved that Rabago was at Saltillo at the time the application was made, and it purports to be signed by him, and not by any person for him; and, if the document is the real protocol of the application as presented, it is to be presumed, at least until the contrary is shown, that the signature which it bears is the real signature of Rabago. Whether the document is or is not the real protocol of the application as presented, was fairly left to the jury under the circumstances and evidence of the case—which, we may add, were so strong and convincing that the jury would not have been justified in finding in the negative. The evidence, indeed, was such as abundantly to satisfy the condition, that the paper referred to as a standard of comparison must be clearly proved to be genuine." Williams *v.* Conger, 125 U. S. 397, 414, 31 L. Ed. 778.

Where note not admitted to be genuine.—A note for five dollars and fifty cents, signed by Jno. Hardy bearing date in 1831, and proved by some witnesses to have been signed by him, is taken as the standard. This note is not admitted to be genuine. The proof is in 1864 of a signature made in 1831. The competency of this evidence is quoted doubtfully. Hardy *v.* Harbin, 154 U. S., appx., 568, 698, 605, 22 L. Ed. 378.

20. Where genuineness of paper never been challenged.—The witness Tipton produced fifteen signatures of Governor Arnija and several of Secretary Vigil, written approximately about the time when the alleged grant in question purported to have been made, taken from among the signatures of these officers contained in the archives, and they were offered as standards of comparison with the signatures found on the grant in controversy. It is objected that the genuineness of these signatures had not been adequately proved, and therefore they should not have been admitted to be used as standards of comparison. They were correctly received. The whole testimony of the witness demonstrated that the signatures in question were upon documents which the witness produced from the archives, the appropriate place for them, and the genuineness of the papers to which they were annexed had never been challenged and were officially treated as authentic. This justified their admission at all events in the absence of any suggestion of proof as to their nongenuineness. United States *v.* Ortiz, 176 U. S. 422, 430, 44 L. Ed. 529.

21. Use of enlarged photographs of signatures.—United States *v.* Ortiz, 176 U. S. 422, 430, 44 L. Ed. 529.

22. Signature made for occasion.—Hick-

5. Who May Make Comparison—a. *In General.*—For a general discussion of comparison made by court, jury or witnesses, see ante, "In Absence of Statute," III, B, 2; "Under Statutes," III, B, 3.

b. *Court of Claims.*—The court of claims determines the facts as well as the law, and may make the comparison in like manner as the jury.[23]

6. Value of Evidence.—In relation to comparison of handwriting, i. e., where genuine signatures are put in evidence to enable the jury to judge by comparison, it is said: "Those having much experience in the trial of questions depending upon the genuineness of handwriting will not require to be reminded that there is nothing in the whole range of the law of evidence more unreliable or where courts and juries are more liable to be imposed upon."[24]

C. By Expert Witnesses—1. General Statement.—In this title will be discussed only expert testimony concerning matters relating exclusively to experts in handwriting, as distinguished from experts in general, for which see the title Expert and Opinion Evidence, ante, p. 200.

2. Who Are Experts.—An expert in regard to handwriting is one who has become familiar with the handwriting of the individual in regard to whom the question is raised.[25] Some men are called who claim to be skilled in the subject of genuine handwritings, and who have experience in comparison of handwritings.[26]

3. When Expert May Testify—a. *Papers Produced at Trial.*—"It is well settled that a witness who only knows a person's handwriting from seeing it in papers produced on trial, and proved or admitted to be his, will not be allowed, from such knowledge, to testify to that person's handwriting, unless the witness be an expert, and the writing in question is of such antiquity that witnesses acquainted with the person's handwriting cannot be had."[27]

b. *Knowledge through Official Position.*—The special qualification of a witness, resulting from his great familiarity, acquired during a long course of official action, with official records and the signatures of officials, qualifies him to testify as an expert as to the genuineness of a signature found upon an alleged grant.[28]

IV. Proof of Identity by Comparison.

See the title Identity.

HARBOR.—See Haven. And see, generally, the titles Collision, vol. 3, p. 884; Criminal Law, vol. 5, pp. 78, 80; Navigable Waters; Ships and Shipping; Waters and Watercourses; Wharves and Wharfingers.

HARBOR COMMISSIONERS.—See the title Ships and Shipping.

HARBOUR.—See Conceal, vol. 3, p. 1003.

HARMLESS ERROR.—See, generally, the title Appeal and Error, vol. 2, p. 331.

HARTER ACT.—See the titles Collision, vol. 3, p. 937; Ships and Shipping.

ory *v.* United States, 151 U. S. 303, 306, 38 L. Ed. 170. See, ante, "Definition and Distinction," III, B, 1.

23. Moore *v.* United States, 91 U. S. 270, 24 L. Ed. 346, cited in Stokes *v.* United States, 157 U. S. 187, 194, 39 L. Ed. 667. See, generally, the title COURTS, vol. 4, p. 861.

24. **Value of evidence.**—Hardy *v.* Harbin, 154 U. S., appx., 568, 598, 605, 22 L. Ed. 378.

25. **Who are experts generally.**—Throckmorton *v.* Holt, 180 U. S. 552, 569, 45 L. Ed. 663.

26. **Who are experts in comparison.**—Hardy *v.* Harbin, 154 U. S., appx., 568, 598, 605, 22 L. Ed. 378.

27. **Paper produced at trial.**—Williams *v.* Conger, 125 U. S. 397, 413, 31 L. Ed. 778.

28. **Knowledge through official position.**—United States *v.* Ortiz, 176 U. S. 422, 429, 44 L. Ed. 529.

HAT.—See note 1.

HATH.—See note 2.

HAVEN.—See note 3.

HAVING.—As to continuing guaranty, see the title GUARANTY, ante, p. 580.

HAWAIIAN ISLANDS.—As to appellate jurisdiction over courts of Hawaii, see the title APPEAL AND ERROR, vol. 1, p. 527. As to power of judges of Hawaii at chambers, see the title CHAMBERS AND VACATION, vol. 3, p. 666. See, also, the title GRAND JURY, ante, p. 570.

HAWKERS AND PEDDLERS.

CROSS REFERENCES.

As to requisites and sufficiency of a certiorari to remove proceedings against huckstering, see the title CERTIORARI, vol. 3, p. 664. As to right to engage in trade in other states, see the title CONSTITUTIONAL LAW, vol. 4, p. 475. As to the right to tax peddlers from another state, see the title INTERSTATE AND FOREIGN COMMERCE.

Definition of Hawker.—The leading primary idea of a hawker and peddler is that of an itinerant or traveling trader, who carries goods about in order to sell them, and who actually sells them to purchasers, in contradistinction to a trader who has goods for sale and sells them in a fixed place of business. By a hawker is generally understood one who not only carries goods for sale, but seeks for purchasers, either by outcry, which some lexicographers conceive as intimated by the derivation of the word, or by attracting notice and attention to them as goods for sale, by an actual exhibition or exposure of them, by placards or labels, or by a conventional signal, like the sound of a horn for the sale of fish.[4]

1. **Hat braids.**—See Arthur *v.* Zimmerman, 96 U. S. 124, 125, 24 L. Ed. 770. See, also, the title REVENUE LAWS.

Hat trimmings.—See Cadwalader *v.* Wanamaker, 149 U. S. 532, 540, 37 L. Ed. 837. See, also, the title REVENUE LAWS.

2. **Hath.**—A statute provided "that no insurance shall be made on a life or lives wherein the assured shall have no interest, or by way of gaming or wagering," and that in all cases where the insured **hath** interest in such life, etc., no greater sum shall be recovered than the amount or value of the interest. The word **hath** was construed as necessarily referring to the time of effecting the insurance, and not to the time of the death; that being the only construction which would subserve the object of the statute to discourage wagering, render the contract uniform and certain, and preserve a fixed relation between the premiums and the amount insured, as required by the principles of life assurance. Connecticut Mut. Life Ins. Co. *v.* Schaefer, 94 U. S. 457, 462, 24 L. Ed. 251.

3. **Haven.**—In Lowndes *v.* Huntington, 153 U. S. 1, 23, 38 L. Ed. 615, a case involving a grant of certain lands with appurtenant **havens**, harbors, creeks, etc., the court said: "While not perhaps of much significance, it may be noticed that in the first charter, that from Governor Nicolls, the description of the appurtenances is 'havens, harbors, creeks,' etc. The word **haven** has perhaps a broader signification than 'harbor.' At any rate, the use of both words in the same grant suggests that all bodies of water which might come within the reach of either term were intended to be included in the grant. In Webster the first definition given to the word **haven** is 'a bay, recess, or inlet of the sea, or the mouth of a river, which affords good anchorage and a safe station for ships.' While this bay might not be a place of safety against all storms coming from any direction, it was protected on three sides, and to that extent was 'a safe station for ships.'"

4. **Definition of hawker.**—Emert *v.* Missouri, 156 U. S. 296, 309, 39 L. Ed. 430.

In Missouri.—Where one solicited the sale of sewing machines by going from one place to another, he was held to be a peddler under the Missouri statute taxing peddlers. Emert *v.* Missouri, 156 U. S. 296, 309, 39 L. Ed. 430. See, also, Machine Co. *v.* Gage, 100 U. S. 676, 25 L. Ed. 754.

Distinction between "peddlers" and "commercial brokers."—A distinction was recognized in the United States Internal Revenue Act of 1862, in which "peddlers" were distinguished from "commercial brokers" and were subjected to a different license tax. Among "commercial brokers" was classed "any person or firm, except one holding a license as wholesale dealer or banker, whose business it is, as the agent of others, to purchase or sell goods, or seek orders therefor, in original

HEADNOTE.—The headnote of a case is not the work of the court, nor does it state its decision—though a different rule, it is true, is prescribed by statute in some states. It is simply the work of the reporter, gives his understanding of the decision, and is prepared for the convenience of the profession in the examination of the reports.[1]

HEAD OF CORPORATION.—See note 2.

HEAD OF DEPARTMENT.—See the titles PUBLIC OFFICERS; UNITED STATES. See note 3.

HEAD OF FAMILY.—See note 4.

HEALTH.

BY WALTER CARRINGTON.

I. Powers in Relation to the Public Health, 682.
- A. Powers of the Federal Government, 682.
- B. Powers of the States, 682.
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CROSS REFERENCES.

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or unbroken packages or produce." Emert *v.* Missouri, 156 U. S. 296, 314, 39 L. Ed. 430. See, generally, the title REVENUE LAWS.

1. United States *v.* Detroit Lumber Co., 200 U. S. 321, 337, 50 L. Ed. 499. See, also, the title COPYRIGHT, vol. 4, p. 602.

2. **Head of a corporation.**—Where the charter of a city declares that the president of the board of trustees shall be the general executive officer of the city government and the general executive **head** of the city, he is the **head** of the corporation within the meaning of a process act, enacting that in a suit against a corporation the summon may be served on "the president or other **head** of the corporation." City of Sacremento *v.* Fowle, 21 Wall. 119, 122, 22 L. Ed. 592. See, generally, the title SUMMONS AND PROCESS.

3. **Head of a department.**—In United States *v.* Mouat, 124 U. S. 303, 307, 31 L. Ed. 463, the court says: "What is necessary to constitute a person an officer of the United States, in any of the various branches of its service, has been very fully considered by this court in United States *v.* Germaine, 99 U. S. 508, 25 L. Ed. 482. In that case, it was distinctly pointed out that, under the constitution of the United States, all its officers were appointed by the president, by and with the consent of the senate, or by a court of law, or the **head** of a department; and the **heads** of the departments were defined in that opinion to be what are now called the members of the cabinet. Unless a person in the service of the government, therefore, holds his place by virtue of an appointment by the president, or of one of the courts of justice or **heads** of departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States."

The commissioner of pensions is not the **head** of a department, within the meaning of § 2, art. 2, of the constitution, prescribing by whom officers of the United States shall be appointed. United States *v.* Germaine, 99 U. S. 508, 25 L. Ed. 482.

4. **Head of a family.**—A grandmother, living with her grandchildren, was the **head** of a Creek **family**, within the mean-

DRAINS AND SEWERS, vol. 5, p. 492; DUE PROCESS OF LAW, vol. 5, p. 499; EMINENT DOMAIN, vol. 5, p. 746; EXPERT AND OPINION EVIDENCE, ante, p. 200; GAS, ante, p. 545; INTERSTATE AND FOREIGN COMMERCE; INTOXICATING LIQUORS; NUISANCES; PHYSICIANS AND SURGEONS; POLICE POWER; QUARANTINE; TREATIES.

As to quarantine, see the titles ANIMALS, vol. 1, p. 325, et seq.; QUARANTINE. As to review of state court decision in reference to health laws, see the title APPEAL AND ERROR, vol. 1, p. 691. As to whether requirement of permission from a board of health to sell milk is a valid regulation, see the title CONSTITUTIONAL LAW, vol. 4, p. 370. As to the powers of the states to legislate for the purpose of protecting the people against fraud and deception in the sale of food products, see the title CONSTITUTIONAL LAW, vol. 4, p. 376. As to jurisdiction of federal courts of suits filed by one state against another to enjoin enforcement of health laws, see the title COURTS, vol. 4, pp. 1010, 1012. As to taking private property to be used in the preservation of public health, see the title EMINENT DOMAIN, vol. 5, p. 746. As to whether the protection of health is a reasonable ground for interfering with the freedom of contract, by determining the hours of labor, see the titles IMPAIRMENT OF OBLIGATION OF CONTRACTS; LABOR. As to court taking judicial notice of the effect of garbage on public health, see the title JUDICIAL NOTICE.

I. Powers in Relation to the Public Health.

A. Powers of the Federal Government.—See the titles ANIMALS, vol. 1, p. 324; INTERSTATE AND FOREIGN COMMERCE; QUARANTINE.

B. Powers of the States—1. IN GENERAL.—The police power of a state embraces such reasonable regulations, established directly by legislative enactment, as will protect the public health;[1] and in pursuance of that object persons and property may be subjected to all kinds of restraints and burdens.[2] But this power is subject to the restriction that no rule prescribed by a state shall contravene the constitution of the United States or infringe any right granted or secured by that instrument,[3] or interfere with the enjoyment of individual rights

ing of the treaty with the Creek Indians in 1832, providing that every head of a family was entitled to select a certain amount of land. Ladiga *v.* Roland, 2 How. 581, 11 L. Ed. 387.

1. **Police power embraces health regulations.**—Jacobson *v.* Massachusetts, 197 U. S. 11, 25, 49 L. Ed. 643; Railroad Co. *v.* Husen, 95 U. S. 465, 472, 24 L. Ed. 527; Dobbins *v.* Los Angeles, 195 U. S. 223, 237, 49 L. Ed. 169; Connolly *v.* Union Sewer Pipe Co., 184 U. S. 540, 558, 46 L. Ed. 679.

The states possess the power to prescribe such regulations as may be reasonable, necessary and appropriate, for the protection of the public health. California Reduction Co. *v.* Sanitary Reduction Works, 199 U. S. 306, 318, 50 L. Ed. 204.

The police power extends to the protection of the health of all persons within the state. Railroad Co. *v.* Husen, 95 U. S. 465, 471, 24 L. Ed. 527.

2. **Persons and property subject to restraints and burdens.**—California Reduction Co. *v.* Sanitary Reduction Works, 199 U. S. 306, 318, 50 L. Ed. 204; Railroad Co. *v.* Husen, 95 U. S. 465, 471, 24 L. Ed. 527; Jacobson *v.* Massachusetts, 197 U. S. 11, 26, 49 L. Ed. 643.

Property owners not entitled to compensation for pecuniary losses incident to health regulations.—The power which the states have of prohibiting such use by individuals of their property as will be prejudicial to the health, of the public, is not —and, consistently with the existence and safety of organized society, cannot be— burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. California Reduction Co. *v.* Sanitary Reduction Works, 199 U. S. 306, 324, 50 L. Ed. 204; Mugler *v.* Kansas, 123 U. S. 623, 669, 31 L. Ed. 205.

3. **Power of state must be exercised within constitutional limits.**—Jacobson *v.* Massachusetts, 197 U. S. 11, 25, 49 L. Ed. 643; California Reduction Co. *v.* Sanitary Reduction Works, 199 U. S. 306, 318, 50 L. Ed. 204.

If a statute purporting to have been enacted to protect the public health is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution. Jacobson *v.*

beyond the necessities of the case.[4] Thus it is not permissible for a state, by its health regulations, to deny to persons within its jurisdiction the equal protection of the laws,[5] or to interfere with transportation into or through the state, beyond what is absolutely necessary for its self-protection.[6] But though a state health law affects interstate or foreign commerce, if such effect is incidental to the legitimate object of the law, and essential to render it efficacious, the law is not thereby rendered invalid.[7]

2. Power to Pass Laws to Prevent the Spread of Contagious Diseases —a. *In General.*—A state has the right to pass laws which, according to the common belief of the people, are adapted to prevent the spread of contagious diseases.[8]

b. *Quarantine Laws.*—See the title Animals, vol. 1, p. 325, et seq.; Interstate and Foreign Commerce; Quarantine.

3. Delegation of Power.—A state may invest local bodies called into existence for purposes of local administration with authority in some appropriate way to safeguard the public health. The mode or manner in which these results are to be accomplished is within the discretion of the state.[9] Thus a state may authorize the board of health of a municipality, when the public health or safety demands it, to require and enforce the vaccination of the inhabitants thereof.[10] This delegation of authority is subject, of course, so far as federal power is concerned, to the condition that no regulation adopted by a local governmental agency acting under the sanction of state legislation, shall contravene the constitution of the United States or infringe any right granted or secured by that instrument.[11]

C. Powers of Municipal Corporations.—By constitutional or statutory en-

Massachusetts, 197 U. S. 11, 31, 49 L. Ed. 643.

4. Individual rights must not be unnecessarily interfered with.—California Reduction Co. *v.* Sanitary Reduction Works, 199 U. S. 306, 318, 50 L. Ed. 204.

5. Denial of equal protection of laws forbidden.—If, by their necessary operation, the health regulations of a state amount to a denial to persons within its jurisdiction of the equal protection of the laws, they are unconstitutional and void. Dobbins *v.* Los Angeles, 195 U. S. 223, 237, 49 L. Ed. 169; Connolly *v.* Union Sewer Pipe Co., 184 U. S. 540, 558, 46 L. Ed. 679.

6. Effect of commerce clause of federal constitution.—Railroad Co. *v.* Husen, 95 U. S. 465, 472, 24 L. Ed. 527.

7. Compagnie Francaise *v.* Board of Health, 186 U. S. 380, 391, 46 L. Ed. 1209.

A state may, by its health laws, incidentally regulate the subjects of legitimate commerce, until congress has acted under the authority conferred upon it by the constitution, even though interstate and foreign commerce is affected. Compagnie *v.* Francaise *v.* Board of Health, 186 U. S. 380, 391, 46 L. Ed. 1209. See the title INTERSTATE AND FOREIGN COMMERCE.

8. Prevention of spread of contageous diseases.—Jacobson *v.* Massachusetts, 197 U. S. 11, 35, 49 L. Ed. 643.

9. Delegation of power to local bodies.—Jacobson *v.* Massachusetts, 197 U. S. 11, 25, 49 L. Ed. 643; California Reduction Co. *v.* Sanitary Reduction Works, 199 U. S. 306, 50 L. Ed. 204.

10. Jacobson *v.* Massachusetts, 197 U. S. 11, 49 L. Ed. 643. See post, "Compulsory Vaccination," I, D, 1, b.

11. Delegated power must be exercised within constitutional bounds.—Jacobson *v.* Massachusetts, 197 U. S. 11, 25, 49 L. Ed. 643.

A local enactment or regulation, even if based on the acknowledged police powers of a state, must always yield in case of conflict with the exercise by the general government of any power it possesses under the constitution, or with any right which that instrument gives or secures. Jacobson *v.* Massachusetts, 197 U. S. 11, 25, 49 L. Ed. 643.

Constitutionality of Massachusetts compulsory vaccination law upheld.—The revised laws of Massachusetts, ch. 75, § 137, provided that the board of health of a city or town, if in its opinion it was necessary for the public health or safety, should require and enforce the vaccination and revaccination of all of the inhabitants thereof, and that if one who was over twenty-one years of age and not under guardianship should refuse or neglect to comply with such requirement, he should forfeit five dollars. By § 139 of the statute, an exception was made in favor of children who should present a certificate signed by a registered physician that they were unfit subjects for vaccination. In pursuance of this statute the board of health of the city of Cambridge, in which smallpox was prevalent, adopted a regulation requiring all the inhabitants of the city who had not been successfully vaccinated within five years, to be vacci-

actments, municipal corporations are generally empowered to make regulations to promote and preserve the public health. Every intendment is to be made in favor of the lawfulness of the exercise of this power. It is not the province of the courts, except in clear cases, to interfere with its exercise.[12] But notwithstanding this general rule, it is now thoroughly well settled by decisions of the supreme court of the United States that municipal by-laws and ordinances, undertaking to regulate useful business enterprises, are subject to investigation in the courts with a view to determine whether the law or ordinance is a lawful exercise of the police power, or whether under the guise of enforcing police regulations there has been an unwarranted and arbitrary interference with the constitutional rights to carry on a lawful business, to make contracts, or to use and enjoy property.[13]

D. Powers of Boards of Health—1. POWER TO ESTABLISH REGULATIONS FOR THE PRESERVATION OF HEALTH—a. *Quarantine Regulations.*—This subject is fully treated under the title QUARANTINE.

b. *Compulsory Vaccination.*—The authority to compel vaccination may be vested in a board of health; such authority to be exercised when in their opinion it is necessary for the public health.[14]

nated, or revaccinated. It was held that the statute was a health law enacted in a reasonable and proper exercise of the police power, and was not violative of the fourteenth amendment of the federal constitution, nor otherwise unconstitutional and inoperative, in its application to an inhabitant of Cambridge who was an adult not under guardianship, and who did not offer to prove that, by reason of his then condition, he was not a fit subject for vaccination at the time he was informed of the requirement of the regulation adopted by the board of health. Jacobson *v.* Massachusetts, 197 U. S. 11, 49 L. Ed. 643.

12. **Powers of municipal corporations.**—California Reduction Co. *v.* Sanitary Reduction Works, 199 U. S. 306, 319, 50 L. Ed. 204; Dobbins *v.* Los Angeles, 195 U. S. 223, 235, 49 L. Ed. 169.

Powers of board of supervisors of San Francisco.—In the constitutional and statutory provisions of the state of California is found full authority for the board of supervisors of the city and county of San Francisco, to make and enforce, within that city and county, all such reasonable sanitary and other regulations as are not in conflict with any general statute or with the constitution, and which have for their object the preservation of the public health, by whatever cause endangered; and this broad power carries with it the power, by contract and ordinance, to guard the public health in all reasonable ways. California Reduction Co. *v.* Sanitary Reduction Works, 199 U. S. 306, 316, 50 L. Ed. 204.

In pursuance of this power the board of supervisors by ordinance granted to a certain person, his associates and assigns, the sole and exclusive right and privilege, for a term of fifty years, to cremate and destroy within the city and county of San Francisco, by crematories or by a process of reduction, house refuse, dirt, ashes, cinders, sludge, crockery, tins, bones and other like matter, dead animals (not provided for by contract or franchise heretofore granted), putrid vegetable matter fish, flesh and food condemned by the board of health of the city and county as unfit for human food—the grantees, their associates and assigns, having the right to charge and collect therefor not exceeding the sum of twenty cents per load. And it was further provided that all such substances should be delivered at and to the crematory erected by the persons to whom this exclusive right was granted, and there, at the expense of the person or corporation conveying the same, be cremated or destroyed, or subjected to such disposition and treatment as would secure and effect a complete combustion of all gases and odors arising therefrom. It was held that this was a valid exercise of the power delegated to the board of supervisors. California Reduction Co. *v.* Sanitary Reduction Works, 199 U. S. 306, 50 L. Ed. 204.

13. **Restrictions upon exercise of police power by municipalities.**—Dobbins *v.* Los Angeles, 195 U. S. 223, 236, 49 L. Ed. 169. See the titles EMINENT DOMAIN, vol. 5, p. 746; IMPAIRMENT OF OBLIGATION OF CONTRACTS; ORDINANCES; POLICE POWER.

14. **Authority to compel vaccination.**—Jacobson *v.* Massachusetts, 197 U. S. 11, 27, 49 L. Ed. 643.

At a time when smallpox was prevalent to some extent in the city of Cambridge, Massachusetts, and was increasing, the board of health of that city in pursuance of legislative authority adopted a regulation requiring all the inhabitants of the city who had not been successfully vaccinated within five years, to be vaccinated or revaccinated. It was held that it could not be adjudged that such regulation was arbitrary, and not necessary in order to protect the public health and secure the

2. Powers as to Expenditures.—**Under the act of congress establishing the national board of health** and subsequent acts making appropriations for and relating to expenditures by the board, the board had no authority to incur any liability upon the part of the government for salaries or other expenses in excess of the amounts appropriated by congress for such purposes.[15]

II. Public Policy or Expediency Not Ground for Abrogating Health Regulations.

If a regulation, enacted by competent public authority avowedly for the protection of the public health, has a real, substantial relation to that object, the courts will not strike it down upon grounds merely of public policy or expediency.[16]

Hearing.—See the titles Appeal and Error, vol. 2, p. 352; Equity, vol. 5, p. 875. And see Final, ante, p. 282. "In Bouvier's Law Dictionary (1 Bouv., p. 581) 'Hearing' is thus defined: 'The examination of a prisoner charged with a crime or misdemeanor and of the witnesses for the accused.' In 9th American and English Encyclopædia of Law, p. 324, it is said to be 'the preliminary examination of a prisoner charged with a crime and of witnesses for the prosecution and defense.' "[1]

public safety. Jacobson *v.* Massachusetts, 197 U. S. 11, 27, 28, 49 L. Ed. 643. See ante, "Delegation of Power," I, B, 3.

15. National board of health had no authority to incur liabilities in excess of appropriations.—Dunwoody *v.* United States, 143 U. S. 578, 586, 36 L. Ed. 269, distinguishing United States *v.* Langston, 118 U. S. 389, 30 L. Ed. 164.

16. Public policy or expediency not ground for abrogating health regulations.—California Reduction Co. *v.* Sanitary Reduction Works, 199 U. S. 306, 318, 50 L. Ed. 204.

1. Hearing.—United States *v.* Patterson, 150 U. S. 65, 68, 37 L. Ed. 999.

Section 847 of the Revised Statutes provides for the **hearing** and deciding on criminal charges a United States commissioner should be entitled to a certain per diem compensation. It was held that the decision upon a motion for bail and the sufficiency thereof fell within this provision, and in regard to a motion for a continuance, the court said: "With respect to motions for continuance, the granting or refusal of them is unquestionably a necessary incident to, and a part of, the **hearing** and determining of criminal charges." United States *v.* Jones, 134 U. S. 483, 487, 33 L. Ed. 1007. But in United States *v.* Patterson, 150 U. S. 65, 37 L. Ed. 999, it was held that **hearing** charges made by complaining witnesses against persons charged with violations of the laws of the United States and holding examinations of such complaining witnesses and other witnesses, was not within the statute. The court said: "The question presented in the Jones case was whether the **hearing** and deciding of motions with respect to bail, and for continuances in cases pending before the commissioner, was a **hearing** and deciding on criminal charges within the scope of that clause, and it was held that it was. But in that case the criminal charges had been made; that is, formal written complaints had been filed, warrants issued, the defendants arrested, and cases were pending, and the ruling was that any judicial action in such cases was **hearing** and deciding on criminal charges, and the general language of classification used in the opinion must be taken in connection with the facts as they existed and the question presented." See, generally, the title UNITED STATES COMMISSIONERS.

Removal of causes.—See, also, the title REMOVAL OF CAUSES.

In Vannevar *v.* Bryant, 21 Wall. 41, 43, 22 L. Ed. 476, a case involving the United States statute authorizing removal of causes from state to federal courts in certain cases, the court said: "The act authorizes the petition for removal to be filed 'at any time before the final **hearing** or trial of the suit.' The **hearing** or trial, here referred to, is the examination of the facts in issue. **Hearing** applies to suits in chancery and trial to actions at law."

HEARSAY EVIDENCE.

BY WALTER CARRINGTON.

I. **Scope of Title**, 686.

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A. In General, 687.

1. General Rule, 687.

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CROSS REFERENCES.

See the titles CONSTITUTIONAL LAW, vol. 4, p. 1; DEPOSITIONS, vol. 5, p. 321; DYING DECLARATIONS, vol. 5, p. 686; EVIDENCE, vol. 5, p. 1004; PAROL EVIDENCE; PEDIGREE; PRESCRIPTION; REFERENCE; USAGES AND CUSTOMS; WITNESSES.

As to the admissibility of declarations and admissions, see the title DECLARATIONS AND ADMISSIONS, vol. 5, p. 214. As to the admissibility of documentary evidence, see the title DOCUMENTARY EVIDENCE, vol. 5, p. 431. As to the admissibility of evidence on the ground that it constitutes part of the res gestæ, see the title RES GESTÆ. As to when the admission of hearsay evidence is ground for reversal, see the title APPEAL AND ERROR, vol. 1, p. 333.

I. Scope of Title.

As questions relating to the admissibility in evidence of declarations and admissions, and of exceptions to the general rule excluding hearsay evidence, have been fully treated under other titles in this work,[1] and as such treatment almost completely covers the question of the admissibility of hearsay evidence, this title will be confined to the statement of the general rule as to the admissibility of such evidence, with illustrations thereof, and the question of the admissibility of evidence given in a former proceeding.

II. Definition.

Hearsay evidence, in its legal sense, denotes that kind of evidence which does not derive its value solely from the credit to be given to the witness himself, but rests, also, in part, on the veracity and competency of some other person.[2]

1. As to the admissibility of oral declarations and admissions, see the title DECLARATIONS AND ADMISSIONS, vol. 5, p. 214, and the table of cross references there given. As to the admissibility of written declarations and admissions, see the title DOCUMENTARY EVIDENCE, vol. 5, p. 431, and the table of cross references there given. As to the admissibility of dying declarations, see the title DYING DECLARATIONS, vol. 5, p. 686. As to the admissibility of evidence on the ground that it constitutes a part of the res gestæ, see the title RES GESTÆ, and the table of cross references there given. As to the admissibility of declarations to impeach the credibility of witnesses, see the title WITNESSES. As to the admissibility of hearsay evidence to prove pedigree, see the title PEDIGREE. As to the admissibility of hearsay evidence to prove prescription, see the title PRESCRIPTION. As to the admissibility of hearsay evidence to prove a usage or custom, see the title USAGES AND CUSTOMS.

2. **Hearsay evidence defined.**—Hopt *v.* Utah, 110 U. S. 574, 581, 28 L. Ed. 262.

Testimony of veternary surgeons as to cattle disease not hearsay.—Where veternary surgeons who, while in the employ of United States government, in-

III. Admissibility.

A. In General—1. General Rule—a. *Rule Stated.*—As a general rule, subject to certain well-established exceptions, hearsay evidence is not admissible.[3] It is not admissible to prove a specific fact, merely because the eye-witnesses to that fact are dead.[4]

b. *Reasons for Rule.*—The exclusion of hearsay evidence stands upon the general consideration, that it is not upon oath; that the party affected by it has no opportunity of cross-examination; that it often supposes better evidence behind; that it is peculiarly liable to be obtained by fraudulent contrivances; and above all, that it is exceedingly infirm, unsatisfactory and intrinsically weak in its very nature and character.[5]

2. Exceptions to Rule.—Certain exceptions to the rule excluding hearsay evidence have been allowed, which perhaps may be as old as the rule itself.[6] But these exceptions stand upon peculiar grounds.[7] In certain exceptional cases

vestigated a certain disease to which cattle were subject, testified as experts from the knowledge thus gained as to the nature and symptoms of the disease, and to the fact that there were certain districts infected with it, it was held that such evidence was not hearsay, since it was a part of their official duty to obtain such knowledge, and learn where such disease originated or was prevalent, and how it became disseminated throughout the country. Grayson *v.* Lynch, 163 U. S. 468, 480, 41 L. Ed. 230.

3. Hearsay evidence not generally admissible.—Hopt *v.* Utah, 110 U. S. 574, 581, 28 L. Ed. 262; Nudd *v.* Burrows, 91 U. S. 426, 439, 23 L. Ed. 286; Wilson *v.* Simpson, 9 How. 109, 121, 13 L. Ed. 66; United States *v.* Kingsley, 12 Pet. 476, 483, 9 L. Ed. 1163; Albertson *v.* Robeson, 1 Dall. 9, 1 L. Ed. 14.

As a general rule hearsay evidence is inadmissible to establish any specific fact which in its nature is capable of being proved by the testimony of a person who speaks from his own knowledge. Clement *v.* Packer, 125 U. S. 309, 321, 31 L. Ed. 721; Queen *v.* Hepburn, 7 Cranch 290, 3 L. Ed. 348; Hopt *v.* Utah, 110 U. S. 574, 581, 28 L. Ed. 262.

The testimony of a witness on a subject, which it does not appear that he himself personally knew anything about, is not admissible in evidence. Patrick *v.* Graham, 132 U. S. 627, 631, 33 L. Ed. 460.

Affidavits resting on hearsay testimony are not competent evidence. Leadville Coal Co. *v.* McCreary, 141 U. S. 475, 478, 35 L. Ed. 824.

Questions to which hearsay testimony responsive, properly excluded.—A question to which an answer detailing the hearsay statements of others, whether verbal or in writing, made at any time or place, would have been responsive, was held to have been properly excluded. Xenia Bank *v.* Stewart, 114 U. S. 224, 232, 29 L. Ed. 101.

Attorney general's report containing statements purporting to have been made by defendants.—In a murder trial a report of one of the defendant's attorneys, made while such attorney was attorney general of the state, and containing statements purporting to have been made by the defendants, and connecting them with the killing, was admitted in evidence. It was held that the evidence was hearsay, and its admission error. Cook *v.* United States, 138 U. S. 157, 184, 34 L. Ed. 906.

Claims to freedom in Maryland are not exempt from the general rule that hearsay evidence is inadmissible. Queen *v.* Hepburn, 7 Cranch 290, 3 L. Ed. 348.

Evidence by hearsay and general reputation is not admissible to establish the freedom of the petitioner's ancestor, and thence to deduce his or her own. Davis *v.* Wood, 1 Wheat. 6, 4 L. Ed. 22.

4. Death of eyewitnesses not ground for admitting hearsay.—Queen *v.* Hepburn, 7 Cranch 290, 296, 3 L. Ed. 348.

5. Reasons for rule excluding hearsay.—Ellicott *v.* Pearl, 10 Pet. 412, 436, 9 L. Ed. 475.

"The testimony of living witnesses personally cognizant of the facts of which they speak, given under the sanction of an oath in open court, where they may be subjected to cross-examination, affords the greatest security for truth." Chaffee & Co. *v.* United States, 18 Wall. 516, 541, 21 L. Ed. 908.

That hearsay testimony supposes some better testimony which might be adduced in the particular case, is not the sole ground of its exclusion. "Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practised under its cover, combine to support the rule that hearsay evidence is totally inadmissible." Clement *v.* Packer, 125 U. S. 309, 321, 31 L. Ed. 721; Hopt *v.* Utah, 110 U. S. 574, 581, 28 L. Ed 262; Queen *v.* Hepburn, 7 Cranch 290, 295, 3 L. Ed. 348.

6. Exceptions to rule excluding hearsay old as rule itself.—Ellicott *v.* Pearl, 10 Pet. 412, 434, 9 L. Ed. 475; Queen *v.* Hepburn, 7 Cranch 290, 296, 3 L. Ed. 348; Clement *v.* Packer, 125 U. S. 309, 321, 31 L. Ed. 721.

7. Exceptions stand on peculiar grounds.—Ellicott *v.* Pearl, 10 Pet. 412, 434, 9 L. Ed. 475.

the declarations and admissions of a party to the suit or of one in privity with him, or in some cases even those of a stranger to the suit are admissible. Cases of pedigree, of prescription, of custom, and of boundary, are exceptions to the rule excluding hearsay. There are also matters of general and public history which may be received without that full proof which is necessary for the establishment of a private fact. These exceptions to the general rule are fully treated under other titles in this work.[8]

B. Testimony of a Witness in a Former Proceeding—1. In a Civil Proceeding.—Where the basis of an action is a judgment in a former action, the testimony of a witness in the former action, who has since died, is admissible for the purpose of ascertaining the subject matter of the controversy in the former action and fixing the scope of the thing adjudged.[9] So a deposition of a witness since deceased taken in a former suit in which both the plaintiff and defendant were parties, and the issues were the same, is admissible in evidence, although one who was a coplaintiff in the former suit is not a party to the suit at bar.[10] But where the parties in the former suit were not the same as those in the latter, the testimony of a witness thereat is not admissible.[11] In an action for damages to a vessel, testimony given in another suit by one of the part owners thereof, as to the extent and value of the repairs, is not admissible.[12] The testimony of a witness on a former trial to be admissible must of course be pertinent and material to the issue between the parties.[13]

2. In a Criminal Proceeding.—Under the 6th amendment of the constitution of the United States, which provides that, in all criminal prosecutions, the accused shall be entitled to be confronted with the witnesses against him, the general rule is that, in such a prosecution, the testimony of a witness taken before the examining magistrate or at a former trial is not admissible against the accused.[14] But if a witness is absent by the wrongful procurement of the

8. See ante, "Scope of Title," I.

What is generally essential to authorize admission of hearsay evidence.—To authorize the admission of hearsay evidence (except in cases of pedigree), three things must generally concur: First, the fact, to which the reputation or tradition applies, must be of a public nature; second, if he reputation or tradition relate to the exercise of a right or privilege, it must be supported by acts of enjoyment or privilege, within the period of living memory; third, it must not be reputation or traditionary declarations to a particular fact. Ellicott *v.* Pearl, 10 Pet. 412, 437, 9 L. Ed. 475.

9. Testimony of a witness since deceased.—Washington Gas Light Co. *v.* District of Columbia, 161 U. S. 316, 328, 40 L. Ed. 712.

10. Philadelphia, etc., R. Co. *v.* Howard, 13 How. 307, 335, 14 L. Ed. 157.

11. Testimony admissible only where parties to two suits are the same.—Beardman *v.* Reed, 6 Pet. 328, 341, 8 L. Ed. 415.

Where no attempt is made to account for the absence of one who was a witness at the trial of another cause, to which the plaintiff in the case being tried was not a party, evidence by one present at the former trial, as to what such witness testified to, is not admissible. Fresh *v.* Gilson, 16 Pet. 327, 331, 10 L. Ed. 982.

12. Testimony of part owner of injured vessel, as to repairs, not admissible.—The New Orleans, 106 U. S. 13, 16, 27 L. Ed. 96.

Such statements could at best bind only such part owner himself and not his coowners, who were merely tenants in common with him and not partners. The New Orleans, 106 U. S. 13, 16, 27 L. Ed. 96.

13. Testimony must be pertinent and material to the issue.—Beardman *v.* Reed, 6 Pet. 328, 341, 8 L. Ed. 415.

In ejectment, a witness was called to prove that a person who was dead had, at a former trial between the plaintiffs and some of the defendants, to recover the land in controversy, testified that an anciently marked corner tree was found by him, at a particular point, of a different kind of timber from that called for in a patent to one Young; no part of the survey of Young was involved in the controversy in this suit; and with several other surveys it was only laid down by the surveyor, as, by showing certain connections, it might conduce to identify the land claimed by the plaintiffs. It was held that as the evidence was not given between the same parties, this testimony could only be received as hearsay; and being immaterial and not tending to elucidate any questions before the jury, was not admissible. Beardman *v.* Reed, 6 Pet. 328, 8 L. Ed. 415.

14. As a general rule testimony before examining magistrate or at former trial

accused, his testimony on a former trial for the same offense under another indictment is admissible.[15] So upon the second trial of a person accused of crime, the testimony of a witness at the first trial who has since died is admissible if the defendant was present at the first trial and the witness was fully examined and cross-examined.[16] The testimony of a witness in a criminal proceeding in a military court is not admissible as independent or original evidence to establish a fact in another case, if the witness is still alive and competent to testify.[17]

is not admissible.—Motes *v.* United States, 178 U. S. 458, 471, 44 L. Ed. 1150; Reynolds *v.* United States, 98 U. S. 145, 158, 25 L. Ed. 244.

The primary object of this provision was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief. Mattox *v.* United States, 156 U. S. 237, 242, 39 L. Ed. 409.

Absence of witness due to negligence of prosecution.—The deposition or statement of an absent witness taken at the examining trial cannot be read at the final trial when it does not appear that the witness was absent by the suggestion, connivance or procurement of the accused, but does appear that his absence was due to the negligence of the prosecution. Motes *v.* United States, 178 U. S. 458, 474, 44 L. Ed. 1150.

15. Testimony of witness absent by wrongful procurement of accused admissible.—Reynolds *v.* United States, 98 U. S. 145, 158, 25 L. Ed. 244. In delivering the opinion of the court in this case, Waite, C. J., said: "The constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated."

In a criminal prosecution when enough has been proved to cast upon the accused the burden of showing and he, having full opportunity therefor, fails to show, that he has not been instrumental in concealing a witness or in keeping him away, his constitutional right is not violated by the admission of competent evidence of the testimony which such witness gave on a previous trial for the same offense under another indictment. Reynolds *v.* United States, 98 U. S. 145, 160, 25 L. Ed. 244.

16. When testimony of witness since deceased is admissible.—Mattox *v.* United States, 156 U. S. 237, 39 L. Ed. 409.

In such case a copy of the stenographic report of the entire former testimony of the witness supported by the oath of the stenographer that it is a correct transcript of his notes and the testimony of the deceased witness, is competent evidence of what he said. Mattox *v.* United States, 156 U. S. 237, 244, 39 L. Ed. 409.

17. Testimony in criminal proceeding in military court.—United States *v.* Clark, 96 U. S. 37, 40, 34 L. Ed. 696.

HEIR, HEIRS AND THE LIKE.

I. Definitions and Construction, 690.

II. Proof of Heirship and Existence of Heirs, 690.

CROSS REFERENCES.

See the titles ALIENS, vol. 1, p. 210; BASTARDY, vol. 3, p. 204; DEEDS, vol. 5, p. 245; DESCENT AND DISTRIBUTION, vol. 5, p. 335; ESTATES, vol. 5, 904; REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS; SHELLEY'S CASE, RULE IN; WILLS. And see CHILD, CHILDREN, vol. 3, p. 767; ISSUE; NEXT OF KIN.

As to construction of word "heirs" in a patent issued, after the inventor's death, to him, his "heirs or assigns," see the title PATENTS. As to what constitutes heirs within the meaning of the pre-emption laws, see the title PUBLIC LANDS. As to construction of words "heirs," "heirs of the body," etc., in wills, see the title WILLS.

I. Definitions and Construction.

The word "heirs" according to its strict and technical import, designates the person or persons appointed by law to succeed to the real estate in case of intestacy.[1] The word "heirs" is inapplicable to personal estate.[2] When used in its technical sense the word "heir" does not mean "next of kin,"[3] but when not used in its technical sense it may mean "heir apparent,"[4] "children," "issue," "lineal descendants," or "next of kin."[5]

II. Proof of Heirship and Existence of Heirs.

Proof of Heirship.—It is competent to prove death and heirship by reputation.[6]

1. "Heirs."—See the following cases: McLean *v.* Wallace, 10 Pet. 625, 638, 9 L. Ed. 559; De La Vergne, etc., Co. *v.* Featherstone, 147 U. S. 209, 222, 37 L. Ed. 138; Barber *v.* Pittsburgh, etc., R. Co., 166 U. S. 83, 108, 41 L. Ed. 925; Orr *v.* Hodgson, 4 Wheat. 453, 461, 4 L. Ed. 613.

Heir of living person.—Strictly speaking no one is the heir of a living person. Barber *v.* Pittsburgh, etc., R. Co., 166 U. S. 83, 108, 41 L. Ed. 925.

2. Heirs, etc., inapplicable to personal estate.—" 'The words "heirs," and "heirs of his body," ' says Mr. Williams, 'are quite inapplicable to personal estate; the heir, as heir, has nothing to do with the personal property of his ancestor. Such property has nothing hereditary in its nature, but simply belongs to its owner for the time being. Hence, a gift of personal property to A simply, without more, is sufficient to vest in him the absolute interest. Whilst, under the very same words, he would acquire a life interest only in real estate, he will become absolutely entitled to personal property.' " De La Vergne, etc., Co. *v.* Featherstone, 147 U. S. 209, 222, 37 L. Ed. 138. See the titles DEEDS, vol. 5, p. 245; ESTATES, vol. 5, p. 906; WILLS.

3. McLean *v.* Wallace, 10 Pet. 625, 638, 9 L. Ed. 559. See the titles ALIENS, vol. 1, p. 228; DESCENT AND DISTRIBUTION, vol. 5, p. 336.

Issue who are aliens not deemed heirs at law.—See the title ALIENS, vol. 1, p. 224.

4. "Heirs" may mean "heirs apparent." —Barber *v.* Pittsburgh, etc., R. Co., 166 U. S. 83, 41 L. Ed. 925. See the title WILLS.

5. "Heirs," "lawful heirs," etc., meaning lineal descendants, issue or children. —Abbot *v.* Essex Co., 18 How. 202, 15 L. Ed. 352. See the titles REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS; SHELLEY'S CASE, RULE IN; WILLS.

6. Secrist *v.* Green, 3 Wall. 744, 751, 18 L. Ed. 153.

Reputation being sufficient to establish death and heirship, a statement of them in a deposition, by an ancient witness, long and intimately acquainted with the family about which he testifies, and who says that certain children ("as appears from entries in the family Bible, and which I believe to be true"), died at such a time, and another child at another time, "as I am informed and believe."—is not subject to exception at the trial. Secrist *v.* Green, 3 Wall. 744, 18 L. Ed. 153.

Proof of Existence of Heirs.—The record of proceedings against "unknown heirs" is no evidence that any such heirs existed.[7]

Presumption That Decedent Left Heirs.—Although it may sometimes be presumed that a decedent left heirs, rather than that he left none; it is but a presumption of fact, in any case, and like other presumptions, may be repelled by countervailing facts and presumptions.[8]

HELD IN TRUST.—See the title INSURANCE.
HENCEFORTH.—See note 1.
HERD LAWS.—See the title ANIMALS, vol. 1, p. 316.
HEREDITAMENTS.—See note 2.
HEREDITARY REAL ESTATE.—See note 3.
HEREIN.—See note 4.
HERETOFORE.—See note 5.
HIDDEN DEFECTS.—See note 6.

7. Hollingsworth *v.* Barbour, 4 Pet. 466, 7 L. Ed. 922.

8. Hollingsworth *v.* Barbour, 4 Pet. 466, 477, 7 L. Ed. 922.

Presumption that deceased left heirs is overcome by evidence showing him to be a foreigner, and that he has been dead twenty-five years. Hollingsworth *v.* Barbour, 4 Pet. 466, 478, 7 L. Ed. 922.

1. **Henceforth.**—In United States *v.* Le Baron, 19 How. 73, 75, 15 L. Ed. 525, the court said: "In Clayton's case (5 Co., 1), a lease, bearing date on the 26th of May, to hold for three years 'from **henceforth**,' was delivered on the 20th of June. It was resolved, that 'from **henceforth**' should be accounted from the day of delivery of the indentures, and not from the day of their date; for the words of an indenture are not of any effect until delivery—traditio loqui facit chartam." See, also the title DEEDS, vol. 5, p. 263.

2. **Hereditaments.**—"In respect to the word 'tenements,' it is only necessary to observe, that it has never been construed in a will, independently of other circumstances, to pass a fee. In Canning *v.* Canning, Moseley 240, and Doe ex dem. Palmer *v.* Richards, 3 T. & R. 356, and Dean ex dem. Moor *v.* Mellor, 5 T. & R. 558; S. C., 2 Bos. & Pul. 247, the same term occurred, as well as the broader expression, **hereditaments**; in neither case, was the term 'tenement' supposed to have any peculiar effect; and the argument, attempting to establish a fee upon the import of the word **hereditaments**, even in a residuary clause, was deliberately overruled by the court." Wright *v.* Page, 10 Wheat. 204, 238, 6 L. Ed. 303. See, generally, the title WILLS.

3. **Hereditary real estate.**—The compiled laws of 1884 of New Mexico provided that the words "bargained and sold," or words to the same effect, in all conveyances of **hereditary real estate**, should have a certain designated effect. It was held that the term **hereditary real estate** meant real estate by inheritance. Douglass *v.* Lewis, 131 U. S. 75, 81, 33 L. Ed. 53. See, also, the title COVENANTS, vol. 5, p. 8.

4. **Herein.**—The words "not otherwise **herein** provided for," in an act providing for customs duties, mean, not otherwise provided for in the act of which they are a part, and the words "not **herein** otherwise provided for," are identical in meaning. Arthur *v.* Vietor, 127 U. S. 572, 576, 32 L. Ed. 201. See Arthur *v.* Butterfield, 125 U. S. 70, 76, 31 L. Ed. 643; Movius *v.* Arthur, 95 U. S. 144, 147, 24 L. Ed. 420. And see the title REVENUE LAWS.

5. **Heretofore contracted.**—The 4th article of the treaty of peace between the United States and Great Britain provided as follows: "It is agreed, that creditors, on either side, shall meet with no lawful impediment to the recovery of the full value, in sterling money, of all bona fide debts, **heretofore** contracted. In Ware *v.* Hylton, 3 Dall. 199, 242, 1 L. Ed. 568, in construing the words **heretofore** contracted in the treaty, the court said: "'**Heretofore** contracted,' that is, entered into at any period of time, before the date of the treaty; without regard to the length or distance of time. These words are descriptive of the particular debts that might be recovered, and relate back to the time such debts were contracted. The time of the contract was plainly to designate the particular debts that might be recovered. A debt entered into during the war, would not have been recoverable, unless under this description of a debt contracted at any time before the treaty."

6. **Hidden defects.**—**Hidden defects** are those which cannot be discovered by simple inspection. Bulkley *v.* Honold, 19 How. 390, 15 L. Ed. 663.

HIGH—HIGH SEAS.—"The term 'high' in one of its significations is used to denote that which is common, open, and public. Thus every road or way or navigable river which is used freely by the public is a 'high' way. So a large body of navigable water other than a river, which is of an extent beyond the measurement of one's unaided vision, and is open and unconfined, and not under the exclusive control of any one nation or people, but is the free highway of adjoining nations or people, must fall under the definition of 'high seas' within the meaning of a statute punishing offenses committed on the high seas."[1]

HIGHEST BIDDER.—See the titles JUDICIAL SALES; SHERIFFS', CONSTABLES' AND MARSHALS' SALES.

HIGHEST COURT.—See the title APPEAL AND ERROR, vol. 1, p. 556.

HIGHWATER.—See note 2.

HIGHWAYS.—See the title STREETS AND HIGHWAYS.

HIMSELF.—See note 3.

HIRE.—See the titles BAILMENTS, vol. 2, p. 782; LANDLORD AND TENANT. See note 4.

HIS.—See note 5.

1. **High.**—United States *v.* Rodgers, 150 U. S. 249, 258, 37 L. Ed. 1071.

High seas.—See the titles CRIMINAL LAW, vol. 5, p. 78; NAVIGABLE WATERS.

"The term **high seas** includes waters on the sea coast without the boundaries of low-water mark; and the waters of the port of Yokohama constitute, within the meaning of the statute, high seas." In re Ross, 140 U. S. 453, 471, 35 L. Ed. 581.

In cases of collision and injury to property or persons on the **high seas** it has frequently been adjudicated in the English common-law courts, since the restraining statutes of Richard II and Henry IV were passed, that **high seas** mean that portion of the sea which washes the open coast; and that any branch of the sea within the fauces terræ, where a man may reasonably discern from shore to shore, is, or at least may be, within the body of a county. In fact, the general rule in England has been, since the time of Lord Coke, upon the interpretation given by the courts of common law to the statutes 13 and 15 Richard II and 2 Henry IV, to prohibit the admiralty from exercising jurisdiction in civil cases, or causes of action arising infra corpus comitatus, but in cases of tort, or collision, upon the **high seas**, or within the ebb and flow of the tide, as far up a river as the tide ebbs and flows, though it may be infra corpus comitatus, courts of admiralty of the United States have jurisdiction. Waring *v.* Clarke, 5 How. 441, 453, 12 L. Ed. 226. See, also, the title ADMIRALTY, vol. 1, p. 132.

2. **Highwater.**—"The term **highwater**, when applied to the sea or to a river where the tide ebbs and flows, has a definite meaning. The line is marked by the periodical flow of the tide, excluding the advance of waters above this line in the one case by winds and storms, and in the other by freshets or floods. But in respect to fresh-water rivers, the term is altogether indefinite, and the line marked uncertain. It has no fixed meaning in the sense of **highwater** mark when applied to a river where the tide ebbs and flows, and should never be adopted as a boundary in the case of freshwater rivers, by intendment or construction, whether between states or individuals. It may mean any stage of the water above its ordinary height, and the line will fluctuate with every varying freshet or flood that may happen." Howard *v.* Ingersoll, 13 How. 381, 423, 14 L. Ed. 189.

3. **Himself.**—The provision in the law punishing certain improper use of the mail that "nothing in the act shall authorize any person to open any letter or sealed matter of the first class not addressed to **himself**," has been held not to preclude one from testifying as to the contents of a letter addressed to **himself** under a fictitious name, though it was contended that the opening of the letter was an offense which would vitiate the evidence thus produced. Andrews *v.* United States, 162 U. S. 420, 424, 40 L. Ed. 1023.

4. **Hire.**—In Central Transportation Co. *v.* Pullman's Palace Car Co., 139 U. S. 24, 51, 35 L. Ed. 55, the court said: "The provision of this statute, by which the plaintiff is empowered to contract with other corporations 'for the leasing or hiring and transfer to them, or any of them,' of its 'railway cars and other personal property,' is fully satisfied by construing it as confirming the plaintiff's right to do as it had been doing, to 'lease' or **hire** (which are equivalent words) to other corporations in the regular course of its business, and to 'transfer' under such leasing or hiring, its 'railway cars,' and 'other personal property,' either connected with the cars, or at least of the same general nature of tangible property."

5. **His attendants.**—A statute provided that one convicted of a capital crime and sentenced to suffer the penalty of death

HISTORICAL FACTS.—See the title JUDICIAL NOTICE.

HOLD.—See note 1.

HOLDER.—For definition of holder of a negotiable instrument, see the title BILLS, NOTES AND CHECKS, vol. 3, p. 296. As to lien of bank on stock, see BANKS AND BANKING, vol. 2, p. 167.

HOLIDAYS.—See the title SUNDAYS AND HOLIDAYS.

HOLOGRAPHIC WILLS.—See the title WILLS.

HOME.—See, generally, the title DOMICILE, vol. 5, p. 473. As to home of an officer, see the title ARMY AND NAVY, vol. 2, p. 520.

HOME PORT.—The solution of the question, where a vessel's home port is, when it arises, depends wholly upon the locality of her owner's residence, and not upon the place of her enrollment.[2]

HOMESTEAD CLAIM OR ENTRY.—See the title PUBLIC LANDS.

HOMESTEAD EXEMPTIONS.

CROSS REFERENCES.

See the titles CONSTITUTIONAL LAW, vol. 4, p. 1; FRAUDULENT AND VOLUNTARY CONVEYANCES, ante, p. 472; PUBLIC LANDS.

As to setting apart bankrupt's exemptions, see the title BANKRUPTCY, vol. 2, p. 907. As to determination of bankrupt's exemptions, see the title BANKRUPTCY, vol. 2, p. 821. As to homestead on public lands, see the title PUBLIC LANDS.

Nature of Homestead Right.—It has been held that the nature of the homestead right is not an estate in land.[3]

Homestead Laws as Laws of the United States.—The laws of a state creating homestead exemptions are not laws for the United States, unless they have been made such by congress itself.[4]

Entry of "Homestead" on Record.—Where it is provided that the word "homestead" be entered of record on the margin of the recorded title, if one

should be kept in solitary confinement until the infliction of the death penalty; and that no person should be allowed to have access to him, except his attendants, counsel, physician, a spiritual adviser of his own selection and members of his own family. In Medley, Petitioner, 134 U. S. 160, 179, 33 L. Ed. 835, the court said: "By the words 'his attendants' in the statute, is evidently meant the officers of the prison and subordinates, who must necessarily furnish him with his food and his clothing, and make inspection every day that he still exists."

His own establishment.—A license to use an invention by a person only to "his own establishment," does not authorize a use at an establishment owned by himself and others. Rubber Co. *v.* Goodyear, 9 Wall. 788, 19 L. Ed. 566.

1. Hold.—As to distinction between right to purchase and right to hold, see Runyan *v.* Coster, 14 Pet. 122, 131, 10 L. Ed. 382. See, also, the title FOREIGN CORPORATIONS, ante, p. 305.

2. Home port.—St. Louis *v.* Ferry Co., 11 Wall. 423, 431, 20 L. Ed. 192. See, generally, the titles MARITIME LIENS; SHIPS AND SHIPPING.

"These provisions, and others that might be referred to, very clearly indicate that the domicile of a vessel that requires to be registered, if we may so speak, or **home port**, is the port at which she is registered, and which must be the nearest to the place where the owner or owners reside." Hays *v.* Pacific Mail Steamship Co., 17 How. 596, 598, 15 L. Ed. 254. See, also, the title SHIPS AND SHIPPING.

The **home port** of the vessel is the port in the office of whose collector the bill of sale, mortgage, etc., should be recorded; not the port of last registry or enrollment when not such **home port.** White's Bank *v.* Smith, 7 Wall. 646, 19 L. Ed. 211.

3. Nature of right.—By the laws of Illinois, the nature of the homestead right is not in an absolute sense an estate in the land. The law creates none and the fee is left as it was before, and the right of occupancy cannot be disturbed while the homestead character exists. Black *v.* Curran, 14 Wall. 463, 469, 20 L. Ed. 849.

4. Exemption against United States.—Where a statute of a state exempting homesteads from levy and sale upon executions has become a law of the United States in that state, it applies to executions issued upon judgments in civil causes recovered in the courts of the United States in the name and on behalf of the United States, equally with those upon judgments rendered in favor of

wishes to claim homestead, actual notice that property is homestead is not equivalent to the entry on record of the word "homestead."[3]

Time to Set Up Right of Homestead.—Where a debtor's property was sold under a creditor's bill, and the purchaser brought an action of ejectment, it was held that the debtor, against the purchaser, could not set up the right of homestead in a part of the land, but should have set same up in the suit upon the creditor's bill.[4]

Contracts Made before Right of Exemption.—Contracts made before there was a right of homestead exemption are not subject to such exemption.[5]

Property Must Be Used as Homestead.—A secret intention of the seller of land to use same as homestead cannot affect the purchaser of the land.[6]

Payment of Amount of Homestead by Holder of Lien against Same.—Payment by the holder of a lien, seeking its enforcement by sale of the premises, of the amount of the homestead exemption to the party entitled to claim such exemption entitled the payor to possession of the whole premises under an Illinois act.[7]

Conveyance without Waiving Right of Homestead.—Where land is sold under execution subject to the homestead, the purchaser has the absolute title when the homestead right ceases.[8]

Exemption against the Foreclosure of a Mortgage.—Under a statute of Texas, the homestead was held exempt from the foreclosure of a mortgage.[9]

Liens upon Homestead Created by Contract before Bankruptcy.—The setting apart of a homestead to a bankrupt under § 5045 of the Revised Statutes does not relieve the property from the operation of liens created by contract before the bankruptcy. So upon discharge from bankruptcy, a lien created by contract before bankruptcy is not discharged.[10]

Not Duty of Assignee in Bankruptcy to Inquire into Homestead Rights.—It is no part of the duty of an assignee in bankruptcy to inquire whether the bankrupt or his wife can claim homestead rights as against incumbrances whose title is superior to his own.[11]

private parties. Fink *v.* O'Neil, 106 U. S. 272, 279, 27 L. Ed. 196.

3. **Entry of "homestead" on record.**—By statute in Colorado it is provided that the word "homestead" be entered of record on the margin of the recorded title, if one wishes to claim same as homestead, and under this statute it was held that actual notice that property was a homestead was not equivalent to the entry on record of the word "homestead." Goodwin *v.* Colorado Mortgage, etc., Co., 110 U. S. 1, 5, 28 L. Ed. 47.

4. Miller *v.* Sherry, 2 Wall. 237, 251, 17 L. Ed. 827.

5. Edwards *v.* Kearzey, 96 U. S. 596, 607, 24 L. Ed. 793.

6. Grosholz *v.* Newman, 21 Wall. 481, 487, 22 L. Ed. 471.

Must be used as homestead.—Where a husband sold land without having wife sign the deed, the conveyance was not void because the grantor intended to use the property conveyed as a part of the homestead. Grosholz *v.* Newman, 21 Wall. 481, 486, 22 L. Ed. 471.

7. Knight *v.* Paxton, 124 U. S. 552, 558, 31 L. Ed. 518.

Payment of exemption where property cannot be divided.—By statute of Illinois passed in 1871, if, in the enforcement of a lien upon premises including the homestead, the value thereof exceeds the exemption, and the premises cannot be divided, there might be a sale of the whole and the payment of the amount of the exemption to the party entitled. Knight *v.* Paxton, 124 U. S. 552, 557, 31 L. Ed. 518.

8. **Where exemption not waived.**—By the law of Illinois where a conveyance is made without waiving the homestead, the fee passed, but its operation was suspended until the grantor abandoned the premises or surrendered possession, and the homestead when occupied as such by the debtor, was not subject to a lien of judgment. Black *v.* Curran, 14 Wall. 463, 470, 20 L. Ed. 849.

9. **Against foreclosure of mortgage.**—By the constitution of the state of Texas of 1868, the homestead of a family was not subject to forced sale for debts, except for the purchase money, or for taxes, and for labor and materials expended thereon. Therefore, premises could not be sold under any decree in a suit for the foreclosure of the mortgage. The prohibition of the constitution extended to any species of compulsory disposition of the homestead, whether denominated a sale or otherwise. Lanahan *v.* Sears, 102 U. S. 318, 321, 26 L. Ed. 180.

10. Long *v.* Bullard, 117 U. S. 617, 621, 29 L. Ed. 1004.

11. Dudley *v.* Easton, 104 U. S. 99, 103, 26 L. Ed. 668. See, generally, the title BANKRUPTCY, vol. 2, p. 907.

HOMICIDE.

BY ERNEST P. STEINHAUER.

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I. Definition.

Homicide is the act of a human being in killing another human being.[1]

II. Murder.

A. Definition.—"Murder at common law, is defined to be, when a person of sound memory and discretion unlawfully killeth any reasonable creature in being, and in the peace of the state, with malice aforethought, either express or implied."[2]

B. Elements—1. MALICE—a. *Necessity for Malice.*—The presence or absence of malice marks the boundary which separates the two crimes of murder and manslaughter.[3]

b. *Express Malice.*—"Express malice is when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature."[4]

1. **Definition.**—Black's Law Dict., p. 577.

2. **Definition.**—Mr. Justice Clifford's dissenting opinion in Wiggins *v.* People, 93 U. S. 465, 470, 23 L. Ed. 941.

Justice Harlan, speaking of murder in Davis *v.* United States, 160 U. S. 469, 484, 40 L. Ed. 499, said: "It is of the very essence of that heinous crime that it be committed by a person of sound memory and discretion, and with malice aforethought; either express or implied."

"Murder is declared by the statutes of Utah to be 'the unlawful killing of a human being with malice aforethought.' This is substantially murder as defined at common law. 4 Bl. Com. 195; 3 Inst. 47." Davis *v.* Utah, 151 U. S. 262, 264, 38 L. Ed. 153; Wilkerson *v.* Utah, 99 U. S. 130, 131, 25 L. Ed. 345.

3. **Necessity for malice.**—Stevenson *v.* United States, 162 U. S. 313, 320, 40 L. Ed. 980.

4. **Express malice.**—Wilkerson *v.* Utah, 99 U. S. 130, 131, 25 L. Ed. 345.

"Express malice exists when one, by deliberate premeditation and design, formed in advance, to kill or to do bodily harm, the premeditation and design being implied from external circumstances capable of proof, such as lying in wait, antecedent threats and concerted schemes against a victim." Sparf *v.* United States, 156 U. S. 51, 60, 39 L. Ed. 343.

"The term 'express malice' means that the homicide was the result of a formed design, based upon a wicked and depraved spirit, and is maliciously conceived and wickedly and maliciously executed without justifiable or lawful excuse. The most usual illustrations, and the ones best understood generally of the term 'express malice' are such as lying in wait for the intended victim, and when he approaches he is slain, or the preparation and administration of poison for the purpose of taking life, because in such instances the acts clearly show the formed design and the unlawful intent and its execution, and therefore is said to be killing upon express malice. These are only illustrations of what is meant by the terms 'express malice,' and any homicide that is shown to have been the result of willful intent and committed without legal excuse is said to be a killing upon

c. *Implied Malice.*—The proof of homicide, as necessarily involving malice, must show the facts under which the killing was effected, and from the whole facts and circumstances surrounding the killing the jury infers malice or its absence. Malice in connection with the crime of killing is but another name for a certain condition of a man's heart or mind, and as no one can look into the heart or mind of another, the only way to decide upon its condition at the time of a killing is to infer it from the surrounding facts, and that inference is one of fact for a jury.[5]

2. INTENT—a. *As Criterion of Crime.*—To constitute murder of the first degree the intention is the true criterion of the crime.[6]

b. *When Intent May Exist.*—The intent necessary to constitute malice aforethought need not have existed for any particular time before the act of killing, but it may spring up at the instant and may be inferred from the fact of killing. This is within the authorities as applied to the common-law crime of murder, though where the crime is classified as in some states, proof of deliberate premeditation is necessary to constitute murder in the first degree.[7]

express malice." Hotema *v.* United States, 186 U. S. 413, 46 L. Ed. 1225.

Where one, after an altercation with another, arms himself for the purpose of pursuing his adversary, or with the intention of putting himself in the way of his adversary, so as to obtain an opportunity to kill him, he is guilty of murder. Gourko *v.* United States, 153 U. S. 183, 191, 38 L. Ed. 680.

5. **Implied malice.**—Stevenson *v.* United States, 162 U. S. 313, 320, 40 L. Ed. 980.

"By the term 'implied malice' is meant that in the case charged the evidence shows that the party charged committed the act, and that it was intentional and unlawful, that is, without justifiable excuse, and the evidence fails to reveal the motive why the person committed the act. In that state of case the law attaches or implies malice to the nature of the act done; that is, the taking of human life without justifiable excuse. Where the evidence fails to show that it was done upon express malice, yet it shows that the party charged intentionally did the act without lawful excuse, malice is inferred, although the evidence may not disclose any motive whatever, and therefore if the killing was intentional and without justifiable excuse, although no motive is shown for it, the party would be guilty of murder and should be convicted therefor, unless excused upon the ground of insanity or the want of mental capacity to form a criminal intent. Therefore in this case it is not material, so far as the question of guilt or innocence is concerned, that the evidence fails to show any motive for the killing, because if the killing was intentional and was not justifiable, the law implies the criminal intent, and, unless rebutted by testimony, would justify a conviction, provided the evidence shows that the party charged had sufficient mental ability to be held responsible for his acts." Hotema *v.* United States, 186 U. S. 413, 46 L. Ed. 1225.

"Implied malice is an inference of the law from any deliberate and cruel act committed by one person against another." Sparf *v.* United States, 156 U. S. 51, 115, 39 L. Ed. 343.

Whether there be what is termed express malice or only implied malice, the proof to show either is of the same nature, viz, the circumstances leading up to and surrounding the killing. Stevenson *v.* United States, 162 U. S. 313, 320, 40 L. Ed. 980.

"The two kinds of malice, therefore, to repeat, indicate but one state of mind, established in different ways—the one by circumstances showing premeditation of the homicide, the other by an inference of the law from the act committed; that is, malice is inferred when one kills another without provocation, or when the provocation is not great." Sparf *v.* United States, 156 U. S. 51, 115, 39 L. Ed. 343.

"Malice may be presumed from the mere fact of killing, nothing further being shown." Pointer *v.* United States, 151 U. S. 396, 414, 38 L. Ed. 208.

Express malice may be implied when there is no considerable provocation, or when the circumstances attending the killing show an abandoned or malignant heart. Wilkerson *v.* Utah, 99 U. S. 130, 131, 25 L. Ed. 345.

Common law.—By the common law malice may be implied from the use of a deadly weapon or other significant facts. Tucker *v.* United States, 151 U. S. 164, 169, 38 L. Ed. 112.

Utah.—The statute of Utah provide that the malice necessary to constitute murder may be express or implied. Wilkerson *v.* Utah, 99 U. S. 130, 131, 25 L. Ed. 345.

Instructions.—Where the evidence on a trial for murder justifies the court in so doing, it may charge the jury that it can infer not only willfulness but malice aforethought. Allen *v.* United States, 164 U. S. 492, 495, 41 L. Ed. 528.

6. **Intent as criterion of crime.**—Respublica *v.* Mulatto Bob, 4 Dall. 145, 146, 1 L. Ed. 776.

7. **When intent may exist.**—Allen *v.* United States, 164 U. S. 492, 495, 41 L. Ed. 528.

3. Motive.—While a motive exists for every act done by a person of sound mind, it is not indispensible to conviction that the particular motive for taking the life of a human being shall be established by proof to the satisfaction of the jury.[8]

C. Degrees of Murder.—"Modern statutes defining murder in many cases affix degrees to the offense, according to the nature and aggravation of the circumstances under which the act of homicide is committed."[9]

Murder in First Degree.—"Murder, in the first degree, is the willful, deliberate and premeditated killing of another."[10]

D. Time of Death.—In cases of murder the rule at common law undoubtedly was that no person should be adjudged "by any act whatever to kill another who does not die by it within a year and a day thereafter; in computation whereof the whole day on which the hurt was done shall be reckoned first." The reason assigned for that rule was that if the person alleged to have been murdered "die after that time, it cannot be discerned, as the law presumes, whether he died of the stroke or poison, etc., or a natural death; and in case of life, a rule of law ought to be certain." And such is the rule in this country in prosecutions for murder, except in jurisdictions where it may be otherwise prescribed by statute.[11]

E. Killing in the Heat of Passion.—"The law, in recognition of the frailty of human nature, regards a homicide committed under the influence of sudden passion, or in hot blood produced by adequate cause, and before a reasonable time has elapsed for the blood to cool, as an offense of a less heinous character than murder. But if there be sufficient time for the passions to subside, and shaken reason to resume its sway, no such distinction can be entertained. And if the circumstances show a killing 'with deliberate mind and formed design,'—with comprehension of the act and determination to perform it, the elements of self-defense being wanting,—the act is murder. Nor is the presumption of malice negatived by previous provocation, having no causal connection with the murderous act, or separated from it by such an interval of time as gives reasonable opportunity for the access of fury to moderate."[12]

F. Killing Provoked by Mere Aggravating Words.—"It is well settled

8. **Motive.**—Pointer *v.* United States, 151 U. S. 396, 414, 38 L. Ed. 208.

"The absence of evidence suggesting a motive for the commission of the crime charged is a circumstance in favor of the accused, to be given such weight as the jury deems proper; but proof of motive is never indispensable to conviction." Pointer *v.* United States, 151 U. S. 396, 414, 38 L. Ed. 208.

Instructions.—Where the attention of the court was directed to the subject of proving motive upon the trial of a person charged with murder, and he charged that it was unnecessary to show a motive for the commission of the crime so long as the evidence satisfied the jury that the person charged was in fact guilty of the act; that it was not necessary to prove by any particular expression of the party charged that he had some personal or what may be termed express malice toward the individual who was killed, the court commits no error. Hotema *v.* United States, 186 U. S. 413, 414, 46 L. Ed. 1225.

There is no error in instructing the jury in effect, that they have the right to consider the absence of any proof of motive, but that such proof is not essential to enable them to convict. Johnson *v.* United States, 157 U. S. 320, 325, 39 L. Ed. 717.

9. **Degrees of murder.**—Mr. Justice Clifford, dissenting opinion in Wiggins *v.* People, 93 U. S. 465, 470, 23 L. Ed. 941.

"No act of congress has established degrees of the crime of murder." Tucker *v.* United States, 151 U. S. 164, 169, 38 L. Ed. 112. See, also, Sparf *v.* United States, 156 U. S. 51, 39 L. Ed. 343.

10. **Murder in first degree.**—Respublica *v.* Mulatto Bob, 4 Dall. 145, 146, 1 L. Ed. 770.

11. **Time of death.**—Louisville, etc., R. Co. *v.* Clarke, 152 U. S. 230, 239, 38 L. Ed. 422.

12. **Killing in the heat of passion.**—Andersen *v.* United States, 170 U. S. 481, 510, 42 L. Ed. 1116.

Instructions.—Instruction cannot properly be complained of by the defendant, which states that, if the defendant in a moment of passion, aroused by the wrongful treatment of his brother and without any previous preparation, did the shooting, the offense would be manslaughter and not murder; but if he prepared himself to kill, and had a previous purpose to do so, then the mere fact of passion would not reduce the crime below murder. Collins *v.* United States, 150 U. S. 62, 65, 37 L. Ed. 998.

by the authorities that mere words, however aggravating, are not sufficient to reduce the crime from murder to manslaughter."[13]

G. Derailing Mail Train.—See post, "Jurisdiction," V, A, footnote.

H. Repelling a Trespasser.—See post, "Repelling a Trespasser," III, E.

III. Manslaughter.

A. Definition and General Consideration.—Manslaughter at common law was defined to be the unlawful and felonious killing of another without any malice, either express or implied.[14] The definition of the crime given by § 5341 of the Revised Statutes of the United States is substantially the same.[15]

B. Effect of Defendant Arming Himself.—Where one, after an altercation with another, had reasonable grounds to believe, and in fact believed, that such other intended to take his life, or to inflict upon him great bodily harm, and, so believing, armed himself solely for necessary self-defense in the event of his being pursued and attacked, and if the circumstances occurring on the occasion of the meeting were such as, by themselves, made a case of manslaughter, then the defendant's arming himself, after the altercation, did not have, in itself, the effect to convert his crime into that of murder.[16]

13. **Killing provoked by mere aggravating words.**—Allen *v.* United States, 164 U. S. 492, 497, 41 L. Ed. 528.

14. **Definition and general consideration.**—Stevenson *v.* United States, 162 U. S. 313, 320, 40 L. Ed. 980.

By the common law any unlawful killing without malice, express or implied, is manslaughter. Tucker *v.* United States, 151 U. S. 164, 170, 38 L. Ed. 112.

Instructions.—A court does not err in refusing to give an instruction upon the subject of manslaughter where it had already fully instructed upon the subject, and by reference to the record it appears that the charge as given, which defined manslaughter to be "the willful and unlawful killing of a human being without malice aforethought," was more accurate than the instruction asked for, which omitted the element of the killing being without any malice either express or implied. Brown *v.* United States, 150 U. S. 93, 95, 37 L. Ed. 1010.

An instruction to the jury as follows: "I give you the law of manslaughter because it has been invoked in the case, and you are to see whether it exists; and because you may apply the doctrine of exclusion to enable you to come to the conclusion as to whether murder exists or not, because, if self-defense does not exist, and if manslaughter does not exist, the only other condition that can exist in the case is a state of murder. Manslaughter is the willful and unlawful killing of a human being without malice aforethought, and it occupies a midway position between a state of case where the law of self-defense would apply and a state of case where the law defining murder applies," is not open to exception when taken with other parts of the charge, which correctly state the law upon the subject of manslaughter. Brown *v.* United States, 150 U. S. 93, 94, 37 L. Ed. 1010.

The court charged the jury that "manslaughter, as applied to a case of this character, is the intentional taking of human life, but the distinguishing trait between manslaughter and murder is the absence of malice; it must spring from a gross provocation, and of such character as to temporarily render the party incapable of that cool reflection that otherwise makes it murder. Of course, the defendant intends to do what he does, but he must be laboring at the time he performs the act under intense mental excitement such as would render any ordinarily prudent person for the time being incapable of that cool reflection that otherwise makes it murder. In that state of case the law does not wholly excuse the offense; but the law, in its charity for the imperfections and weaknesses of human nature, reduces it from murder to manslaughter." Held, this was for the benefit and not to the prejudice of the accused, and, therefore he could not claim there was error. Addington *v.* United States, 165 U. S. 184, 185, 41 L. Ed. 679.

15. **Definition under § 5341, Rev. Stat.**—Stevenson *v.* United States, 162 U. S. 313, 320, 40 L. Ed. 980.

"The statutes of the United States provide that any person who, within any of the places or upon any of the waters described in section fifty-three hundred and thirty-nine, 'unlawfully and willfully, but without malice, strikes, stabs, wounds or shoots at, or otherwise injuries another, of which striking, stabbing, wounding, shooting or other injury such other person dies, either on land or sea, within or without the United States, is guilty of the crime of manslaughter.' Rev. Stat., § 5341." Addington *v.* United States, 165 U. S. 184, 186, 41 L. Ed. 679.

16. **Effect of defendant arming himself.**—Gourko *v.* United States, 153 U. S. 183, 191, 38 L. Ed. 680, followed and applied in Thompson *v.* United States, 155 U. S. 271, 39 L. Ed. 146.

Stated in another form: Although the

C. Resisting Arrest by Officer without a Warrant.—"At common law, if a party resisted arrest by an officer without warrant, and who had no right to arrest him, and if in the course of that resistance the officer was killed, the offense of the party resisting arrest would be reduced from what would have been murder, if the officer had had the right to arrest, to manslaughter. What would be murder, if the officer had the right to arrest, might be reduced to manslaughter by the very fact that he had no such right."[17]

D. Pushing a Person from a Door.—In a Pennsylvania case it was held to be manslaughter for one to push another from a door, which the latter was trying to enter, in such a manner as to cause the latter to fall down some steps causing injuries resulting in death.[18]

E. Repelling a Trespasser.—A person "cannot repel a mere trespass on his land by the taking of life, or proceed beyond what necessity requires. When he uses in the defense of such property a weapon which is not deadly, and death accidently ensues, the killing will not exceed manslaughter, but when a deadly weapon is employed it may be murder or manslaughter, according to the circumstances."[19]

F. Killing in the Heat of Passion.—See ante, "Killing in the Heat of Passion," III, F.

IV. Justifiable and Excusable Homicide.

A. Justifiable Homicide—1. DEFINITION.—Justifiable homicide is that committed with full intent, but under such circumstances as to render the act one proper to be performed.[20]

2. ILLUSTRATIONS.—A homicide is justifiable when committed in resisting an attempt to murder a person,[21] and by statute, in some states, when committed in

defendant may not have been justified on the occasion and under the particular circumstances of the difficulty in believing that the taking of his adversary's life was, then and there, necessary to save his own life or to protect himself from serious bodily harm, nevertheless, the jury were not authorized to find him guilty of murder because of his having deliberately armed himself; provided he rightfully so armed himself for purposes simply of self-defense, and if, independently of the fact of arming himself, the case tested by what occurred on the occasion of the killing was one of manslaughter only. Gourko *v.* United States, 153 U. S. 183, 191, 38 L. Ed. 680, followed and applied in Thompson *v.* United States, 155 U. S. 271, 39 L. Ed. 146.

Instructions.—See post, "Self-Defense and Effect of Arming Oneself," V, G, 3.

"The court, in effect, said—or the jury may, not unreasonably, have understood the court as declaring—that preparation, by arming, although for self-defense only, could not be followed, in any case, by manslaughter, if the killing, after such arming, was not, in fact, in necessary self-defense. Such we understand to be the meaning of the charge. In our opinion the court erred in so charging the jury. If the accused was justified in the eye of the law in arming himself for self-defense, and if, without seeking, but on meeting, his adversary, on a subsequent occasion, he killed him, not in necessary self-defense, then his crime was that of manslaughter or murder, as the circumstances, on the occasion of the killing, made it the one or the other. If guilty of manslaughter, looking alone at those circumstances, he could not be found guilty of murder by reason of his having previously armed himself solely for self-defense." Gourko *v.* United States, 153 U. S. 183, 191, 38 L. Ed. 680.

17. **Resisting arrest by officer without a warrant.**—John Bad Elk *v.* United States, 177 U. S. 529, 534, 44 L. Ed. 874. See, generally, the title ARREST, vol. 2, p. 541.

18. **Pushing a person from a door.**—Commonwealth *v.* Biron, 4 Dall. 125, 1 L. Ed. 769.

19. **Repelling a trespasser.**—Wallace *v.* United States, 162 U. S. 466, 473, 40 L. Ed. 1039.

20. **Definition.**—Bouvier's Law Dict., vol. 1, p. 958.

21. A marshal of the United States, charged with the duty of protecting and guarding a judge of the United States court against assault upon his person and his life, being present at the critical moment, when prompt action was necessary, and having found it to be his duty, a duty which he had no liberty to refuse to perform, to take the life of a person attempting to assault the judge, was justified in so doing. In re Neagle, 135 U. S. 1, 69, 34 L. Ed. 55.

"The penal code of California declares (§ 197) that homicide is justifiable when committed by any person 'when resisting any attempt to murder any person.'" In re Neagle, 135 U. S. 1, 68, 34 L. Ed. 55

the lawful defense of the person.[22]

B. Excusable Homicide.—Definition.—Excusable homicide is that which takes place under such circumstances of accident or necessity that the party cannot strictly be said to have committed the act willfully and intentionally, and whereby he is relieved from the penalty annexed to the commission of a felonious homicide.[23]

C. Self-Defense—1. IN GENERAL.—A homicide committed in actual defense of life or limb is excusable if it appear that the slayer was acting under a reasonable belief that he was in imminent danger of death or great bodily harm from the deceased, and that his act in causing death was necessary in order to avoid the death or great bodily harm which was apparently imminent.[24]

When Slayer Is the Aggressor.—But where there is manifestly no adequate or reasonable ground for such belief, or the slayer brings on the difficulty for the purpose of killing the deceased, or violation of the law on his part is the

22. "By the Revised Code of Mississippi (1880), § 2878 (and this section is common to the homicide statutes of several states), homicide is justifiable when committed in the lawful defense of the person when there shall be reasonable ground to apprehend a design to do some great personal injury, and imminent danger of such design being accomplished." New Orleans, etc., R. Co. *v.* Jopes, 142 U. S. 18, 23, 35 L. Ed. 919.

23. **Definition.**—Bouvier's Law Dict., vol. 1, p. 958.

24. **In general.**—Andersen *v.* United States, 170 U. S. 481, 508, 42 L. Ed. 1116; Allen *v.* United States, 164 U. S. 492, 41 L. Ed. 528; Addington *v.* United States, 165 U. S. 184, 41 L. Ed. 679.

Where the accused embarks in a quarrel with no felonious intent, or malice, or premeditated purpose of doing bodily harm or killing, and under reasonable belief of imminent danger he inflicts a fatal wound, it is not murder. Wallace *v.* United States, 162 U. S. 466, 471, 40 L. Ed. 1039.

"The law of self-defense justifies an act done in honest and reasonable belief of immediate danger. The familiar illustration is, that if one approaches another, pointing a pistol and indicating an intention to shoot, the latter is justified by the rule of self-defense in shooting, even to death; and that such justification is not avoided by proof that the party killed was only intending a joke, and that the pistol in his hand was unloaded. Such a defense does not rest on the actual, but on the apparent facts and the honesty of belief in danger. By the Revised Code of Mississippi (1880), § 2878 (and this section is common to the homicide statutes of several states), homicide is justifiable when committed in the lawful defense of the person when there shall be reasonable ground to apprehend a design to do some great personal injury, and imminent danger of such design being accomplished. In 1 Wharton's Criminal Law, 9th Ed., § 488, the author says: 'It is conceded on all sides that it is enough if the danger which the defendant seeks to avert is apparently imminent, irremedial and actual.'" New Orleans, etc., R. Co. *v.* Jopes, 142 U. S. 18, 23, 24, 35 L. Ed. 919.

Resisting arrest.—Where an officer attempts to arrest a person, and such person is placed in a position in which his life is imperiled by the officer, and he slays the officer without having any notice of his official character, and the killing was apparently necessary to save his own life, then the killing of the officer is homicide in self-defense, and it is error for the judge in such case to qualify the above rule, in his instructions to the jury, to the effect that if the defendant prevented the officer from giving notice that he was acting officially, then the rule invoked would not apply. Starr *v.* United States, 153 U. S. 614, 620, 38 L. Ed. 841.

"The possession of a conscience void of offense toward God and men is not an indispensable prerequisite to justification of action in the face of imminent and deadly peril, nor does the intrinsic rightfulness of the occupation or situation of a party, having in itself no bearing upon or connection with an assault, impose a limitation on the right to repel it." Starr *v.* United States, 153 U. S. 614, 623, 38 L. Ed. 841.

"The motive of the accused in being where he was had nothing to do with the question of his right of self-defense in itself, and the unlawfulness of his previous conduct formed in itself no element in the solution of that question, but was to be considered only in so far as it threw light on his belief that his arrest was sought by the officer." Starr *v.* United States, 153 U. S. 614, 624, 38 L. Ed. 841.

Instructions.—Where the court said, in substance, that if the circumstances were such as to produce upon the mind of the accused, as a reasonably prudent man, the impression that he could save his own life, or protect himself from serious bodily harm, only by taking the life of his assailant, he was justified by the law in resorting to such means, unless he went to where the deceased was for the purpose of provoking a difficulty in order

reason of his expectation of an attack, the plea of self-defense cannot avail.[25]

Perfect and Imperfect Right of Self-Defense.—"A perfect right of self-defense can only obtain and avail where the party pleading it acted from necessity, and was wholly free from wrong or blame in occasioning or producing the necessity which required his action. If, however, he was in the wrong—if he was himself violating or in the act of violating the law—and on account of his own wrong was placed in a situation wherein it became necessary for him to defend himself against an attack made upon himself, which was superinduced or created by his own wrong, then the law justly limits his right of self-defense, and regulates it according to the magnitude of his own wrong. Such a state of case may be said to illustrate and determine what in law would be denominated the imperfect right of self-defense."[26]

2. Duty to Retreat—a. *General Rule.*—Where a person is assaulted, the general rule is, that, before killing his assailant, he must retreat as far as he can reasonably do so with regard to his own safety.[27]

b. *By One on His Own Premises but Outside of Dwelling House.*—A person while on his premises, outside of his dwelling house, is not obliged to retreat, nor to consider whether he can safely retreat, but is entitled to stand his ground and meet any attack made upon him with a deadly weapon, in such way and with such force as, under all the circumstances, he, at the moment, honestly believes, and has reasonable grounds to believe, is necessary to save his own life or to protect himself from great bodily injury.[28]

that he might slay his adversary, it committed no error. Addington *v.* United States, 165 U. S. 184, 187, 41 L. Ed. 679.

25. When slayer is the aggressor.—Andersen *v.* United States, 170 U. S. 481, 508, 42 L. Ed. 1116; Allen *v.* United States, 164 U. S. 492, 41 L. Ed. 528; Addington *v.* United States, 165 U. S. 184, 41 L. Ed. 679; Wallace *v.* United States, 162 U. S. 466, 40 L. Ed. 1039.

"Where a difficulty is intentionally brought on for the purpose of killing the deceased, the fact of imminent danger to the accused constitutes no defense." Wallace *v.* United States, 162 U. S. 466, 471, 40 L. Ed. 1039.

26. Wallace *v.* United States, 162 U. S. 466, 472, 40 L. Ed. 1039.

27. General rule.—Allen *v.* United States, 164 U. S. 492, 498, 41 L. Ed. 528.

"It is clear that to establish a case of justifiable homicide it must appear that something more than an ordinary assault was made upon the prisoner; it must also appear that the assault was such as would lead a reasonable person to believe that his life was in peril. Wallace *v.* United States, 162 U. S. 466, 40 L. Ed. 1039." Allen *v.* United States, 164 U. S. 492, 498, 41 L. Ed. 528.

"Nor is there anything in the instruction of the court that the prisoner was bound to retreat as far as he could before slaying his assailant that conflicts with the ruling of this court in Beard *v.* United States, 158 U. S. 550, 39 L. Ed. 1086. That was the case of an assault upon the defendant upon his own premises, and it was held that the obligation to retreat was no greater than it would have been if he had been assailed in his own house. So, too, in the case of Alberty *v.* United States, 162 U. S. 499, 40 L. Ed. 1051, the defendant found the deceased trying to obtain access to his wife's chamber through a window, in the night time, and it was held that he might repel the attempt by force, and was under no obligation to retreat if the deceased attacked him with a knife. The general duty to retreat instead of killing when attacked was not touched upon in these cases. Whart. on Homicide, § 485." Allen *v.* United States, 164 U. S. 492, 498, 41 L. Ed. 528.

28. By one on his own premises but outside of dwelling house.—Beard *v.* United States, 158 U. S. 550, 563, 39 L. Ed. 1086.

"We cannot agree that the accused was under any greater obligation, when on his own premises, near his dwelling house, to retreat or run away from his assailant, than he would have been if attacked within his dwelling house. The accused being where he had a right to be, on his own premises, constituting a part of his residence and home, at the time the deceased approached him in a threatening manner, and not having by language or by conduct provoked the deceased to assault him, the question for the jury was whether, without fleeing from his adversary, he had, at the moment he struck the deceased, reasonable grounds to believe, and in good faith believed, that he could not save his life or protect himself from great bodily harm except by doing what he did, namely, strike the deceased with his gun, and thus prevent his further advance upon him." Beard *v.* United States, 158 U. S. 550, 39 L. Ed. 1086.

To come within the consideration of self-defense one was doing what he had the legal right to do, when, keeping within

c. *When Accused Was Where He Had a Right to Be.*—Where the accused was where he had a right to be, the law does not require him to step aside when his assailant is rapidly advancing upon him with a deadly weapon, and a charge to the effect that although the deceased sprang at the accused, with a knife in hand, for the purpose of cutting him to pieces, yet if the accused could have stepped aside or paralyzed the arm of his assailant, his killing the latter was not in the exercise of the right of self-defense, is erroneous.[29]

d. *Where Deceased Found Entering Room of Defendant's Wife.*—"A man who finds another trying to obtain access to his wife's room in the night time, by opening a window, may not only remonstrate with him, but may employ such force as may be necessary to prevent his doing so; and if the other threatens to kill him, and makes a motion as if to do so, and puts him in fear of his life, or of great bodily harm, he is not bound to retreat, but may use such force as is necessary to repel the assault."[30]

e. *When Right of Self-Defense Restored.*—"If a person, under the provocation of offensive language, assaults the speaker personally, but in such a way as to show that there is no intention to do him serious bodily harm, and then retires under such circumstances as show that he does not intend to do anything more, but in good faith withdraws from further contest, his right of self-defense is restored when the person assaulted, in violation of law, pursues him with a deadly weapon and seeks to take his life or do him great bodily harm."[31]

f. *Test Whether Limits of Self-Defense Exceeded.*—The doctrine is impracticable which tests the question whether a defendant exceeded the limits of self-defense or acted in the heat of passion by the deliberation with which a judge

his own premises and near his dwelling, he joined his wife who was in dispute with others, one of whom, as he had been informed, had already threatened to take the cow away or kill him. Beard *v.* United States, 158 U. S. 550, 558, 39 L. Ed. 1086.

29. When accused was where he had a right to be.—Rowe *v.* United States, 164 U. S. 546, 558, 41 L. Ed. 547.

"By numerous quotations from adjudged cases, the court, by every form of expression, pressed upon the jury the proposition that 'a person who has slain another cannot urge in justification of the killing a necessity produced by his own unlawful and wrongful acts.' But that abstract principle has no application to this case, if it be true—as the evidence on behalf of the defense tended to show—that the first real provocation came from the deceased when he used towards the accused language of an offensive character, and that the accused immediately after kicking at or lightly kicking the deceased, signified by his conduct that he no longer desired controversy with his adversary; whereupon the deceased, despite the efforts of the accused to retire from further contest, sprang at the latter, with knife in hand, for the purpose of taking life, and would most probably have accomplished that object, if the accused had not fired at the moment he did. Under such circumstances, did the law require that the accused should stand still, and permit himself to be cut to pieces, under the penalty that if he met the unlawful attack upon him and saved his own life, by taking that of his assailant, he would be guilty of manslaughter? We think not." Rowe *v.* United States, 164 U. S. 546, 555, 41 L. Ed. 547.

30. Where deceased found entering room of defendant's wife.—Alberty *v.* United States, 162 U. S. 499, 508, 40 L. Ed. 1051.

"We think the charge of the court in this connection is open to the same objection that was made to the charge in the case of Beard *v.* United States, 158 U. S. 550, 39 L. Ed. 1086. The only difference suggested is that in that case the attack was made with firearms, and in this case it would appear that the defendant supposed that the deceased was about to attack him with a knife. Defendant, however, was working at Lipes,' where his wife was staying, and if, as he claims, he saw a man in the act of raising a window which led to his wife's room, it was perfectly natural that he should wish to investigate, and to ascertain for what purpose the man was there. It appears to have been so dark at the time that defendant did not recognize deceased except by his voice, that the deceased threatened, with an oath, to kill him, and as he says, made for him with a knife. Under such circumstances we think a charge to the jury that he was bound to retreat as far as he could, or disable his adversary without killing him, was misleading." Alberty *v.* United States, 162 U. S. 499, 507, 508, 40 L. Ed. 1051.

31. When right of self-defense restored.—Rowe *v.* United States, 164 U. S. 546, 555, 41 L. Ed. 547.

expounds the law to a jury or a jury determines the facts, or with which judgment is entered and carried into execution.[32]

V. Procedure.

A. Jurisdiction—1. In General.—For a full treatment of this subject of jurisdiction, see the title Criminal Law, vol. 5, p. 43.

2. Between a State and the United States.—Criminal homicide, committed in a state, is an offense against the authority of the state,[33] unless it was committed in a place within the exclusive jurisdiction of the United States.[34]

B. Indictment—1. Necessity for Indictment by Grand Jury.—The words "due process of law" in the fourteenth amendment do not necessarily require an indictment by a grand jury in a prosecution by a state for murder, whose constitution authorizes such prosecution by information.[35]

2. Time and Place.—For treatment of this subject see elsewhere.[36]

3. Construction.—A rule of construction should not be applied, which would compel the pleader to indulge in too much repetition.[37]

32. Test whether limits of self-defense exceeded.—Brown *v.* United States, 150 U. S. 93, 99, 37 L. Ed. 1010; Hickory *v.* United States, 151 U. S. 303, 316, 38 L. Ed. 170.

33. Between a state and the United States.—Coleman *v.* Tennessee, 97 U. S. 509, 536, 24 L. Ed. 1118.

Derailing a mail train.—Where the accused derailed a mail train and thereby caused the death of the engineer, his act is an offense by the law of the state, and the state may punish him accordingly for murder; and it is no defense that the act was an offense against the United States, for it is settled law that the same act may constitute an offense against the United States and against a state, subjecting the guilty party to punishment under the laws of each government. Crossley *v.* California, 168 U. S. 640, 641, 42 L. Ed. 610.

34. Coleman *v.* Tennessee, 97 U. S. 509, 536, 24 L. Ed. 1118.

"Murder is not an offense against the United States, except when committed on an American vessel on the high seas, or in some port or haven without the jurisdiction of the state, or in the District of Columbia, or in the territories, or at other places where the national government has exclusive jurisdiction. The offense within the limits of a state, except where jurisdiction has been ceded to the United States, is as much beyond the jurisdiction of these courts as though it had been committed on another continent. The prosecution of the offense in such a case does not, therefore, arise under the constitution and laws of the United States; and the act of congress which attempts to give the federal courts jurisdiction of it is, to my mind, a clear infraction of the constitution. That instrument defines and limits the judicial power of the United States." Virginia *v.* Rives, 100 U. S. 313, 336, 25 L. Ed. 667.

"There are no common-law crimes of the United States, and the crime of murder, as such, is not known to the national government, except in places over which it may exercise exclusive jurisdiction." Pettit *v.* Walshe, 194 U. S. 205, 217, 48 L. Ed. 938.

35. Necessity for indictment by grand jury.—Hurtado *v.* California, 110 U. S. 516, 28 L. Ed. 232; McNulty *v.* California, 149 U. S. 645, 648, 37 L. Ed. 882; Barbier *v.* Connolly, 113 U. S. 27, 28 L. Ed. 923; In re Kemmler, 136 U. S. 436, 34 L. Ed. 519; In re Converse, 137 U. S. 624, 34 L. Ed. 796; Hallinger *v.* Davis, 146 U. S. 314, 36 L. Ed. 986. See the title CONSTITUTIONAL LAW, vol. 4, pp. 492, 496; DUE PROCESS OF LAW, vol. 5, p. 667.

36. Time and place.—See the title INDICTMENTS, INFORMATIONS, PRESENTMENTS AND COMPLAINTS.

37. Construction.—"The only question that could arise as to the sufficiency of the indictment is suggested by the words, 'and did then and there, to wit, at the time and place last above mentioned, him, the said Maurice Fitzgerald, cast and throw from and out of the said vessel into the sea, and plunge, sink, and drown him, the said Maurice Fitzgerald, in the sea aforesaid.' These words, it is said, do not necessarily import that the casting and throwing the deceased into the sea was done willfully, feloniously, and with malice aforethought. But they cannot properly be separated from those which show the nature and effect of the assault. The words immediately preceding show that the accused did 'then and there piratically, willfully, feloniously, and with malice aforethought, strike and beat the said Maurice Fitzgerald, then and there giving to the said Maurice Fitzgerald several grievous, dangerous, and mortal wounds.' The latter words and those first above quoted are connected by the conjunctive 'and,' and should be construed together; and, so construed, it is clear that the words 'piratically, willfully, feloniously, and with malice aforethought' refer not only to the striking and beating of the deceased,

4. Duplicity and Uncertainty.—An indictment for murder is not objectionable on the ground of duplicity or uncertainty where it charges that death occurred by shooting and drowning.[38]

5. Finding Guilty of Less Offense than Charged.—Under § 1035, Rev. Stat., a defendant charged with the crime of murder may be found guilty of manslaughter.[39]

6. Election.—Where two counts in an indictment differ from each other only in stating the manner in which the murder was committed, the question whether the prosecution should be compelled to elect is a matter purely within the discretion of the court.[40]

7. Failure to Indicate Degree of Murder.—"An indictment which clearly and distinctly alleges facts showing a murder by the unlawful killing of a human being with malice aforethought is good as an indictment for murder under the Utah statutes, although it may not indicate, upon its face, in terms, the degree of that crime."[41]

whereby mortal wounds were inflicted upon him, but to the casting and throwing of him into the sea, whereby he was drowned. Any other rule of construction would compel the pleader to indulge in too much repetition. Heydon's Case, 3 Rep. 7." St. Clair *v.* United States, 154 U. S. 134, 145, 38 L. Ed. 936.

38. Duplicity and uncertainty.—Andersen *v.* United States, 170 U. S. 481, 500, 42 L. Ed. 1116.

"Granting that death could not occur from shooting and drowning at the same identical instant, yet the charge that it ensued from both involved no repugnancy in the pleading. For the indictment charged the transaction as continuous, and that two lethal means were employed cooperatively by the accused to accomplish his murderous intent, and whether the vital spark fled before the riddled body struck the water, or lingered until extinguished by the waves, was immaterial." Andersen *v.* United States, 170 U. S. 481, 500, 42 L. Ed. 1116.

"The government was not required to make the charge in the alternative in separate counts. The mate was shot and his body immediately thrown overboard, and there was no doubt that, if not then dead, the sea completed what the pistol had begun." Andersen *v.* United States, 170 U. S. 481, 500, 42 L. Ed. 1116.

39. Finding of less offense than charged.—"By § 1035 of the Revised Statutes of the United States it is enacted that 'in all criminal causes the defendant may be found guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charged: Provided, that each attempt be itself a separate offense.' Under this statute the defendant charged in the indictment with the crime of murder may be found guilty of the lower grade of crime, viz, manslaughter. There must, of course, be some evidence which tends to bear upon that issue." Stevenson *v.* United States, 162 U. S. 313, 315, 40 L. Ed. 980.

40. Election.—Pointer *v.* United States, 151 U. S. 396, 38 L. Ed. 208; Pierce *v.* United States, 160 U. S. 355, 356, 40 L. Ed. 454.

Where two murders were committed under such circumstances, that there is a close connection between the two killings, in respect of time, place, and occasion, and it is difficult, if not impossible, to separate the proof of one charge from the proof of the other, the accused is not confounded in his defense by the union of the two offenses of murder in the same indictment, and his substantial rights are not prejudiced by the refusal of the court to compel the prosecutor to elect upon which of the two charges he would proceed; but if in the progress of the trial it appears that the accused might be embarrassed or confounded in his defense, by reason of being compelled to meet both charges of murder at the same time, and before the same jury, it is in the power of the court, at any time before the trial is concluded, to require the government to elect upon which charge it will seek a verdict. Pointer *v.* United States, 151 U. S. 396, 404, 38 L. Ed. 208.

41. Failure to indicate degree of murder.—Davis *v.* Utah, 151 U. S. 262, 266, 38 L. Ed. 153.

"Of course, if an indictment is so framed as to clearly show that the crime charged is not of the class designated as murder in the first degree, the jury could not find a verdict of guilty of murder in that degree. But, as already suggested, the pleader need not indicate the degree, but may restrict the averments to such facts, as, in law, show a murder, that is to say, an unlawful killing with malice aforethought, leaving the ascertainment of the degree to the jury, or, in case of confession, to the court. As the acts which, under the Utah statute, constitute murder, whether of the highest or lowest degree, constituted murder at common law, it is clear that an indictment good at common law as an indictment for murder, in whatever circumstances of atrocity the crime may have been committed, is suffi-

8. Allegation of Joint Assault.—It is not necessary for an indictment, which alleges a joint assault, to show which one or more of the defendants committed the assault, as the proof of the guilt of one would authorize his conviction and the acquittal of the others.[42]

9. Alleging Deliberate and Premeditated Malice.—An indictment alleging that the defendants did, with deliberate and premeditated malice, inflict a mortal wound, of which he instantly died, and that they killed and murdered him in the manner and form aforesaid, sufficiently avers deliberate and premeditated malice under the Oregon statute which requires a statement of the acts constituting the offense, in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended.[43]

10. Alleging Death by Poisoning.—When it is charged in the indictment that the accused administered strychnine and other poisons with the unlawful and felonious intent to take the life of the deceased, and that, so administered, they did have the effect of causing death, the charge is sufficient. It matters not whether he knew the exact character of the strychnine or other poisons.[44]

cient for any degree of the crime of murder under a statute relating to murder as defined at common law, and establishing degrees of that crime in order that the punishment may be adapted to the special circumstances of each case." Davis *v.* Utah, 151 U. S. 262, 267, 38 L. Ed. 153.

"We are of opinion that the indictment in this case sufficiently charged the crime of murder. The acts constituting the crime are set forth with such clearness and distinctness that both the defendant and the court understood the character of the offense charged, and the court was enabled to pronounce judgment according to the right of the case. The defendant was charged with having willfully, feloniously, and of his deliberately premeditated malice aforethought, assaulted the deceased with a revolver, with which he beat, bruised, and wounded her upon the head, inflicting a mortal wound, from which death instantly resulted, whereby, in the manner stated, the defendant killed and murdered the person so assaulted. The indictment alleges an unlawful killing with malice aforethought and thereby a murder. It was not necessary to allege, in express words, an intent to kill, because murder, as defined by the statute, may be committed if the killing be unlawful, and if no considerable provocation appears, or the circumstances attending the killing show an abandoned or malignant heart. Under the charge made in this case it was competent to show by evidence, under § 4454 of the Complied Laws of Utah, that the killing was with willful, deliberate malice, and was premeditated, and it was, perhaps, competent to show that the killing, in the mode charged, was by an act greatly dangerous to the life of the decedent, and 'evidencing a depraved mind, regardless of human life.' In either case, a verdict of murder in the first degree would have been proper. If the evidence showed a case of homicide, that under the statute was not murder in the first degree, but was nevertheless committed under such circumstances as would have constituted murder at common law, then the verdict should have been that the defendant was guilty of murder in the second degree. But as the evidence was not preserved in a bill of exceptions, we cannot say that the verdict of guilty of murder in the first degree was unauthorized by the facts adduced at the trial. It certainly was within the scope of the indictment." Davis *v.* Utah, 151 U. S. 262, 269, 38 L. Ed. 153.

42. Allegation of joint assault.—St. Clair *v.* United States, 154 U. S. 134, 145, 38 L. Ed. 936.

"Without merit is the objection that the indictment does not show which one or more of the defendants committed the alleged assault. The indictment charged that the defendants St. Clair, Sparf, and Hansen, acting jointly, killed and murdered Fitzgerald. The offense was one which in its nature might be committed by one or more of the defendants. Proof of the guilt of either one would have authorized his conviction and the acquittal of the others. Archbold's Cr. Pr. & Pl. 176; 2 State Trials, 526; Young *v.* McKay, 8 T. R. 98, 105." St. Clair *v.* United States, 154 U. S. 134, 145, 38 L. Ed. 936.

43. Alleging deliberate and premeditated malice.—Fitzpatrick *v.* United States, 178 U. S. 304, 308, 44 L. Ed. 1078.

44. Alleging death by poisoning.—Westmoreland *v.* United States, 155 U. S. 545, 549, 39 L. Ed. 255.

"At the common law, though it was necessary to allege the kind of poison administered, nevertheless proof of the use of a different kind of poison was regarded as an immaterial variance. 'If A. be indicted for poisoning of B., it must allege the kind of poison, but if he poisoned B. with another kind of poisoning, yet it maintains the indictment, for the kind of death is the same.' 2 Hale P. C. 185; 2 Bishop Crim. Pro., §§ 514 and 555." Westmoreland *v.* United States, 155 U. S. 545, 549, 39 L. Ed. 255.

"The indictment need not specify in de-

C. Defenses—1. INSANITY.—For a discussion of insanity as a defense, see the titles CRIMINAL LAW, vol. 5, p. 43; INSANITY.

2. INFANCY.—The discussion of infancy as a defense is treated under the titles CRIMINAL LAW, vol. 5, p. 43; INFANTS.

3. DRUNKENNESS.—In general, drunkenness is no defense to homicide.[45]

4. LACK OF INTENTION AND MALICE.—"It would be a very singular principle to establish, that, where a man was charged with a homicide, caused by maliciously shooting into a crowd with the purpose of killing some person against whom he bore malice, but with no intent to injure or kill the individual who was actually struck by the shot, he should be held excused because he did not intend to kill that particular person, and had no malice against him."[46]

D. Evidence—1. PRESUMPTIONS.—As to presumptions arising from conduct of accused, such as escape or attempting to escape, and hiding evidences of the crime, see the title CRIMINAL LAW, vol. 5, p. 43.

2. ADMISSIBILITY—a. *In General.*—The general discussion of the subject of evidence is treated under the title EVIDENCE, vol. 5, p. 1004.

b. *To Prove Guilt of Accused.*—Where there is no doubt that a homicide has been committed, it is the province of the jury to determine whether the defendant is a guilty party, and any fact which had a bearing upon this question, immediate or remote, and occurring at any time before the incident was closed, is proper for the consideration of the jury. But statements made by other defendants in his absence implicating him with the murder would not be competent.[47]

c. *To Prove Self-Defense.*—Upon the question whether the killing of the deceased by the defendant was in self-defense, any evidence, which, according to the common experience of mankind, tended to show that the defendant had reasonable cause to apprehend great bodily harm from the conduct of the deceased towards him just before the killing, is admissible.[48]

d. *Character*—(1) *Of Deceased.*—Evidence that the deceased was a larger and more powerful man than the defendant, as well as evidence that the deceased had the general reputation of being a quarrelsome and dangerous person, is competent, especially if his character in this respect was known to the defendant.[49]

tail the mode in which its operation was had. It is enough to charge that poison was administered, and that such poison, so administered, caused the death." Westmoreland *v.* United States, 155 U. S. 545, 549, 39 L. Ed. 255.

"So, also, it is unnecessary to aver that the poison was taken into the stomach of the deceased. The crime would be complete if the poison was by hypodermic injection, or otherwise, introduced into the body of the deceased, and affecting the heart, or other organ, caused the death." Westmoreland *v.* United States, 155 U. S. 545, 549, 39 L. Ed. 255.

45. Drunkenness.—See the title DRUNKENNESS, vol. 5, p. 496.

Where the court has charged that there must be a willful and intentional killing in order to warrant a conviction of murder, it is not erroneous to add that the recent use of whiskey would not be a defense in this case. Hotema *v.* United States, 186 U. S. 413, 418, 46 L. Ed. 1225.

46. Lack of intention and malice.—In re Coy, 127 U. S. 731, 753, 32 L. Ed. 274.

47. To prove guilt of accused.—Fitzpatrick *v.* United States, 178 U. S. 304, 313, 44 L. Ed. 1078.

Where the defense put a calender in evidence, to show at what time the moon arose on the night of the killing, and for the purpose of showing that it was not light enough to indentify the accused, the prosecution may put in evidence with respect to the effect of light from the flash of a revolver to show whether such light would be sufficient to enable a person firing the revolver to be identified. Fitzpatrick *v.* United States, 178 U. S. 304, 316, 44 L. Ed. 1078.

Where the evidence against one accused of murder is purely circumstantial, it is clearly proper for the government to endeavor to establish, as a circumstance in the case, the fact that another person who was present in the vicinity at the time of the killing, could not have committed the crime. Bram *v.* United States, 168 U. S. 532, 568, 42 L. Ed. 568.

48. To prove self-defense.—Smith *v.* United States, 161 U. S. 85, 88, 40 L. Ed. 626, citing Wiggins *v.* People, 93 U. S. 465, 23 L. Ed. 941; Allison *v.* United States, 160 U. S. 203, 215, 40 L. Ed. 395.

49. Character of deceased.—Smith *v.* United States, 161 U. S. 85, 88, 40 L. Ed. 626, citing Wiggins *v.* People, 93 U. S.

(2) *Of Third Person.*—On a trial for murder of a mate committed upon the high seas, proof of the character of the captain of the vessel and his treatment of the accused prior to the killing, was not admissible, where there was nothing to indicate that the captain's conduct was so connected with the killing of the mate as to form part of the res gestæ, or that it could have any legitimate tendency to justify, excuse or mitigate the crime.[50]

(3) *Of Accused.*—See the title CRIMINAL LAW, vol. 5, p. 125.

e. *Prior Provocation.*—In a trial for murder, if the defendant's testimony fails to establish any grounds of self-defense, it is proper for the court to exclude any evidence of prior provocation, or even of injuries previously inflicted by the deceased upon the accused.[51]

f. *Fruits of Crime.*—"Proof that defendant had in his possession, soon after, articles apparently taken from the deceased at the time of his death, is always admissible, and the fact, with its legitimate inference, is to be considered by the jury along with the other facts in the case in arriving at their verdict."[52]

g. *Facts Too Remote.*—Evidence of facts too remote from the time of the homicide is inadmissible.[53]

h. *Bloodstains.*—"The existence of bloodstains at or near a place where violence has been inflicted is always relevant and admissible in evidence."[54]

i. *Picture of Deceased.*—The picture of the deceased is admissible on the question of identity.[55]

j. *Proof of Other Crimes.*—See the title EVIDENCE, vol. 5, p. 1004.

k. *Threats*—(1) *Uncommunicated Threats.*—In a trial for homicide, where the question, whether the prisoner or the deceased commenced the encounter which resulted in death, is in any manner of doubt, it is competent to prove threats of violence against the prisoner made by the deceased, though not brought to the knowledge of the prisoner.[56]

465, 23 L. Ed. 941; Allison *v.* United States, 160 U. S. 203, 215, 40 L. Ed. 395.

50. Of third person.—Andersen *v.* United States, 170 U. S. 481, 503, 42 L. Ed. 1116.

On a trial for the murder of the mate, evidence of the character of the captain for ferocity, brutality and vindictiveness, is inadmissible, where there is no adequate basis for the contention that the accused killed the mate in self-defense. Andersen *v.* United States, 170 U. S. 481, 509, 42 L. Ed. 1116.

51. Prior provocation.—Andersen *v.* United States, 170 U. S. 481, 509, 42 L. Ed. 1116.

52. Fruits of crime.—Wilson *v.* United States, 162 U. S. 613, 620, 40 L. Ed. 1090.

"Possession of the fruits of crime, recently after its commission, justifies the inference that the possession is guilty possession, and, though only prima facie evidence of guilt, may be of controlling weight unless explained by the circumstances or accounted for in some way consistent with innocence." Wilson *v.* United States, 162 U. S. 613, 619, 40 L. Ed. 1090.

53. Facts too remote.—Testimony that the accused had, a month previous to the homicide, threatened violence against another member of the same party, and that he was disagreeable and used vulgar language toward the other members of the party, is inadmissible, because such incidents are too remote from the time of the homicide, nor do they tend to show that he had any feeling of enmity toward the deceased. Bird *v.* United States, 180 U. S. 356, 360, 45 L. Ed. 570.

Testimony that the accused tried to pick a fight with another person of the same party six months after the homicide, is inadmissible because too remote and it does not show that he had any feeling of enmity toward the deceased. Bird *v.* United States, 180 U. S. 356, 360, 45 L. Ed. 570.

54. Bloodstains.—Wilson *v.* United States, 162 U. S. 613, 620, 40 L. Ed. 1090.

"The jury might regard bloodstains not satisfactorily explained as a circumstance in determining whether or not a murder had been committed." Wilson *v.* United States, 162 U. S. 613, 620, 40 L. Ed. 1090.

55. Picture of deceased.—Wilson *v.* United States, 162 U. S. 613, 621, 40 L. Ed. 1090.

56. Wiggins *v.* People, 93 U. S. 465, 23 L. Ed. 941.

"Although there is some conflict of authority as to the admission of threats of the deceased against the prisoner in a case of homicide, where the threats had not been communicated to him, there is a modification of the doctrine in more recent times, established by the decisions of courts of high authority, which is very well stated by Wharton, in his work on Criminal Law, § 1027: 'Where the question is as to what was deceased's attitude at the time of the fatal encounter, recent threats may become relevant to show that

(2) *Communicated Threats.*—In a murder case recent threats made by the deceased and communicated to the defendant are admissible in evidence upon the question whether defendant had reasonable cause to apprehend an attack, fatal to life or fraught with great bodily injury, and hence was justified in acting on a hostile demonstration and one of much less pronounced character than if such threats had not preceded it.[57] They are relevant because indicating cause for apprehension of danger and reason for promptness to repel attack, but they cannot be admitted if offered by the prosecution as tending to show spite, ill-will, or grudge on the part of the person threatened; nor can they, being admitted on defendant's behalf, if coupled with an actual or apparent hostile demonstration, be turned against him in the absence of evidence justifying such a construction.[58]

this attitude was one hostile to the defendant, even though such threats were not communicated to defendant. The evidence is not relevant to show the quo animo of the defendant, but it may be relevant to show that, at the time of the meeting, the deceased was seeking defendants's life.'" Wiggins *v.* People, 93 U. S. 465, 466, 23 L. Ed. 941.

57. Communicated threats.—Allison *v.* United States, 160 U. S. 203, 215, 40 L. Ed. 395.

If it appears that the accused believed and had reasonable ground for the belief that he was in imminent danger of death or great bodily harm from the person whom he shot at the moment that he fired, and would not have fired but for such belief, and if that belief, founded on reasonable ground, might in any view the jury could properly take of the circumstances surrounding the killing, have excused his act or reduced the crime from murder to manslaughter, then evidence of threats of the deceased before the killing is relevant and the exclusion of it is error. Wallace *v.* United States, 162 U. S. 466, 471, 40 L. Ed. 1039.

In Wallace *v.* United States, 162 U. S. 466, 40 L. Ed. 1039, defendant offered to prove by Mrs. Alice Sargent that somewhere near the middle of February, 1895, she had a conversation with Zane, on which occasion "Alex. Zane said to this woman and threatened that he would kill Jerry Wallace, and that he had a knife that he was carrying at that time for that purpose, and that these threats were communicated to Jerry Wallace by this witness afterwards." This was objected to, the objection sustained and defendant excepted. A similar offer of proof by one Taylor was made and a similar exception taken. Defendant also offered to prove by Samuel Collins "that at a time shortly before the 7th of March last he met Alexander Zane and had a conversation with Alexander Zane about Jerry Wallace, and that in that conversation he threatened to kill Jerry Wallace, and that he said to this witness that he at one time made him look down the muzzle of a double-barrelled shotgun and he wished he had killed him at that time, and that these threats were communicated to the defendant." An offer to prove similar threats prior to the homicide by Mary Crow was made, excluded and exception taken. When the defendant was on the stand he testified that he took the gun into the field because he was afraid of the party, and especially of Alexander Zane, and did not feel safe without some protection. The following questions were put and ruling made: "Q. You may state, Mr. Wallace, what Zane did at that time, just before you fired the shot. A. He just took his hand something like this (indicating) saying, 'Damm you, I will kill you.' Q. You may state to the jury from that demonstration what you belived Zane was about to do." To this question plaintiff objected, the objection was sustained and defendant excepted. The supreme court held that: "If Jerry Wallace believed and had reasonable ground for the belief that he was in imminent danger of death or great bodily harm from Zane at the moment he fired, and would not have fired but for such belief, and if that belief, founded on reasonable ground, might in any view the jury could properly take of the circumstances surrounding the killing, have excused his act or reduced the crime from murder to manslaughter, then the evidence in respect of Zane's threats was relevant and it was error to exclude it; and it was also error to refuse to allow the question to be put to Wallace as to his belief based on the demonstration on Zane's part to which he testified."

And the mere fact that the accused, when he saw the deceased trespassing on his property, procured a gun and returned with it, is not in itself sufficient ground for the exclusion of such evidence. Wallace *v.* United States, 162 U. S. 466, 40 L. Ed. 1039.

58. Allison *v.* United States, 160 U. S. 203, 215, 40 L. Ed. 395.

"We think that the language of the court in the particulars named is open to the criticism made in reference to like instructions under consideration in Thompson *v.* United States, 155 U. S. 271, 281, 39 L. Ed. 146, where we remarked: 'While it is no doubt true that previous threats will not, in all circumstances,

l. *Dying Declarations.*—The admissibility of dying declarations is treated in the title DYING DECLARATIONS, vol. 5, p. 686.

m. *Confessions.*—This part of the subject is treated under the title CONFESSIONS, vol. 3, p. 1009.

E. Witnesses—1. IN GENERAL.—For a general discussion of this subject, see the title WITNESSES.

2. DEFENDANT'S RIGHT TO HAVE LIST OF WITNESSES.—See the title CRIMINAL LAW, vol. 5, p. 110.

3. EXAMINATION OF.—A witness may be cross-examined upon facts relevant to the issue,[59] or which effect his character or credibility as a witness.[60]

F. Questions of Law and Fact—1. TO DETERMINE NATURE OF CRIME.—Though the evidence might appear to the court to be simply overwhelming to show that the killing was in fact murder, and not manslaughter or an act performed in self-defense, yet, so long as there was some evidence relevant to the issue of manslaughter, the credibility and force of such evidence must be for the jury, and cannot be matter of law for the decision of the court.[61]

2. DEGREE OF MURDER.—Where, under the statute, it is for the jury to say whether the facts make a case of murder in the first degree or murder in the second degree, it is error for the court to say, in its charge, that the offense, by whomsoever committed, was that of murder in the first degree.[62]

3. OVERT DEMONSTRATION OF VIOLENCE.—"What is or is not an overt demonstration of violence varies with the circumstances. Under some circumstances a slight movement may justify instant action because of reasonable apprehension of danger; under other circumstances this would not be so. And it is for the jury, and not for the judge, passing upon the weight and effect of the evidence, to determine how this may be."[63]

G. Instructions—1. IN GENERAL.—This subject is treated, generally, under the title INSTRUCTIONS.

2. AS TO THE PHILOSOPHY OF THE MENTAL OPERATIONS.—"To direct the at-

justify or, perhaps, even extenuate the act of the party threatened in killing the person who uttered the threats, yet it by no means follows that such threats, signifying ill-will and hostility on the part of the deceased, can be used by the jury as indicating a similar state of feeling on the part of the defendant. Such an instruction was not only misleading in itself, but it was erroneous in the present case, for the further reason that it omitted all reference to the conduct of the deceased at the time of the killing, which went to show an intention then and there to carry out the previous threats.'" Allison *v.* United States, 160 U. S. 203, 216, 40 L. Ed. 395.

59. Examination of.—On a trial for homicide a woman may be cross-examined as to the defendant's drunken sleep on the occasion, and as to the conversation between defendant and her husband after he awoke. Tla-Koo-Yel-Lee *v.* United States, 167 U. S. 274, 42 L. Ed. 166.

60. Where, on a trial for homicide, a woman testifies against her husband, she may be asked if she is living with another person, as her answers bear upon her character and credibility as a witness. Tla-Koo-Yel-Lee *v.* United States, 167 U. S. 274, 42 L. Ed. 166. See, generally, the title WITNESSES.

61. To determine nature of crime.—Stevenson *v.* United States, 162 U. S. 313, 315, 40 L. Ed. 980.

"The ruling of the learned judge was to the effect that, in this case, the killing was either murder, or else it was done in the course of self-defense, and that under no view which could possibly be taken of the evidence would the jury be at liberty to find the defendant guilty of manslaughter. The court passed upon the strength, credibility and tendency of the evidence, and decided, as a matter of law, what it seems to us would generally be regarded as a question of fact, viz, whether under all the circumstances which the jury might, from the evidence, find existed in the case, the defendant was guilty of murder, or whether he killed the deceased not in self-defense, but unlawfully and unjustly, although without malice. The presence or absence of malice would be the material consideration in the case, provided the jury should reject the theory of self-defense, and yet this question of fact is, under the evidence in the case, determined by the trial court as one of law and against the defendant." Stevenson *v.* United States, 162 U. S. 313, 315, 40 L. Ed. 980.

62. Degree of murder.—Hopt *v.* People, 110 U. S. 574, 28 L. Ed. 262.

63. Overt demonstration of violence.—

tention of the jury to the contemplation of the philosophy of the mental operations, upon which justification or excuse or mitigation in the taking of human life may be predicated, is to hazard the substitution of abstract conceptions for the actual facts of the particular case as they appeared to the defendant at the time."[64]

3. Self-Defense and Effect of Arming Oneself.—An instruction is erroneous in withstanding from the jury the question of self-defense,[65] and likewise in telling them that the intentional arming himself with a pistol by the

Allison *v.* United States, 160 U. S. 203, 216, 40 L. Ed. 395.

64. As to the philosophy of the mental operations.—Allen *v.* United States, 150 U. S. 551, 561, 37 L. Ed. 1179.

65. Self-defense.—Allen *v.* United States, 157 U. S. 675, 681, 39 L. Ed. 854.

In Allen *v.* United States, 157 U. S. 675, 39 L. Ed. 854, the following instruction was held erroneous: If it is true that deceased and the other boys attacked defendant with sticks, and while that attack was going on and in the heat of that affray, and the sticks were not of a dangerous or deadly character, and under such circumstances the defendant shot and killed the deceased, that would be manslaughter; but if there was an absence of that condition, then there is no manslaughter in it, nor could there be any self-defense in it. The court said: "By this instruction the jury were shut up, in effect, to find either manslaughter or murder—the claim of self-defense was excluded. Or, rather, self-defense was eliminated if the sticks were not 'deadly weapons.' In this we think there was error. In one sense it may be true that sticks or clubs are not deadly weapons. Carrying them does not import any hostile intent, nor, even in view of an expected affray, a design to take life. But when a fight is actually going on sticks and clubs may become weapons of a very deadly character. Life may be endangered or taken by blows from them as readily as by balls from a pistol. Hence we think that the jury ought not to have been told that there 'could not be any self-defense in it;' and that 'it could not be self-defense because the injury received would not be of that deadly character or that dangerous nature that would give a man the right to slay another because of threatened deadly injury or great bodily injury received.' Such a question as that was one peculiarly for the jury, and we think that they should have been left free to say whether the accused had not a right, when defending himself from an attack made by several persons using sticks, to consider himself in danger of life or limb. The verdict found, that of murder, is, we think, convincing that the jury were misled by this instruction."

A charge to the jury that "you are to distinguish * * * between a case where a man prepares simply to defend himself and keeps himself in the right in that defense, and a state of case where he prepares himself recklessly, wantonly, and without just cause to take the life of another. If he prepares himself in the latter way, and he is on the lookout for the man he has thus prepared himself to kill and he kills him upon sight, that is murder, and it would shock humanity or even the most technical and hair-spliting court to decide anything else. That can be nothing else but murder. If he is in the right—if he is in the right at the time of the killing—and simply prepared himself to defend his own life, that is preparation not to take the life of another, but preparation to defend himself. That is the distinction, a distinction that is clear and comprehensive,"—is erroneous when it ignores evidence tending to show that the defendant had not armed himself at all, but had the gun with him for the purpose of sport, and that his appearance at the place of the killing had no connection with the deceased. It invites the jury to contemplate the spectacle of the defendant looking up the deceased with deliberate preconceived intention of murdering him, unrelieved by allusion to defensive matter, which throws a different light on the transaction. Allison *v.* United States, 160 U. S. 203, 211, 40 L. Ed. 395.

Instructions are erroneous which fail to inform the jury of defendant's right to kill in self-defense where he had testified to his own belief that his life was in danger, and to the facts that led him so to believe. Bird *v.* United States, 180 U. S. 356, 362, 45 L. Ed. 570.

In Bird *v.* United States, 187 U. S. 118, 129, 47 L. Ed. 100, a court upon the question of self-defense charged as follows: "But in determining this matter, under the evidence before you, you must consider the situation of the parties at the time and all the surrounding circumstances, together with the testimony of the witnesses for the prosecution, as well as the evidence of the defendant." The contention of the plaintiff in error was that the last paragraph "qualified the whole instruction and permeated it with two errors;" because it was in effect declared that even if the testimony of the witnesses for the government were untrue it was to be considered in determining the verdict; and because all of the evidence for the defendant (plaintiff in error) except his own was withdrawn from the jury in passing on the issue of self-defense. But the supreme court held the

defendant, even if with a view to self-defense, would make a case of murder unless the actual affray developed a case of necessary self-defense.[66]

4. Obligation to Instruct upon Manslaughter.—Where there is no evidence to reduce an offense below the grade of murder, a court is under no obligation to give an instruction upon manslaughter.[67]

5. Corpus Delicti.—Where there was no witness to the homicide and the identification of the body was not perfect owing to its condition caused by fire, yet when taking all the circumstances together, there was clearly enough to warrant the jury in finding that the partially burned body was that of deceased and that he had been killed by the defendant, the trial court properly refuses to instruct the jury to bring in a verdict of not guilty for the reason that the corpus delicti had not been proved.[68]

6. Instruction to Find Verdict of Not Guilty.—Where on a trial for murder there is not sufficient evidence to support a verdict of guilty of an offense less than one charged, it is not error for the court to instruct the jury that they

instruction was not open to this criticism when considered in connection with other instructions. The rule as to the credibility of witnesses was given in other instructions, and did not have to accompany every ruling, and the jury were instructed that it was their duty "to consider the whole evidence and render a verdict in accordance with the facts proved upon the trial." The injunction was not limited by the paragraph complained of by plaintiff in error. That was preceded by the following: "In considering whether the killing in this case was justifiable or excusable on the ground of self-defense, the jury should consider all the circumstances attending the killing, the conduct of the parties at the time and shortly prior thereto, and their respective situations at the time. You should determine from the evidence in this case whether the several parties were situated at the time of the killing as described by the witness for the prosecution or described by the defendant himself."

66. Effect of arming oneself.—Allen *v.* United States, 157 U. S. 675, 39 L. Ed. 854.

An instruction that if the defendant was assaulted with sticks, and the sticks were not deadly weapons, and they were engaged in a conflict, and in that conflict the defendant shot the deceased, without previous preparation, without previous deliberation, without previous selection of a deadly weapon, without a contemplated purpose to use that weapon in a dangerous way, then that would be manslaughter, and it could not be self-defense, is objectionable, not only on the ground that it shuts out from the consideration of the jury the claim of self-defense, but because of the assumption that if the defendant in view of the previous threats that he was to be killed, had armed himself with a pistol and subsequently used it when attacked, it would have been not only not a case of self-defense, but not even of manslaughter, but of murder. Allen *v.* United States, 157 U. S. 675, 680, 39 L. Ed. 854.

"In this respect the instruction involved the same error which we considered in the case of Gourko *v.* United States, 153 U. S. 183, 38 L. Ed. 680, and where it was held that a person who has an angry altercation with another person, such as to lead him to believe that he may require the means of self-defense in case of another encounter, may be justified, in the eye of the law, in arming himself for self-defense; and if, on meeting his adversary, on a subsequent occasion, he kills him, but not in necessary self-defense his crime may be that of manslaughter or murder, as the circumstances, on the occasion of the killing, make it the one or the other; and that if, looking alone at those circumstances, his crime be that of manslaughter, it is not converted into murder by reason of his having previously armed himself. In the case of Thompson *v.* United States, 155 U. S. 271, 39 L. Ed. 146, the same view was taken by this court, and the judgment of the court below was reversed because, at the trial, the jury was instructed that 'the previous selection, preparation, and subsequent use of a deadly weapon shows that there was a purpose to kill contemplated before that affray existed, and whenever that exists, when it is done improperly and unlawfully so that there is no law of self-defense in it, the fact that they may have been in an actual affray with hands or fists would not reduce the grade of the crime to manslaughter.' This language was regarded by this court as erroneous because it involved the assumption that the act of the defendant in arming himself showed a purpose to kill, formed before the actual affray." Allen *v.* United States, 157 U. S. 675, 680, 39 L. Ed. 854.

67. Obligation to instruct upon manslaughter.—Davis *v.* United States, 165 U. S. 373, 375, 41 L. Ed. 750. See ante, "Definition and General Consideration," III, A.

68. Corpus delicti.—Perovich *v.* United States, 205 U. S. 86, 91, 51 L. Ed. 722.

could not consistently with the law arising from the evidence find the defendants guilty of manslaughter or of any offense less than the one charged; that if the defendants were not guilty of the offense charged, the duty of the jury was to return a verdict of not guilty.[69]

7. MANNER OF INSTRUCTING.—It is the duty of the judge to be impartial and calm in his instructions to the jury.[70]

VI. Sentence and Punishment.

"As the crime of murder involves sufficient capacity to distinguish between right and wrong, the legal interpretation of every verdict of guilty as charged is that the jury believed from all the evidence beyond a reasonable doubt that the accused was guilty, and was therefore responsible, criminally, for his acts."[71]

HOPPER BARGE.—See note 1.

HORSE RACING.—See the titles ACCIDENT INSURANCE, vol. 1, p. 60; CONSTITUTIONAL LAW, vol. 4, p. 379.

69. **Instruction to find verdict of not guilty.**—Sparf *v.* United States, 156 U. S. 51, 106, 39 L. Ed. 343.

The jury will not be justified in finding a verdict of manslaughter if there is no evidence upon which to base such a finding, and in that event the court will have the right to instruct the jury to that effect. Anderson *v.* United States, 170 U. S. 481, 511, 42 L. Ed. 1116; Sparf *v.* United States, 156 U. S. 51, 39 L. Ed. 343; Stevenson *v.* United States, 162 U. S. 313, 315, 40 L. Ed. 980.

70. **Manner of instructing.**—Hickory *v.* United States, 160 U. S. 408, 40 L. Ed. 474.

An instruction which is tantamount to saying to the jury that flight created a legal presumption of guilt, so strong and so conclusive, that it is the duty of the jury to act on it as an axiomatic truth, is incorrect; it should be impartial and calm. Hickory *v.* United States, 160 U. S. 408, 422, 40 L. Ed. 474.

On a homicide charge, the court instructed the jury: "Bearing in mind that he stands before you as an interested witness, while these circumstances are of a character that they cannot be bribed, that cannot be dragged into perjury, they cannot be seduced by bribery into perjury, but they stand as bloody, naked facts before you, speaking for Joseph Wilson and justice, in opposition to and confronting this defendant, who stands before you as an interested party, the party who has in this case the largest interest a man can have in any case upon earth." Held, such instruction crosses the line which separates the impartial exercise of the judicial function from the region of partisanship where reason is disturbed, passions excited, and prejudices are necessarily called into play. Hickory *v.* United States, 160 U. S. 408, 424, 40 L. Ed. 474, citing Allison *v.* United States, 160 U. S. 203, 40 L. Ed. 395; Starr *v.* United States, 153 U. S. 614, 38 L. Ed. 841; Reynolds *v.* United States, 98 U. S. 145, 25 L. Ed. 244.

71. Davis *v.* United States, 160 U. S. 469, 488, 40 L. Ed. 499. See the title SENTENCE AND PUNISHMENT.

1. **Hopper barge.**—As to whether or not a **hopper barge** is a ship in the meaning of the salvage laws, see Cope *v.* Vallette Dry Dock Co., 119 U. S. 625, 629, 30 L. Ed. 501. See, also, the title SHIPS AND SHIPPING.

HOSPITALS AND ASYLUMS.

CROSS REFERENCES.

As to right of secretary of commissioners of naval hospitals to commissions on disbursements, see the title ARMY AND NAVY, vol. 2, pp. 532, 533. As to soldiers' homes, see the title ARMY AND NAVY, vol. 2, p. 539. As to construction of conveyances of property for hospital purposes to charitable uses, see the title CHARITIES, vol. 3, p. 678. As to certainty of a devise of property for a site for the erection of a hospital, see the title CHARITIES, vol. 3, p. 684. As to right of congress to make appropriation for hospitals upon grounds owned by Roman Catholic Church, see the title CONSTITUTIONAL LAW, vol. 4, p. 464. As to right of a lessee to use property for hospital purposes, see the title LANDLORD AND TENANT.

Navy Hospital Commissioners and Their Authority.—The act of 1811, constituting the fund for navy hospitals, makes the secretaries of the navy, treasury and war departments, a board of commissioners, by the name and style of commissioners of navy hospitals, and gives some general directions in what way the fund is to be employed; but the mode and manner of transacting their business is not in any way prescribed.[1]

HOTCHPOT.—See the title ADVANCEMENTS, vol. 1, p. 198.

HOTEL.—See the title INNS AND INNKEEPERS.

HOUSE.—See BUILDING, vol. 3, p. 542.

HOUSEHOLD.—Persons who dwell together as a family constitute a "household."[2]

HOUSE OF REPRESENTATIVES.—See the title CONSTITUTIONAL LAW, vol. 4, p. 1.

HUNTING GROUNDS.—See note 3.

1. **Naval hospital commissioners and their authority.**—United States *v.* Fillebrown, 7 Pet. 28, 29, 8 L. Ed. 596.

Necessity that proceedings of commissioners be in writing.—There is no general principle of law, known to the court, and no authority has been shown, establishing the doctrine, that all the proceedings of the commissioners of navy hospitals must be in writing, or that they shall be deemed void, unless the statute under which they act shall require their proceedings to be reduced to writing; it is certainly fit and proper that every important transaction of the board should be committed to writing, but the law imposes no such indispensable duty. United States *v.* Fillebrown, 7 Pet. 28, 29, 8 L. Ed. 596.

2. Arthur *v.* Morgan, 112 U. S. 495, 499, 28 L. Ed. 825. See EFFECTS, vol. 5, p. 693. See, also, the title REVENUE LAWS.

3. **Hunting grounds.**—See Worcester *v.* Georgia, 6 Pet. 515, 553, 8 L. Ed. 483. See the title INDIANS.

HUSBAND AND WIFE.

BY J. N. CLAYBROOK.

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See the titles ACKNOWLEDGMENTS, vol. 1, p. 76; BIGAMY AND POLYGAMY, vol. 3, p. 225; DIVORCE AND ALIMONY, vol. 5, p. 412; DOMICILE, vol. 5, p. 473; DOWER, vol. 5, p. 487; ESTOPPEL, vol. 5, p. 913; FRAUDULENT AND VOLUNTARY CONVEYANCES, ante, p. 472; INFANTS; MARRIAGE; MARRIAGE CONTRACTS AND SETTLEMENTS; SEPARATE ESTATE OF MARRIED WOMEN; TRUSTS AND TRUSTEES; UNDUE INFLUENCE; WILLS; WITNESSES.

As to pleading coverture of defendant in abatement, as defense to action, see the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 31. As to service of citation in action against women marrying before issuance of writ of error, see the title APPEAL AND ERROR, vol. 2, p. 169. As to liability of married women on national bank stock, see the title BANKS AND BANKING, vol. 3, pp. 137, 138. As to extent of adoption of common law in relation to husband and wife, by states and territories, see the title COMMON LAW, vol. 3, pp. 965, 972. As to marriage as consideration, see the title CONTRACTS, vol. 4, p. 552. As to state laws and

decisions as controlling federal courts on questions relating to separate estate, see the title COURTS, vol. 4, p. 1115. As to impairment of earning capacity as element of damages in action by wife for personal injury, see the title DAMAGES, vol. 5, p. 186. As to domicile of married women, see the title DOMICILE, vol. 5, p. 473. As to joinder of wife in deed of husband as barring dower, see the title DOWER, vol. 5, p. 487. As to estoppel of married women, see the title ESTOPPEL, vol. 5, p. 913. As to right of husband to administer in wife's estate, see the title EXECUTORS AND ADMINISTRATORS, ante, p. 119. As to rights of persons intermarrying with Indians, see the title INDIANS. As to coverture as suspending statute of limitations, see the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION. As to marriage contracts or settlements, see the title MARRIAGE CONTRACTS AND SETTLEMENTS. As to judgment in action by husband and wife as barring action by husband, for same course of action, see the title RES ADJUDICATA. As to separation of property in Louisiana, see the title SEPARATE ESTATE OF MARRIED WOMEN. As to purchase by husband and conveyance to wife as constituting resulting trust, see the title TRUSTS AND TRUSTEES. As to husband or wife as witnesses for or against each other, see the title WITNESSES.

I. Powers and Disabilities.

A. Powers and Disabilities of Wife—1. CONTRACTUAL CAPACITY—a. *General Rules.*—At the common law, a married women cannot as a general rule bind herself by contract,[1] and her disability in this respect cannot be overcome by any form of acknowledgment or mode of execution, or by her uniting with her husband in the contract.[2] A contract entered into by both husband and wife is the obligation of the husband alone.[3] The doctrine of the common law has, however, been greatly modified in most of the states by legislation, and the extent to which a married woman may contract, and the manner in which her contracts shall be authenticated and enforced, are definitely prescribed.[4]

b. *Particular Contracts*—(1) *Contracts to Convey.*—At the common law, a bond for the conveyance of land when signed by a married woman, neither confers a legal nor equitable right upon the obligee.[5]

(2) *Covenants of Title.*—See the title COVENANTS, vol. 5, p. 17.

(3) *Contracts of Purchase.*—The disabilities imposed upon married women are intended for their protection, and the law will not allow them to be used

1. **Capacity to contract.**—Bank *v.* Partee, 99 U. S. 325, 330, 25 L. Ed. 390; Shanks *v.* Dupont, 3 Pet. 242, 248, 7 L. Ed. 666; Pierce *v.* Turner, 5 Cranch 154, 170, 3 L. Ed. 64; Ankeney *v.* Hannon, 147 U. S. 118, 123, 37 L. Ed. 105; Elliott *v.* Peirsol, 1 Pet. 328, 338, 7 L. Ed. 164; Clark *v.* Beecher, 154 U. S., appx., 631, 24 L. Ed. 705.

"By the principles of the common law, a married women can, in general, do no act to bind her; she is said to be sub potestate viri, and subject to this will and control. Her acts are not like those of infants, and some other disabled persons, voidable only; but are, in general, absolutely void ab initio." Elliott *v.* Peirsol, 1 Pet. 328, 338, 7 L. Ed. 164.

2. **Mode of executing contract as overcoming disability.**—Bank *v.* Partee, 99 U. S. 325, 330, 25 L. Ed. 390.

3. **Contract by husband and wife.**—Ankeney *v.* Hannon, 147 U. S. 118, 123, 37 L. Ed. 105.

4. **Modification of common-law rule by statute.**—Bank *v.* Partee, 99 U. S. 325, 25 L. Ed. 390; Marchand *v.* Griffon, 140 U. S. 516, 35 L. Ed. 527. See post, "Conveyances of Real Estate," I, A, 1, b, (5).

In Mississippi, unless a married woman has a separate estate there situate, she is, as to her contracts, subject to the disability of coverture, and a creditor suing her there must aver in his bill or declaration that she has such an estate, and that his debt is a charge upon it, or ought to be paid out of it. Bank *v.* Partee, 99 U. S. 325, 326, 25 L. Ed. 390.

The statute does not oblige a married woman to pay for property purchased on credit, the rule being that such an obligation cannot be enforced. Bank *v.* Banks, 101 U. S. 240, 246, 25 L. Ed. 850.

In Louisiana, a married woman cannot bind herself for her husband's debts. Marchand *v.* Griffon, 140 U. S. 516, 35 L. Ed. 527.

As to wife's powers as to separate estate, in general, see the title SEPARATE ESTATE OF MARRIED WOMEN.

5. **Contracts to convey.**—Agricultural Bank *v.* Rice, 4 How. 225, 11 L. Ed. 949. See the title VENDOR AND PURCHASER.

as the means of committing fraud.[6] Hence, it is well settled that a married woman may take land by purchase,[7] and that, in such case, the equitable rule that purchase money is to be treated as a lien on the land sold where the purchaser has taken no separate security, applies with as much force as to any other case.[8]

(4) *Promissory Notes.*—At common law, a married woman is disabled from executing any promissory notes, either alone or in conjunction with her husband, and a note signed by both is binding on the husband alone.[9]

(5) *Conveyance of Real Estate*—(a) *At Common Law.*—By the common law, a married woman could not convey an estate of freehold owned by her unless by levying a fine or suffering a common recovery.[10]

(b) *Under Statutes.*—The common-law rule as to conveyances by married women was changed in England by the statute of 3 & 4 Will. IV, c, 74, which abolished fines and recoveries, and provided other means for transferring the estates of femes covert.[11] And in most, if not all, of the states of the Union, statutes have been passed providing for the manner in which a married woman may dispose of her real estate.[12] The method usually provided is by deed of both husband and wife,[13] which must, as a general rule, be acknowledged by

6. Disability not to be used as means of defrauding seller.—Chilton *v.* Braiden, 2 Black 458, 17 L. Ed. 304; Bedford *v.* Burton, 106 U. S. 338, 339, 27 L. Ed. 112.

7. Purchase of land by married woman.—Bedford *v.* Burton, 106 U. S. 338, 339, 27 L. Ed. 112; Chilton *v.* Braiden, 2 Black 458, 17 L. Ed. 304.

Where a married woman buys land giving notes secured by vendor's lien for purchase price, she is liable therein, and is not to be allowed for improvements. The lien may be enforced for amount due, and she is not entitled to set aside contract and recover amount paid on notes. Bedford *v.* Burton, 106 U. S. 338, 27 L. Ed. 112.

8. Vendor's implied lien against married women.—Chilton *v.* Braiden, 2 Black 458, 17 L. Ed. 304; Bedford *v.* Burton, 106 U. S. 338, 27 L. Ed. 112. See the title VENDORS' LIENS.

9. Promissory notes.—Ankeney *v.* Hannon, 147 U. S. 118, 123, 37 L. Ed. 105; Marchand *v.* Griffon, 140 U. S. 516, 527, 35 L. Ed. 527.

10. Conveyance by feme covert at common law.—Williams *v.* Paine, 169 U. S. 55, 64, 42 L. Ed. 658; Bank *v.* Banks, 101 U. S. 240, 243, 25 L. Ed. 850.

11. Abolition of common-law rule in England.—Williams *v.* Paine, 169 U. S. 55, 64, 42 L. Ed. 658.

Great changes in the rules of the common law in that regard were made, even before the colonies separated from the parent country. Deeds of indenture in transferring the real property of the wife, with the consent of the husband, were substituted in the place of fine and recovery. Bank *v.* Banks, 101 U. S. 240, 243, 25 L. Ed. 850.

12. Abolition of common-law rule in United States.—Williams *v.* Paine, 169 U. S. 55, 64, 42 L. Ed. 658.

13. Method of conveying under state statutes.—Schley *v.* Pullman Car Co., 120 U. S. 575, 583, 30 L. Ed. 789; Knight *v.* Paxton, 124 U. S. 552, 31 L. Ed. 518; Sewall *v.* Haymaker, 127 U. S. 719, 729, 32 L. Ed. 299; Williams *v.* Paine, 169 U. S. 55, 63, 42 L. Ed. 658; Kaiser *v.* Strickney, 131 U. S., appx. clxxxvii, clxxxix, 23 L. Ed. 176; Elliott *v.* Peirsol, 1 Pet. 328, 329, 7 L. Ed. 164.

The conveyance of the estates of married women by deed, with separate examination and acknowledgment, has taken the place of the alienation of such estates by fine in a court of record under the law of England, though differing in some of its effects, owing to the diversity in the nature of the two modes of proceeding. Hitz *v.* Jenks, 123 U. S. 297, 300, 31 L. Ed. 156.

As to a wife's property generally, it is well settled that she may, by joining in a deed with her husband, convey any interest she has in real estate. Such a deed conveys the interest of both. Stephen *v.* Beall, 22 Wall. 337, 22 L. Ed. 786.

In Illinois.—Within the meaning of the act of 1847, and according to the tendency of the decisions of the supreme court of the state of Illinois, the wife joins with her husband in the execution of a conveyance of her estate of inheritance where her name alone appears in the granting clause, but the deed is signed by both herself and husband, is acknowledged by both, and is certified as required by law. Such conveyance, so signed, acknowledged, and certified, of the wife's land, seems to be as effectual, under the local law, to invest the grantee with the title and interest of both husband and wife as if his name had also appeared in the granting clause. Schley *v.* Pullman Car Co., 120 U. S. 575, 583, 30 L. Ed. 789.

In the District of Columbia, a married woman may convey her general property by uniting with her husband in a deed executed in the form required by §§ 450, 451 and 452 of the statutes. In this way she could charge her property with the

the wife in the mode prescribed by statute.[14] Whatever the statutory requirements may be, they must be strictly pursued.[15] If a deed purports to convey the wife's lands, the wife, and not the husband, must be the grantor.[16] The fact that a deed for the wife's land is in the form prescribed by the statute does not, of course, prevent it from being impeached for insanity or infancy of the grantor or for fraud or duress.[17]

(6) *Mortgages.*—Since, at the common law, a married woman is incapable of making a valid contract, it follows that she cannot bind her general property by mortgage.[18] But this rule has been superseded by statute in most of the

payment of a debt, although she might not be able to bind herself individually. Where the husband did unite with her in the execution of a deed and the requirements of the law as to the form of execution were in all respects complied with, it was held that the deed was binding. Kaiser *v.* Strickney, 131 U. S., appx. clxxxvii, clxxxix, 26 L. Ed. 176.

"Under the laws of Maryland, which were in force in the District of Columbia in 1859, we think it was then competent for a married woman, outside of the district, to execute, with her husband, a power of attorney to convey her lands therein, which, when acknowledged by her according to the statute relating to the acknowledgment by married women of deeds conveying their real property in the district, thereby became a valid and sufficient instrument to authorize the conveyance by attorney." Williams *v.* Paine, 169 U. S. 55, 63, 42 L. Ed. 658.

In Maryland, a married woman cannot dispose of real property, without the consent of her husband; nor can she execute a good and valid deed to pass real estate, unless he join it; the separate examination and other solemnities required by law are indispensable, and must not be omitted. A deed, therefore, executed by a married woman, of real property, acquired by her while a sole trader and while she was abandoned by her husband, is void. Rhea *v.* Rhenner, 1 Pet. 105, 7 L. Ed. 72.

In Ohio a deed for land, acknowledged by the wife, but not acknowledged by the husband in the lifetime of the wife, will not pass her estate in the lands conveyed. Sewall *v.* Haymaker, 127 U. S. 719, 730, 32 L. Ed. 299.

In Virginia the acknowledgment and the recording of conveyances by husband and wife of lands in that commonwealth, in the mode prescribed by her laws, is essential to pass the estate of the wife in such lands. Sewall *v.* Haymaker, 127 U. S. 719, 728, 32 L. Ed. 299.

14. Acknowledgment by wife.—See the title ACKNOWLEDGMENTS, vol. 1, pp. 78, 79, 83, 88.

15. Statutes to be strictly pursued.—Elliott *v.* Peirsol, 1 Pet. 328, 7 L. Ed. 164; Meegan *v.* Boyle, 19 How. 130, 15 L. Ed. 577.

In Virginia and Kentucky, the solemn modes of conveyance by fine and common recovery have never been in common use; and in those states, the capacity of a feme covert to convey her estate by deed, is the creature of statute law; and to make her deed effectual, the forms and solemnities, prescribed by the statutes, must be pursued. Elliott *v.* Peirsol, 1 Pet. 328, 338, 7 L. Ed. 164.

In Missouri, where a deed was offered in evidence, purporting to convey the titles of married women to land, and their names were in the handwriting of other persons, and there was no proof that the women had either signed or acknowledged the deed, it was properly refused by the court to be allowed to go to the jury. Meegan *v.* Boyle, 19 How. 130, 15 L. Ed. 577.

16. Wife to be grantor in deed conveying her lands.—Agricultural Bank *v.* Rice, 4 How. 225, 11 L. Ed. 949.

In order to convey by grant, the party possessing the right must be the grantor, and use apt and proper words to convey to the grantee. If, therefore, the title to land is in married women, and a deed for the land recites the names of the husbands, as grantors, purporting to convey in right of their wives, the deed is insufficient to convey the title of the wives. Nor is such a deed made effective by its being signed and sealed by the wives. The interest of the husbands is conveyed by it, but nothing more. A receipt of money, subsequently, by the female grantors, does not pass the legal title, nor give effect to a deed, which, as to them, was utterly void. Agricultural Bank *v.* Rice, 4 How. 225, 11 L. Ed. 949.

17. Impeaching deed regular on its face.—Hitz *v.* Jenks, 123 U. S. 297, 302, 31 L. Ed. 156.

The alienation of land by deed of husband and wife with her separate examination and acknowledgment is, in form as well as in fact, a conveyance by the parties, and therefore does not, even if the acknowledgment is certified by a magistrate in the form prescribed by statute, and recorded, bind a wife who, by reason of infancy or insanity, is incapable of conveying. Sims *v.* Everhardt, 102 U. S. 300, 26 L. Ed. 87; Williams *v.* Baker, 71 Penn. St. 476. In any case of fraud or duress, also, it may be impeached by bill in equity, or, in some states, in an action at law. Hitz *v.* Jenks, 123 U. S. 297, 302, 31 L. Ed. 156.

18. Power to mortgage at common law.—See ante, "General Rules," I, A, 1, a.

states.[19] In some states a married woman, though possessing general power to contract, cannot mortgage her estate to secure her husband's debts.[20] But a statute which merely exempts the wife's property from her husband's debts does not have this effect.[21] The wife's power to mortgage her separate estate is treated in another title.[22]

c. *Ratification or Disaffirmance.*—Acts of a married woman which are voidable because of her coverture, may be ratified or disaffirmed after termination of the coverture.[23] If an infant, who is also a married woman, makes an instru-

19. Power to make mortgage under statute.—Bedford *v.* Burton, 106 U. S. 338, 341, 27 L. Ed. 112; Hitz *v.* Jenks, 123 U. S. 297, 300, 31 L. Ed. 156.

In Tennessee "married women over the age of twenty-one years, owning the fee or other legal or equitable interest or estate in real estate, shall have the same powers of disposition, by will, deed, or otherwise, as are possessed by femes sole or unmarried women." Code of Tennessee, § 2486. This provision would seem to be sufficient to confer upon a married woman, purchasing land to her own use, power to execute a mortgage upon the land to secure the purchase money—binding at least upon the land, if not creating any personal obligation against her. Bedford *v.* Burton, 106 U. S. 338, 341, 27 L. Ed. 112.

In the District of Columbia, "there can be no doubt that by a deed, voluntarily executed and duly acknowledged by the husband and the wife, the entire title of both might be conveyed to secure the payment of his debt, notwithstanding that the act of 1869, as construed by this court, exempted the land, or any interest therein, from being taken on execution against him. Hitz *v.* National Metropolitan Bank, 111 U. S. 722, 28 L. Ed. 577; Mattoon *v.* McGrew, 112 U. S. 713, 28 L. Ed. 824." Hitz *v.* Jenks, 123 U. S. 297, 300, 31 L. Ed. 156.

The 25th section of the law of Louisiana incorporating the Union Bank of Louisiana declares that in all hypothecary contracts and obligations entered into by any married individual with the bank, it shall be lawful for the wife to unite with him; and in such case the property of the wife, whether dotal or of any other description, shall be affected by the contract. Where a wife united with her husband in mortgaging property to the bank, the mortgage was good under this clause. Union Bank *v.* Stafford, 12 How. 327, 13 L. Ed. 1008; New Orleans Canal, etc., Co. *v.* Stafford, 12 How. 343, 13 L. Ed. 1015.

20. Mortgage to secure husband's debts.—Bein *v.* Heath, 6 How. 228, 12 L. Ed. 416.

Where a wife mortgaged her property to raise money, and the question did not turn upon her doing so as the surety of her husband, it was not necessary for the lender to prove that the proceeds of the loan enured to her separate use. Bein *v.* Heath, 6 How. 228, 12 L. Ed. 416.

The Civil Code of Louisiana (article 2412) enacts, that "the wife, whether separated in property by contract or by judgment, or not separated, cannot bind herself for her husband, nor cojointly with him, for debts contracted by him before or during the marriage. Bein *v.* Heath, 6 How. 228, 12 L. Ed. 416; Marchand *v.* Griffon, 140 U. S. 516, 527, 35 L. Ed. 527.

Estoppel to show that mortgage was given for husband's debts.—Where a wife mortgaged her property, and then sought relief in chancery upon the ground that the contract was void in consequence of her disability to contract, and it was shown that the lender acted in good faith; proceeded cautiously under legal advice, under assurances that the loan was for the exclusive use of the wife, to whom the money was actually paid; the interest upon the loan paid for several years; the mortgaged property insured by her, and the policy assigned to the mortgagee; a bill to relieve her from the contract cannot receive the sanction of a court of equity. Bein *v.* Heath, 6 How. 228, 12 L. Ed. 416.

21. Statute exempting wife's property from husband's debts.—Barrel *v.* Tilton, 119 U. S. 637, 642, 30 L. Ed. 511.

A provision of a state constitution, "that the property and possessory rights of every married woman at the time of marriage, or afterwards acquired by gift, devise or inheritance, shall not be subject to the debts or contracts of the husband," merely preserves the property of the wife from its compulsory subjection to his debts or contracts, and was not designed to control her voluntary disposal of it, and in the absence of other restrictions, she can mortgage it to secure the payment of a debt owing by him. Barrell *v.* Tilton, 119 U. S. 637, 642, 30 L. Ed. 511.

22. Power to mortgage separate estate.—See the title SEPARATE ESTATE OF MARRIED WOMEN.

23. Ratification or disaffirmance of voidable acts.—Weatherhead *v.* Baskerville, 11 How. 329, 13 L. Ed. 717; Sims *v.* Everhardt, 102 U. S. 300, 310, 26 L. Ed. 87.

A recognition by a married woman, when freed from coverture, of a sale which she had made in conjunction with her husband, amounts to no more than a ratification of that particular sale. Weatherhead *v.* Baskerville, 11 How. 329, 13 L. Ed. 717.

ment voidable because of her infancy, the disability of coverture enables her to postpone the act of avoidance to a reasonable time after the coverture is ended.[24] If a married woman chose to rescind a contract she must, as a general rule, restore what she has received, before she will be permitted to recover.[25]

2. Powers of Attorney.—At common law, married women are incapable of appointing an agent or attorney,[26] and in some states in which the powers of married women have been enlarged by statute, the power to make powers of attorney is expressly denied.[27] But where, by statute, a married woman is capable of doing an act, or of transferring property or rights with the assent of her husband, she may appoint an agent or attorney to do the same,[28] and even if such act or conveyance be defective because unauthorized by statute at the time when made, it may be cured by a statute subsequently enacted.[29] The

24. Time of disaffirmance.—Sims *v.* Everhardt, 102 U. S. 300, 310, 26 L. Ed. 87; Weatherhead *v.* Baskerville, 11 How. 329, 13 L. Ed. 717.

Where the circuit court instructed the jury that they might consider the acts of one of the daughters and her husband, in acquiescing in a partition, and in receiving "a small tract of land," as a recognition of the true construction of the will to be, that the daughters were not entitled to an equal share, the acts of partition being accompanied by long adverse possession, say thirty or forty years, this instruction was erroneous. The daughter was a minor when she married, and continued covert until within a short time before she brought the suit. No presumption arising from her acts could therefore be made against her. Weatherhead *v.* Baskerville, 11 How. 329, 13 L. Ed. 717.

25. Restoration of benefits received upon disaffirmance.—Slaughter *v.* Glenn, 98 U. S. 242, 245, 25 L. Ed. 122.

26. Power of attorney.—Williams *v.* Paine, 169 U. S. 55, 67, 42 L. Ed. 658; Holladay *v.* Daily, 19 Wall. 606, 22 L. Ed. 187.

"In most of the states a married woman cannot, in the absence of statutory authority, execute, either alone or in connection with her husband, a valid power of attorney to convey her interest in real property." Holladay *v.* Daily, 19 Wall. 606, 609, 22 L. Ed. 187.

Even in case of a joint suit at law, an appointment of an attorney by a married women is void; and her husband may make an attorney for both. Story on Agency, § 6, quoted in Williams *v.* Paine, 169 U. S. 55, 67, 42 L. Ed. 658.

27. Power of attorney by feme covert void by statute.—**In Minnesota**, a married woman cannot make a power of attorney. Drury *v.* Foster, 2 Wall. 24, 33, 17 L. Ed. 780.

In Texas a power of attorney from a wife to her husband does not authorize him to act for her and as her agent in conveying her separate property, as such an instrument is void under the statute and decisions of Texas requiring the privy acknowledgment of married women to transfers of their separate real property, and a deed from the husband, acting for himself and wife, not being signed by her and acknowledged by her privily and apart from her husband, does not convey her separate property. Mexia *v.* Oliver, 148 U. S. 664, 671, 37 L. Ed. 602.

28. Power of attorney to convey wife's real estate.—Williams *v.* Paine, 169 U. S. 55, 67, 42 L. Ed. 658.

Thus, where a wife was capable of conveying her real estate by a deed, properly executed and acknowledged by her privily, etc., and joined in by her husband, it was held that she could accomplish the same thing by authorizing another to convey for her, where the authority was joined in by her husband, and the required private examination, etc., made. Williams *v.* Paine, 169 U. S. 55, 67, 42 L. Ed. 658.

29. Cure by statute of conveyance made under power from married woman.—Randall *v.* Kreiger, 23 Wall. 137, 23 L. Ed. 124. See, also, Dibble *v.* Bellingham Bay Land Co., 163 U. S. 63, 67, 41 L. Ed. 72.

A. and wife, residents of the state of New York, executed a power of attorney to B. to sell lands in Minnestoa Territory of which A., the husband, was seized. The power was executed and acknowledged by both parties, the wife undergoing such separate examination as by the laws of New York makes valid the execution of deeds by a feme covert. At the time when this power of attorney was given there was no law of the territory authorizing such an instrument to be executed by the wife or the attorney to convey under it. B., professing to act for the two parties, sold and conveyed a piece of land, then worth $3,000, with general warranty, to C., for that sum, and A. received the money. The legislature of Minnesota subsequently passed an act by which it was enacted that "all deeds of conveyance of any lands in the territory, whether heretofore or hereafter made, under a joint power of attorney from the husband and wife, shall be as binding and have the same effect as if made by the original parties." The husband and wife afterwards revoked the power. The husband died leaving a large estate composed entirely of personalty, the whole of which he gave to his wife. The wife now

power is to be construed liberally in favor of the object to be accomplished.[30] Neither a married woman nor her heirs at law can repudiate a sale of her land under a power of attorney upon the ground that the power had been revoked by war, where she acquiesced in the transaction and received its benefits with full knowledge of the circumstances.[31]

3. CAPACITY TO ACT AS TRUSTEE—a. *In General.*—There is no incapacity in a married women to become a trustee, and to exercise the legal judgment and discretion belonging to that character.[32]

b. *Conveyances of Real Estate.*—Where a married woman is a trustee of land for the benefit of a third person, she may execute a deed to a bona fide purchaser, who has paid the purchase money to the cestui que use, without joining her husband,[33] and this principle is equally applicable to a deed executed under a power of attorney granted by her.[34]

4. CAPACITY TO BE ESTOPPED.—See the title ESTOPPEL, vol. 5, p. 913.

brought suit for dower in the land sold by B. as attorney for her husband and herself. Held, that the power of attorney was validated by the curative act, which the court, adverting to the fact that the husband had received the purchase money for the tract, and that it had become part of his estate, and that the whole of it on his death passed to the wife, declares had a strong natural equity at its root, and accomplished that which a court of equity would have failed to decree against the wife. only because it would be prevented by the unbending law as to feme coverts in such cases. Randall *v.* Kreiger, 23 Wall. 137, 23 L. Ed. 124.

30. Power construed liberally.—Holladay *v.* Daily, 19 Wall. 606, 22 L. Ed. 187. See the title POWERS.

A power of attorney to sell and convey real property, given by a husband and his wife, in general terms, without any provision against a sale of the interest of either separately, or other circumstance restraining the authority of the attorney in that respect, authorizes a conveyance by the attorney of the interest of the husband by a deed executed in his name alone. Holladay *v.* Daily, 19 Wall. 606, 22 L. Ed. 187.

Where a power of attorney is made by husband and wife, French people resident in France, to sell lands in Illinois—the power, a long French instrument with the usual verbiage of the style de notaire, speaking of the lands as lands which "Mr. and Madame," etc., own there—there being evidence that the husband owned land there, but none that the husband and wife did, the presumption is that the joinder of the wife was made to alienate some supposed right of dower, and not to describe lands owned by the wife and husband jointly, instead of by the husband alone; this at least in favor of a bona fide purchaser, long in possession. Dolton *v.* Cain, 14 Wall. 472, 473, 20 L. Ed. 830.

31. Estoppel of married woman to repudiate transactions done by attorney.—Williams *v.* Paine, 169 U. S. 55, 75, 42 L. Ed. 658 (holding, also, that war did not revoke the power of attorney). See the titles POWERS; PRINCIPAL AND AGENT; WAR.

"The purchase money for the land was received by the principal, and to permit her heirs after her death to repudiate the transaction on the ground that the power of attorney had been revoked would be at war with every principle of equity and fair dealing. This principle applies as strongly in the case of a married woman as in any other, and it will not permit her or, upon her death, her heirs at law, to repudiate a transaction the benefits of which she received with full knowledge of the circumstances attending it, and yet claim to recover an estate which had been sold with her authority and the purchase money for which had been paid to her. Bein *v.* Heath, 6 How. 228, 247, 12 L. Ed. 416; Bank *v.* Partee, 99 U. S. 325, 329, 25 L. Ed. 390. Bedford *v.* Burton, 106 U. S. 338, 27 L. Ed. 112, considers generally the obligation of married women to do equity under circumstances somewhat similar in principle to the present case." Williams *v.* Paine, 169 U. S. 55, 75, 42 L. Ed. 658.

32. Capacity to act as trustee.—A trustee in equity is regarded in the light of an instrument or agent for the cestui que trust and the authority confined to him is in the nature of a power. Gridley *v.* Wynant, 23 How. 500, 502, 16 L. Ed. 411.

33. Conveyance by married woman acting as trustee.—Gridley *v.* Wynant, 23 How. 500, 16 L. Ed. 411; Gridley *v.* Westbrook, 23 How. 503, 16 L. Ed. 412.

By executing the deed she does not defeat an estate to which her husband is entitled and it is within the scope of her authority as trustee, and therefore will be sustained by a court of equity against her heirs. Gridley *v.* Wynant, 23 How. 500, 501, 16 L. Ed. 411.

Her children, who were her heirs at law, having brought a suit at law to recover the land from the bona fide purchaser, a court of equity will interpose to restrain their proceedings. Gridley *v.* Wynant, 23 How. 500, 501, 16 L. Ed. 411.

34. Conveyance by attorney of married woman acting as trustee.—Gridley *v.* Westbrook, 23 How. 503, 16 L. Ed. 412.

5. Testamentary Capacity.—As to testamentary capacity of married women, see the title Wills.

6. Capacity to Execute Powers.—A married woman may execute a power without the co-operation of her husband.[35]

7. Acquisition of National Character or Citizenship.—The incapacities of femes covert, provided by the common law, apply to their civil rights, and are for their protection and interest. But they do not reach their political rights, nor prevent their acquiring or losing a national character. Those political rights do not stand upon the mere doctrine of municipal law, applicable to ordinary transactions, but stand upon the more general principles of the law of nations.[36]

8. Criminal Responsibility of Married Women.—At the common law if a wife act in company with her husband in the commission of a felony, other than treason or homicide, it is conclusively presumed that she acted under his coercion, and is consequently without any guilty intent.[37]

9. When Wife Entitled to Act as Feme Sole—a. *Desertion or Abandonment by Husband.*—There are certain special cases where a married woman is compelled to act from necessity as a feme sole, and where coverture does not disable her from entering into binding contracts. Thus where the husband is imprisoned for life or for years or is banished, or voluntarily abandons her, her disability ceases.[38]

b. *Wife Acting as Sole Trader.*—The disability of coverture does not exist where the wife is permitted to act as a sole trader, as in England by the custom of London, and in this country by special legislation.[39]

B. Powers and Disabilities of Husband.—The husband cannot sell the wife's real property without her consent.[40] This is true even though the title is in his name, if the wife has an equitable interest in the land, and the purchaser has notice thereof.[41] And, as a general rule, the husband cannot execute a

35. Capacity to execute powers.—Gridley *v.* Wynant, 23 How. 500, 502, 16 L. Ed. 411; Barnes *v.* Irwin, 2 Dall. 199, 201, 1 L. Ed. 348. See, generally, the title POWERS.

36. Acquisition of national character.—Shanks *v.* Dupont, 3 Pet. 242, 248, 7 L. Ed. 666.

37. Crimes by wife.—Trust Co. *v.* Sedgwick, 97 U. S. 304, 308, 24 L. Ed. 954.

38. Desertion or abandonment of husband.—Bank *v.* Partee, 99 U. S. 325, 330, 25 L. Ed. 390; Rhea *v.* Rhenner, 1 Pet. 105, 7 L. Ed. 72. See, also, Barber *v.* Barber, 21 How. 582, 589, 16 L. Ed. 226.

In such cases the husband is considered as civilly dead, and the wife as in a state of widowhood. Bank *v.* Partee, 99 U. S. 325, 330, 25 L. Ed. 390.

Under Ohio statutes.—See Ankeney *v.* Hannon, 147 U. S. 118, 125, 37 L. Ed. 105, where the Ohio statute is set out.

Where wife may sue as if feme sole.—See post, "Actions by Wife," VIII, A, 1, b.

Property given to a wife in lieu of alimony decreed to her, passes to her as fully as if conveyed to a third person for a valuable consideration, and in regard to it the wife is to be considered as feme sole, with power to dispose of it. Wallingsford *v.* Allen, 10 Pet. 583, 9 L. Ed. 542.

39. Wife acting as sole trader.—Bank *v.* Partee, 99 U. S. 325, 330, 25 L. Ed. 390; Rhea *v.* Rhenner, 1 Pet. 105, 7 L. Ed. 72; Bank *v.* Banks, 101 U. S. 240, 25 L. Ed. 850.

When a wife left by her husband, without maintenance and support, has traded as a feme sole and obtained credit as such, she is liable for her own debts as if she were unmarried. Rhea *v.* Rhenner, 1 Pet. 105, 7 L. Ed. 72.

In Maryland, a deed, executed by a married woman, of real property, acquired by her while a sole trader, and while she was abandoned by her husband, is void. Rhea *v.* Rhenner, 1 Pet. 105, 7 L. Ed. 72.

In Mississippi, when a married woman engages in trade or business as a feme sole she shall be bound by her contracts made in the course of such trade or business, in the same manner as if she was unmarried. Bank *v.* Banks, 101 U. S. 240, 25 L. Ed. 850.

40. Power of husband to sell wife's property.—Hennessy *v.* Woolworth, 128 U. S. 438, 32 L. Ed. 500.

In Minnesota, the husband's assent to a contract for the sale of the wife's lands is not sufficient to bind the wife, so as to authorize a decree of specific performance against her. Hennessy *v.* Woolworth, 128 U. S. 438, 32 L. Ed. 500.

41. Sale of land, title of which is in husband, but held by him as trustee.—Holgate *v.* Eaton, 116 U. S. 33, 29 L. Ed. 538. In this case the property was purchased by the husband at a sale decreed in a suit to foreclose a mortgage held by him as his wife's trustee, and the title

conveyance of the wife's real estate without her joining in the deed.[42]

II. Property Rights.

A. Interest of Husband in Wife's Property—1. PERSONAL PROPERTY—a. *Property in Possession at Time of Marriage.*—At the common law, the money or personal property which the wife has at the time of her marriage, not secured to her by a settlement or contract, belongs to the husband absolutely.[43]

b. *Property Acquired after Marriage*—(1) *In General.*—At the common law, personal property purchased by a married woman on credit, or with her earnings, during the coverture, belongs absolutely to the husband, and is subject to the levy of an execution against her husband.[44]

(2) *Earnings of Wife.*—By the common law the earnings of the wife belong exclusively to the husband; they vest in him as absolutely as though they were the proceeds of his own labor and industry.[45]

c. *Property in Action.*—Marriage is only a qualified gift to the husband of choses in action belonging to the wife, his right to them being dependent on their being reduced to possession during the coverture. The husband may sue for and recover, or release or assign them, and when recovered and reduced to possession, the money becomes absolutely his own.[46] It seems that a bona fide

was taken in his own name, but the wife still had an equitable interest in the land.

Where the wife repudiates a contract made by the husband, who is the trustee, for the sale of her lands, she cannot, after the conditions have changed, and the property decreased in value, sue for the specific performance of the contract. Holgate *v.* Eaton, 116 U. S. 33, 29 L. Ed. 538.

42. Power of husband to convey wife's lands.—Meegan *v.* Boyle, 19 How. 130, 15 L. Ed. 577.

In Pennsylvania, it was held in an early case that the statute of 32 Henry VIII, ch. 7, validated a deed of a husband to his wife's lands, where the wife did not join in the deed, and where possession had been held under the deed for a long time. Boehm *v.* Engle, 1 Dall. 15, 1 L. Ed. 17.

Power of husband as to separate estate.—See the title SEPARATE ESTATE OF MARRIED WOMEN.

43. Personalty in possession.—Jackson *v.* Jackson, 91 U. S. 122, 23 L. Ed. 258; Bank *v.* Banks, 101 U. S. 240, 243, 25 L. Ed. 850; Seitz *v.* Mitchell, 94 U. S. 580, 584, 24 L. Ed. 179.

Money, goods, and personal chattels in possession vested absolutely in the husband, and became his property as completely as property purchased with his own money; and such property never went back to the wife unless given to her by the husband in his lifetime or by his will, and in case of his death it vested in his executors. Bank *v.* Banks, 101 U. S. 240, 243, 25 L. Ed. 850.

Reason of rule.—This harsh rule of the common law was founded upon the idea, that, as the husband was bound by the marriage to support the wife and the rest of the family, he was entitled to whatever she possessed, or subsequently acquired, which was available for that purpose—a rule which would have had some good ground for its existence, had it only applied when the money or earnings of the wife were necessary for that purpose. But, becoming absolutely the property of the husband, they were subject to his disposal without regard to the necessities of the family, and might be taken from them at the suit of his creditors. They partook of the condition, and were subject to the fate, of his separate property. Jackson *v.* Jackson, 91 U. S. 122, 124, 23 L. Ed. 258.

44. Property acquired during coverture.—Seitz *v.* Mitchell, 94 U. S. 580, 584, 24 L. Ed. 179.

45. Earnings of wife.—Jackson *v.* Jackson, 91 U. S. 122, 124, 23 L. Ed. 258; Seitz *v.* Mitchell, 94 U. S. 580, 584, 24 L. Ed. 179. See, also, Belford *v.* Scribner, 144 U. S. 488, 504, 36 L. Ed. 514.

Exclusion of interest of husband in earnings.—But where the proof shows that an authoress from time to time settled with the owners of the copyright for her royalties, the court will presume that her legal title as the author of the books was in some due and proper manner conveyed to and vested in the persons who secured the copyright thereof; and acquiescence for many years, by all the parties, in that claim of proprietorship in the copyright, is enough to answer the suggestion of the husband's possible marital interest in his wife's earnings. Belford *v.* Scribner, 144 U. S. 488, 504, 36 L. Ed. 514.

Earnings as separate property.—See the title SEPARATE ESTATE OF MARRIED WOMEN.

46. Property in action.—Bank *v.* Banks, 101 U. S. 240, 243, 25 L. Ed. 850; McClanahan *v.* Davis, 8 How. 170, 12 L. Ed. 1033; Cassell *v.* Carroll, 11 Wheat. 131, 6 L. Ed. 438; Price *v.* Sessions, 3 How. 624, 634, 11 L. Ed. 755.

Remainder in personalty.—By the laws of Virginia, where there is a tenancy for

assignment, for a valuable consideration, made by a husband, of a debt, actually and presently due to his wife, divests, in equity, the title of the wife.[47]

2. REAL ESTATE—a. *Estates of Inheritance.*—By the rules of the common law, marriage gives the husband a freehold tenure in the estate of inheritance in land of the wife.[48]

b. *Leaseholds.*—Leaseholds of the wife enure to the benefit of the husband and bring him into the relation of tenant to the lessors, where there is nothing in the lease indicating a contrary intent.[49]

c. *Rents and Profits.*—At the common law, the husband has the right to the rents and profits of the wife's estates of inheritance during their joint lives.[50] The husband's interest is capable of sale,[51] but in some states, by statute, is not subject to seizure by his creditors.[52]

d. *Proceeds of Sale.*—By the common law, if the husband and wife sell and

life in a slave, with remainder to the wife of another person, the interest of the husband in the wife's remainder is placed upon the footing of an interest in a chose in action. If, therefore, he survives the wife, he may reduce the property into possession at the expiration of the life estate; but if he be dead at such expiration, the property survives to the wife, and on her death passes to her legal representative as part of her assets. McClanahan *v.* Davis, 8 How. 170, 12 L. Ed. 1033.

Query, whether the husband or his personal representative is not bound to administer upon the wife's estate, before bringing suit to recover property so situated in the state of Virginia. McClanahan *v.* Davis, 8 How. 170, 12 L. Ed. 1033.

The Mississippi statute of 1839 secured to married women their choses in action, free from the rights of their husbands, and such property is not, in that state, liable for the husband's debts. Price *v.* Sessions, 3 How. 624, 634, 11 L. Ed. 755.

Where a testator devised certain property to his infant daughter, to be delivered over to her when she should arrive at the age of eighteen years, and the daughter, at the age of sixteen, married the executor who had the principal management of the estate, and possession of the property devised, he must be considered as holding it as executor, and not as husband. And the law providing that a wife should retain such property in her own right, notwithstanding her coverture, having gone into operation before the daughter arrived at the age of eighteen years, the distribution to her must be considered to have been made under that law. The property, therefore, cannot be responsible for the husband's debts. Price *v.* Sessions, 3 How. 624, 11 L. Ed. 755.

47. **Assignment as divesting wife's title.**—Cassell *v.* Carroll, 11 Wheat. 134, 6 L. Ed. 438.

In Cassell *v.* Carroll, 11 Wheat. 134, 6 L. Ed. 438, it was held that under the particular circumstances of the case, where the consideration had actually gone beneficially for the wife, and the whole transaction had been under the direction of a court of chancery, and been confirmed by parliament, the assignment was, to all intents and purposes, valid to assign the rents, and the act of parliament made it, to all intents and purposes, a legal title and assignment.

48. **Interest of husband in wife's estates of inheritance.**—Bank *v.* Banks, 101 U. S. 240, 243, 25 L. Ed. 850; Sims *v.* Everhardt, 102 U. S. 300, 308, 26 L. Ed. 87.

49. **Leaseholds.**—Where one writes to a man's wife (there being a relationship by blood between the party writing and the wife) proposing to her to occupy a certain farm on which she and her husband were then living, and to pay a certain rent therefor, which offer she accepts, and there is nothing in the correspondence beyond the fact that the property is offered to the wife, and that the wife accepts it, to infer a purpose to give it to her to the exclusion of her husband, the husband is not excluded. The lease enures to his benefit and brings him into the relation of a tenant to the lessors. Lucas *v.* Brooks, 18 Wall. 436, 21 L. Ed. 779.

50. **Right to rents and profits.**—Sims *v.* Everhardt, 102 U. S. 300, 308, 26 L. Ed. 87; Bank *v.* Banks, 101 U. S. 240, 243, 25 L. Ed. 850; Baker *v.* Kilgore, 145 U. S. 487, 36 L. Ed. 786.

By marriage the husband becomes entitled to the rents and profits. His control over the usufruct thereof is absolute, extends during their joint lives, or at least as long as the marriage relations continued. Sims *v.* Everhardt, 102 U. S. 300, 308, 26 L. Ed. 87.

51. **Husband's interest capable of sale.**—Sims *v.* Everhardt, 102 U. S. 300, 308, 26 L. Ed. 87.

52. **Statute exempting rents and profits of wife's lands from liability for husband's debts.**—Baker *v.* Kilgore, 145 U. S. 487, 490, 36 L. Ed. 786.

Validity of act exempting rents and profits from husband's debts.—It is competent for the legislature to exempt the rents and profits of the wife's estate from liability for debts and contracts of the husband, existing at the time such immunity is declared and an act so providing is valid as applied to a judgment previously rendered against the husband,

convey her lands, the money which he receives therefor, without any reservation of rights on her part, will belong to him.[53]

B. Community Property—1. In General.—In several states and territories certain property acquired by husband and wife during marriage is treated as belonging to them as partners or as a community, though usually the husband is invested with the power to dispose of it during the coverture.[54] Statutes having this object in view are in force in Louisiana, Porto Rico, Texas and Washington. Although the general idea of all of the statutes is the same, they differ in several material respects, and the statute of each state or territory, so far as passed on by the supreme court of the United States will be treated separately.

2. In Louisiana—a. *In General.*—In Louisiana, in the absence of a contrary provision by marriage contract, the law gives a community of acquets or gains between married persons, where the marriage is contracted within the state, or where the marriage is contracted out of the state, and the parties afterwards go there to live.[55] This partnership or community exists by operation of law.[56]

b. *What Constitutes.*—The fruits and income of the wife's paraphernal property administered by the husband belong to the conjugal partnership or community.[57]

c. *Descent.*—Community property descends to the heirs subject to only such debts as are chargeable against it.[58] The wife's interest in the community prop-

where the particular profits of the wife's estate in dispute had not, when that act was passed, come to the hands of the husband, and were not, at that time, in existence, nor in any legal sense, vested in him. Baker *v.* Kilgore, 145 U. S. 487, 490, 36 L. Ed. 786.

"Moreover, his right, prior to that enactment, to take the profits of his wife's estate did not come from contracts between him and his wife or between him and the state, but from a rule of law established by the legislature, and resting alone upon public considerations arising out of the marriage relation. It was entirely competent for the legislature to change that rule in respect, at least, to the future rents and profits of the wife's estate. Such legislation is for the protection of the property of the wife, and neither impairs nor defeats any vested right of the husband." Baker *v.* Kilgore, 145 U. S. 487, 490, 36 L. Ed. 786.

53. Interest of husband in proceeds of sale of wife's lands.—Kesner *v.* Trigg, 98 U. S. 50, 25 L. Ed. 83.

54. Statutes providing for community property.—See Warburton *v.* White, 176 U. S. 484, 44 L. Ed. 555; Fleitas *v.* Richardson, No. 2, 147 U. S. 550, 552, 37 L. Ed. 276.

55. Community property in Louisiana.—Conner *v.* Elliott, 18 How. 591, 15 L. Ed. 497; Fleitas *v.* Richardson, No. 2, 147 U. S. 550, 552, 37 L. Ed. 276; Nalle *v.* Young, 160 U. S. 624, 638, 40 L. Ed. 560; Mellen *v.* Buckner, 139 U. S. 338, 388, 35 L. Ed. 199.

56. Partnership exists by operation of law.—Fleitas *v.* Richardson, No. 2, 147 U. S. 550, 552, 37 L. Ed. 276; Nalle *v.* Young, 160 U. S. 624, 638, 40 L. Ed. 560.

Marriage contracted out of state and husband and wife residing outside.—The privilege thus conferred upon the wife does not extend, by virtue of the clause in the constitution of the United States providing that "the citizens of each state shall be entitled to all the privileges and immunities of citizens of several states," to a native born citizen of Louisiana, who was married while under age, in the state of Mississippi, in which state was her domicile together with her husband during the continuance of the marriage. Land in Louisiana, acquired by the husband during the marriage, was not subject to the Louisiana law, in respect to the community of acquets or gain. Conner *v.* Elliott, 18 How. 591, 15 L. Ed. 497.

This right was one which attached to the contract of marriage, which the state of Louisiana had a right to regulate; and was not one of the personal rights of a citizen, within the meaning of the constitution. Conner *v.* Elliott, 18 How. 591, 15 L. Ed. 497.

As to paraphernal, dotal or extra dotal property, or as to suits by wife for separation of property, see the title SEPARATE ESTATE OF MARRIED WOMEN.

57. Fruits of paraphernal property.—Civil Code, arts. 2386 (2363), 2402 (2371). The husband may appropriate such fruits and income to his own use. He is not liable to her for neglecting to collect them. Nor is he liable for interest on the debt to his wife, except after she has obtained judgment against him. Fleitas *v.* Richardson, No. 2, 147 U. S. 550, 554, 37 L. Ed. 276.

As to paraphernal property, see the title SEPARATE ESTATE OF MARRIED WOMEN.

58. Descent of community property.—Mellen *v.* Buckner, 139 U. S. 338, 388, 35

erty descends to her heirs, free from claims against the husband.[59]

3. In Porto Rico—a. *Power of Husband.*—The very foundation of the community and its efficacious existence depend on the power of the husband, during the marriage, over the community, and his right, in the absence of fraud or express legislative restriction, to deal with the community and its assets as the owner thereof.[60]

b. *Divorce as Defeating Wife's Interest.*—The rendition of a decree of divorce against a wife, for adultery, does not work a forfeiture of her right to share in the community property.[61]

c. *Liquidation of Community Property.*—A wife, against whom a decree of divorce has been rendered may enforce a liquidation of the community property, if there is anything due her.[62] The fact that the husband may have been extravagant or even reckless does not require him to account to the community for funds which he has thus improperly expended,[63] and the wife is not entitled to be allowed for attorneys' fees in the liquidation suit.[64]

4. In Texas.—In Texas, property purchased after marriage is prima facie community property, whether the conveyance be in the name of the husband or of the wife, or in their joint names.[65] But this rule only holds good where the purchase is made with community funds, and the presumption may be rebutted by proof that the purchase was intended for the wife.[66] And where the consideration was nominal only, and the deed made to the wife, the presumption is that it was intended to vest the title in her as separate property.[67]

5. In Washington.—In Washington Territory, by the act of Nov. 14, 1879 it was provided that in case of intestacy the share of a deceased husband or wife in the community property should pass to the legal issue of the intestate, and in default of such issue to the surviving husband or wife as the case might be.[68] It was held that this act was not unconstitutional with respect to property acquired under two earlier acts, one of which provided for community property and that the husband should have the entire management or control, "with the like absolute power of disposition as his own separate estate," and the other of which provided that upon the death of the husband or wife the whole of the

L. Ed. 199; Johnson *v.* Waters, 111 U. S. 640, 28 L. Ed. 547.

59. Mellen *v.* Buckner, 139 U. S. 338, 388, 35 L. Ed. 199.

60. Power of husband over community property.—Garrozi *v.* Dastas, 204 U. S. 64, 79, 51 L. Ed. 369.

"The purpose of the community, as expounded from the earliest times, whilst securing to the wife of the dissolution of the marriage an equal portion of the net results of the common industry, common economy and common sacrifice, was yet, as a matter of necessity, during the existence of the community, not to render the community inept and valueless to both parties by weakening the marital power of the husband as to his expenditures and contracts, so as to cause him to be a mere limited and consequently inefficient agent." Garrozi *v.* Dastas, 204 U. S. 64, 79, 51 L. Ed. 369.

61. Divorce as defeating wife's interest.—Garrozi *v.* Dastas, 204 U. S. 64, 51 L. Ed. 369.

62. Liquidation of community property.—Garrozi *v.* Dastas, 204 U. S. 64, 51 L. Ed. 369.

63. Duty of husband to account to community for extravagance.—Garrozi *v.* Dastas, 204 U. S. 64, 78, 51 L. Ed. 369.

The power of the husband, as the head and master and administrator of the community, is not in its nature so restricted that in the absence of express limitation he can, after the dissolution of the community, be called to account and compelled to return to the community money which he has actually expended during the existence of the community, because, in the judgment of a court, such expenses may be deemed to have been not suitable to his situation in life, extravagant, or even reckless. Garrozi *v.* Dastas, 204 U. S. 64, 78, 51 L. Ed. 369.

64. Right of wife to attorneys' fees incurred in liquidation suit.—Garrozi *v.* Dastas, 204 U. S. 64, 51 L. Ed. 369.

65. In Texas.—Cooke *v.* Avery, 147 U. S. 375, 395, 37 L. Ed. 209; Hanrick *v.* Patrick, 119 U. S. 156, 172, 30 L. Ed. 396.

66. Hanrick *v.* Patrick, 119 U. S. 156, 172, 30 L. Ed. 396.

67. Hanrick *v.* Patrick, 119 U. S. 156, 30 L. Ed. 396. See the title SEPARATE ESTATE OF MARRIED WOMEN.

68. Descent of community property in Washington.—Warburton *v.* White, 176 U. S. 484, 44 L. Ed. 555.

property, subject to the community debts should go to the survivor.[69]

C. Conveyances to Husband and Wife.—Undoubtedly, at common law, husband and wife did not take, under a conveyance of land to them jointly, as tenants in common or as joint tenants, but each became seized of the entirety, per tout et non per my; the consequence of which was that neither could dispose of any part without the assent of the other, but the whole remained to the superior under the original grant.[70] But even at common law when lands are granted to them as tenants in common, thereby treating them without any respect to their social union, they will hold by moieties, as other distinct and individual persons would do.[71]

D. Conveyances in Fraud of Marital Rights.—A husband, even before marriage, may, in virtue of the marriage contract, have inchoate rights in the estate of his wife, which, if the marriage be consummated, will be protected by a court of equity against any antecedent contracts and conveyances secretly made by the wife, in fraud of those marital rights; but they are mere equities, and in no just sense constitute any legal or equitable estate in her lands or other property, antecedent to the marriage.[72]

E. Liability of Wife's Property for Husband's Debts.—If money, which a married woman might have had secured to her own use, is allowed to go into the business of her husband, be mixed with his property, and applied to the purchase of real estate for his advantage, or for the purpose of giving him credit in business, and is thus used for a series of years, such real estate, unless there is at the time of its purchase a specific agreement that it shall belong to the wife, becomes the property of the husband for the purpose of paying his debts.[73] But property purchased by wife with money belonging to her separate estate cannot be subjected by husband's creditors.[74] Inconsiderable improvements made on the wife's property before the contracting of a debt by the husband cannot be subjected by the husband's creditors.[75] Where a statute

69. Act changing mode of descent.—Warburton *v.* White, 176 U. S. 484, 44 L. Ed. 555.

"It is a misconception of that system to suppose that because power was vested in the husband to dispose of the community acquired during marriage, as if it were his own, therefore by law the community property belonged solely to the husband. The conferring on the husband the legal agency to administer and dispose of the property involved no negation of the community, since the common ownership would attach to the result of the sale of the property." Warburton *v.* White, 176 U. S. 484, 497, 44 L. Ed. 555.

70. Tenancy by entireties.—Hunt *v.* Blackburn, 128 U. S. 464, 469, 32 L. Ed. 488, where this rule was held to obtain in Arkansas.

71. Where land conveyed to husband and wife as tenants in common.—Hunt *v.* Blackburn, 128 U. S. 464, 469, 32 L. Ed. 488.

A husband and wife purchased the separate halves of a tract of land at different times, with intent of holding in moieties, and conveyed the husband's half to one who paid therefor in good faith and without actual notice. At the request of the purchaser, a second deed was made from the original vendor to the husband and wife which ran directly to the husband and wife, the deed being made at the very time when the husband and wife were executing the conveyance to the purchaser from them. It was held that the wife could not claim that she was entitled to an estate by entirety by reason of the second conveyance to herself and husband, as the second deed did not divest the title which had once vested in her husband and herself by the former conveyance from the same grantor, nor alter its nature. Hunt *v.* Blackburn, 128 U. S. 464, 469, 471, 32 L. Ed. 488.

Where the highest court of a state has proceeded upon the conclusion that a person and his wife held by moieties, its decree standing unreversed is binding. Hunt *v.* Blackburn, 128 U. S. 464, 469, 32 L. Ed. 488.

72. Fraud on marital rights.—Crane *v.* Morris, 6 Pet. 598, 8 L. Ed. 514.

73. Right of husband's creditors against wife's property.—Humes *v.* Scruggs, 94 U. S. 22, 24 L. Ed. 51.

As to conveyances or transfers in fraud of creditors, see the title FRAUDULENT AND VOLUNTARY CONVEYANCES, ante, p. 472.

74. Property purchased with money belonging to separate estate.—Davis *v.* Fredericks, 104 U. S. 618, 26 L. Ed. 849.

Right of husband's creditors against wife's separate property.—See the title SEPARATE ESTATE OF MARRIED WOMEN.

75. Improvements on wife's property by husband.—Sexton *v.* Wheaton, 8 Wheat.

exempts the wife's property from liability for the husband's debts, curtesy of the husband is exempted, as to debts subsequently contracted.[76]

III. Support of Wife.

The wife is entitled to support from her husband.[77]

IV. Transactions between Husband and Wife.

A. Validity as between Parties.—At the common law, because of the unity of husband and wife, agreements between husband and wife, during coverture, for the transfer of property by one to the other, are void at law.[78] Although the common-law rule still obtains in some states,[79] it has, as a general rule, been superseded by statute permitting husband and wife to contract with each other in the same manner and to the same effect as if they were strangers.[80]

B. Validity as to Creditors and Purchasers.—See the title FRAUDULENT AND VOLUNTARY CONVEYANCES, ante, p. 472.

229, 5 L. Ed. 603. See the title IMPROVEMENTS.

76. **Effect of exemption of wife's property from liability.**—Hitz *v.* National Metropolitan Bank, 111 U. S. 722, 28 L. Ed. 577; Halferty *v.* Wilmeing, 112 U. S. 713, 28 L. Ed. 824.

77. **Support.**—Kehr *v.* Smith, 20 Wall. 31, 34, 22 L. Ed. 313.

"A decree awarding alimony to the wife or children, or both, is not a debt which has been put in the form of a judgment, but is rather a legal means of enforcing the obligation of the husband and father to support and maintain his wife and children. He owes this duty, not because of any contractual obligation or as a debt due from him to the wife, but because of the policy of the law which imposes the obligation upon the husband. The law interferes when the husband neglects or refuses to discharge this duty and enforces it against him by means of legal proceedings." Wetmore *v.* Markoe, 196 U. S. 68, 74, 49 L. Ed. 390; Audubon *v.* Shufeldt, 181 U. S. 575, 45 L. Ed. 1009.

Liability for alimony as discharged by bankruptcy.—See the title BANKRUPTCY, vol. 2, p. 862.

78. **Validity of transaction at common law.**—Wallingsford *v.* Allen, 10 Pet. 583, 9 L. Ed. 542; Kitchen *v.* Bedford, 13 Wall. 413, 20 L. Ed. 637; Jones *v.* Clifton, 101 U. S. 225, 25 L. Ed. 908.

Validity in equity of settlement on wife for separate use.—See the title SEPARATE ESTATE OF MARRIED WOMEN.

79. **Common law still in force in some states.**—Kitchen *v.* Bedford, 13 Wall. 413, 20 L. Ed. 637.

The statute law of Arkansas has not changed the common-law rule, that a husband cannot legally make a gift to his wife during coverture. Kitchen *v.* Bedford, 13 Wall. 413, 20 L. Ed. 637.

80. **Validity of transactions under statute.**—Waterman *v.* Mackenzie, 138 U. S. 252, 257, 34 L. Ed. 923; Jones *v.* Clifton, 101 U. S. 225, 25 L. Ed. 908; Seitz *v.* Mitchell, 94 U. S. 580, 24 L. Ed. 179; Wilson *v.* Riddle, 123 U. S. 608, 616, 31 L. Ed. 280; Humes *v.* Scruggs, 94 U. S. 22, 24 L. Ed. 51; Luhrs *v.* Hancock, 181 U. S. 567, 45 L. Ed. 1005; Hitz *v.* National Metropolitan Bank, 111 U. S. 722, 28 L. Ed. 577; Halferty *v.* Wilmeing, 112 U. S. 713, 28 L. Ed. 824.

The technical reasons of the common law arising from the unity of husband and wife, which would prevent his conveying the property directly to her for a valuable consideration, as upon a contract or purchase, have long since ceased to operate in the case of his voluntary transfer of it as a settlement upon her. Jones *v.* Clifton, 101 U. S. 225, 25 L. Ed. 908; Luhrs *v.* Hancock, 181 U. S. 567, 571, 45 L. Ed. 1005.

The husband's reservation of a power of revocation or appointment to other uses does not impair the validity or efficiency of the conveyance in transferring the property to his wife, to hold until such power shall be executed; nor does it tend to create an imputation upon his good faith and honesty in the transaction, and such a power does not, in the event of his bankruptcy, pass to his assignee. Jones *v.* Clifton, 101 U. S. 225, 25 L. Ed. 908.

Where rights of existing creditors are not affected, a voluntary settlement upon the wife, whether made through the husband, or directly by the wife with his consent, is void. Jackson *v.* Jackson, 91 U. S. 122, 23 L. Ed. 258.

Conveyance by husband to trustee for benefit of wife.—In United States Bank *v.* Lee, 13 Pet. 107, 118, 10 L. Ed. 81, it was said: "The capacity of the husband to contract, through the intervention of trustees, with the wife, and to make a valid conveyance, founded on a bona fide consideration paid out of the wife's separate estate, has not been questioned; nor is the doctrine open to controversy."

Conveyance of curtesy by husband to wife.—A husband may, in the absence of fraud, convey his curtesy to trustees for the benefit of his wife and children, where he makes such conveyance to repay the

V. Liability of Husband for Wife's Contracts or Torts.

A. Contracts.—At common law, the husband is liable for the wife's antenuptial debts,[81] especially where he receives property of the wife by virtue of the marriage, and subsequently promises to pay her debts.[82]

B. Torts.—The husband is liable for the torts and frauds of the wife committed during coverture. If committed in his company or by his order, he alone is liable.[83]

VI. Criminal Conversation.

For adultery or criminal conversation with a man's wife, the law gives a satisfaction to the husband by an action of trespass vi et armis.[84]

VII. Separation.

A. Contracts for Separate Maintenance.—A contract by a husband for the separate maintenance of his wife, if reasonable and made in respect to a separation to occur immediately, or for the continuance of one that has already taken place, is valid, especially where the separation is occasioned by the misconduct of the husband.[85] The validity of such a covenant is not impaired by the fact that the deed contains a provision that if the parties should afterwards

wife for her property which he has used to pay his debts. Hitz *v.* National Metropolitan Bank, 111 U. S. 722, 726, 28 L. Ed. 577; Halferty *v.* Wilmeing, 112 U. S. 713, 28 L. Ed. 824. See the titles CURTESY, vol. 5, p. 155; FRAUDULENT AND VOLUNTARY CONVEYANCES, ante, p. 472.

The wife has the same right to buy his curtesy in her real estate, to have it barred by a proper conveyance, as any one else has. Her equity is as good as that of any other creditor, and he could secure her as well as he could another. Hitz *v.* National Metropolitan Bank, 111 U. S. 722, 726, 28 L. Ed. 577; Halferty *v.* Wilmeing, 112 U. S. 713, 28 L. Ed. 824.

In New York husband and wife are authorized to make conveyances and contracts of and concerning personal property to and with each other, in the same manner and to the same effect as if they were strangers. Waterman *v.* Mackenzie, 138 U. S. 252, 257, 34 L. Ed. 923.

Section 1776 of the Code of Georgia provides that a husband may, at any time during coverture, either through trustees, or directly to his wife, convey any property, subject to the rights of prior purchasers or creditors without notice. Wilson *v.* Riddle, 123 U. S. 608, 616, 31 L. Ed. 280.

81. Antenuptial debts.—Pierce *v.* Turner, 5 Cranch 154, 170, 3 L. Ed. 64; Beach *v.* Lee, 2 Dall. 257, 1 L. Ed. 371.

82. Where husband receives property by marriage and promises to pay debt.—Where a husband comes into the possession of the property of the wife upon the marriage and subsequently promises to pay her antenuptial debts, the property received by him through marriage is a sufficient consideration for his contract and it may be enforced against him after the death of the wife. Beach *v.* Lee, 2 Dall. 257, 1 L. Ed. 371.

83. Liability of husband for wife's torts.—Trust Co. *v.* Sedgwick, 97 U. S. 304, 308, 24 L. Ed. 954.

Breach of trust by wife.—A feme covert may be a trustee, but her husband is personally liable for any breach of trust she may commit, and hence she cannot act in the administration of the trust without his concurrence or consent. Trust Co. *v.* Sedgwick, 97 U. S. 304, 308, 24 L. Ed. 954.

84. Criminal conversation.—Tinker *v.* Colwell, 193 U. S. 473, 481, 48 L. Ed. 754, Quoting 3 Black. Com. (Wendell's Ed., p. 139), where it is said that the damages in such case are usually very large and exemplary.

Judgment for criminal conversation as released by bankruptcy.—See the title BANKRUPTCY, vol. 2, p. 792.

85. Validity of contract for separate maintenance of wife.—Walker *v.* Walker, 9 Wall. 744, 19 L. Ed. 814.

A covenant by a husband for the maintenance of the wife, contained in a deed of separation between them, through the medium of trustees, where the consideration is apparent, must now be regarded on authority as valid, notwithstanding the serious objections to such deeds. It will accordingly be enforced in equity, if it appears that the deed was not made in contemplation of a future possible separation, but in respect to one which was to occur immediately, or for the continuance of one that had already taken place. And this especially if the separation was occasioned by the misconduct of the husband, and the provision for the wife's support, was reasonable under the circumstances, and no more than a court before which she was entitled to carry her grievances would have decreed to her as alimony. Walker *v.* Walker, 9 Wall. 744, 19 L. Ed. 814.

A deed by which a husband, on articles of separation between him and his wife, binds himself to pay, in trust for her,

come together, the trust should remain and be executed in like manner, as if they should remain separate.[86]

B. Separate Maintenance under Statute.—In some states a wife living apart from her husband, without her fault, is, by statute, entitled to separate maintenance from the husband, the allowance to be one reasonably suited to the condition of the parties in life.[87]

C. Agreements as to Property Rights.—Where property is given by a husband to his wife in lieu of alimony, and subsequently a final separation takes place, and an agreement is entered into between them that each shall retain the property then held by them, the husband has no interest in that given to the wife in lieu of alimony.[88]

VIII. Actions.

A. Actions by Husband or Wife or Both—1. PARTIES—a. *Action by Husband.*—An action of ejectment to recover land cast by descent on a married woman,[89] or for injuries to profits of her land,[90] or for the recovery of choses in action, the legal title of which, is in him,[91] may be brought by the husband alone.

b. *Actions by Wife.*—At the common law, husband and wife are regarded as one person, and, except in the cases where she is entitled to act as a feme sole,[92]

a certain amount of money (capital) and interest on it till paid, becomes a voluntary settlement if, before payment is made, the parties are reconciled, make null all the covenants of the articles of separation, and cohabit again, with an agreement that the settlement shall stand as agreed on, except that the husband shall not pay interest while he and his wife live together. Kehr *v.* Smith, 20 Wall. 31, 22 L. Ed. 313. See the title FRAUDULENT AND VOLUNTARY CONVEYANCES, ante, p. 472.

86. Walker *v.* Walker, 9 Wall. 744, 19 L. Ed. 814.

87. **Separate maintenance.**—Harding *v.* Harding, 198 U. S. 317, 49 L. Ed. 1066. See the title DIVORCE AND ALIMONY, vol. 5, p. 412.

As to whether a judgment in suit by wife for separate maintenance finding that separation was not due to fault of wife, is conclusive in suit by husband for divorce on issue as to wife's desertion, see the title RES ADJUDICATA. As to what constitutes denial of full faith and credit to such a judgment, see the title FOREIGN JUDGMENTS, RECORDS AND JUDICIAL PROCEEDINGS, ante, p. 335.

88. **Construction of agreement as to property rights.**—Where a wife having separated herself from her husband, for ill-treatment by him, applied to a court for alimony, which was allowed to her, pendente lite; and the husband gave her several slaves, in discharge of the alimony, which she manumitted, by deed, and subsequently a final separation took place between them by a verbal agreement, each agreeing to retain "the property each had, and to be quits for ever," and the wife relinquished all further claim for alimony, and after the death of the wife, the husband claimed slaves, as his, it was held that they were free by virtue of the deed of manumission executed by the wife. Wallingsford *v.* Allen, 10 Pet. 583, 9 L. Ed. 542.

The transfer of property must be considered as having been made for a valuable consideration and passed the property as fully to the wife as if the husband had conveyed it to a third person for a valuable consideration. In regard to that property, the wife is to be considered as a feme sole, and her right to dispose of it follows as a matter of course. Wallingsford *v.* Allen, 10 Pet. 583, 9 L. Ed. 542.

89. **Ejectment for wife's land.**—If the title to land be cast by descent on a married woman, her husband having a life estate, may bring ejectment; if he fails to do so for seven years, the statute of limitations will bar his right; and if he and his wife convey their title to another, their grantee cannot recover after the expiration of seven years from the time when the limitation first began to run against the husband. Gregg *v.* Tesson, 1 Black 150, 17 L. Ed. 74.

90. **Injury to profits of wife's land.**—Bank *v.* Banks, 101 U. S. 240, 243, 25 L. Ed. 850.

91. **Action of trover for recovery of bonds legally owned by husband.**—Where a husband gives bond to a person to sell and purchase land for the benefit of his wife, and the person to whom they are entrusted fraudulently disposes of them to one who takes with notice of the trust, his wife is not a necessary party to an action of trover by the husband against the purchaser. Kitchen *v.* Bedford, 13 Wall. 413, 20 L. Ed. 637.

92. **Where wife entitled to act as feme sole.**—Barber *v.* Barber, 21 How. 582, 589, 16 L. Ed. 226. See ante, "When Wife Entitled to Act as Feme Sole," I, A, 9.

When wife may sue as feme sole.—The cases mentioned in the books where a

she cannot sue alone.[93] State statutes, however, very generally provide for suits by married women without joinder of the husband,[94] and this is especially true with respect to suits concerning her separate estate.[95]

c. *Actions by Both Husband and Wife.*—We have already seen that a married woman cannot, as a general rule, sue on a right of action accruing to her without joining her husband.[96] There are also certain causes of action in favor of the wife which cannot be sued on by the husband alone. Thus an action for an injury to the inheritance of the wife must be brought in the joint names of the husband and wife.[97]

2. DECLARATION—a. *Actions for Criminal Conversation.*—In an action for criminal conversation, the usual and more correct practice is to declare in trespass vi et armis and contra pacem.[98]

b. *Actions of Ejectment.*—In ejectment, the rule is well established, that

feme covert may sue as a feme sole are: When her husband is banished, or has abjured the realm, or has been transported for felony; where the husband is an alien enemy, and his wife is domiciled in the realm; where the husband is an alien domiciled abroad, and has never been in the realm; or where he has voluntarily abandoned her, and is under a disability to return; so where the husband has deserted the wife in a foreign country, and she goes to England and maintains herself as a feme sole; where the husband, in a foreign state, compels his wife to leave him for another political jurisdiction, and she maintains herself there as a feme sole. Barber *v.* Barber, 21 How. 582, 589, 16 L. Ed. 226.

93. Married woman cannot sue alone as general rule.—Holdane *v.* Sumner, 15 Wall. 609, 21 L. Ed. 254; Barber *v.* Barber, 21 How. 582, 589, 16 L. Ed. 226; Bank *v.* Banks, 101 U. S. 240, 243, 25 L. Ed. 850; Marchand *v.* Livandais, 127 U. S. 775, 32 L. Ed. 324; Bein *v.* Heath, 6 How. 228, 12 L. Ed. 416; Weatherhead *v.* Baskerville, 11 How. 329, 359, 13 L. Ed. 717.

A married woman cannot sue, without the assent and association of her husband, for any property for which she owns, or to which she may become entitled in any of the ways in which they may occur. Weatherhead *v.* Baskerville, 11 How. 329, 359, 13 L. Ed. 717.

Except in cases where the wife is entitled to act as feme sole, she cannot sue at law, unless it be jointly with her husband, for she is deemed to be under the protection of her husband, and a suit respecting her rights must be with the assent and co-operation of her husband. Barber *v.* Barber, 21 How. 582, 589, 16 L. Ed. 226.

If a married women brings an action in her own name, without joining her husband, the proceeding is not void, although the defect may be pleaded in bar, or set up as a defense on the trial. Holdane *v.* Sumner, 15 Wall. 609, 21 L. Ed. 254.

Husband as necessary party on appeal.—See the title APPEAL AND ERROR, vol. 2, p. 71.

94. Suits by married women under statutes.—Sykes *v.* Chadwick, 18 Wall. 141, 21 L. Ed. 824; Texas, etc., R. Co. *v.* Humble, 181 U. S. 57, 45 L. Ed. 747.

Action for negligent injuries to wife.—In Arkansas, a married woman may sue alone for damages for personal injuries by negligence. Texas, etc., R. Co. *v.* Humble, 181 U. S. 57, 45 L. Ed. 747.

As to whether the Arkansas statute governs in suit by married women injured there, but domiciled in another state, see the title CONFLICT OF LAWS, vol. 3, p. 1079, note 49.

Action against joint obligor of husband.—In the District of Columbia, a married woman may sue the joint obligor of her husband at law on an instrument given for the recovery of her dower right in lands and given for her separate use. Sykes *v.* Chadwick, 18 Wall. 141, 21 L. Ed. 824.

In Arkansas where a married woman is a party, her husband must be joined with her, except in the following cases: "First. She may be sued alone upon contracts made by her in respect to her sole and separate property, or in respect to any trade or business carried on by her under any statute of this state. Second. She may maintain an action in her own name for or on account of her sole or separate estate or property, or for damages against any person or body corporate for any injury to her person, character or property. Third. Where the action is between herself and her husband and she may sue and be sued alone." Texas, etc., R. Co. *v.* Humble, 181 U. S. 57, 63, 45 L. Ed. 747.

95. Suits as to separate estate.—See the title SEPARATE ESTATE OF MARRIED WOMEN.

96. See the preceding section.

97. Action for injury to wife's inheritance.—Bank *v.* Banks, 101 U. S. 240, 243, 25 L. Ed. 850.

98. Declarations in actions for criminal conversation.—Tinker *v.* Colwell, 193 U. S. 473, 48 L. Ed. 754, quoting Chitty Plead., vol. 1, 150, note h.

when the right of entry is by ouster of the title of the wife, the demise may be laid in the name of the husband, or in the names of the husband and wife.[99]

B. Actions against Husband and Wife or Both—1. PARTIES—a. *In General.*—At common law, husband and wife during coverture are regarded as one person in most respects, from which it follows as a general rule that the wife cannot be sued without joining her husband.[1]

b. *Action to Foreclose Mortgage on Wife's Realty.*—In Florida, in an action to foreclose a mortgage on the wife's realty, the husband is a necessary party.[2]

c. *Recovery of Land from Husband and Wife.*—In Oregon, where a married woman is in possession of land with her husband, she may be joined with her husband in a suit brought for its recovery by the true owner thereof.[3]

d. *Divesting Wife's Title in Trust Realty.*—Where the object is to divest a feme covert of an interest in real estate, the title of which is in a trustee for her use, the trust being an active one, it is error to decree against her without making the trustee a party to the suit.[4]

2. JUDGMENT.—In the absence of statute, a married woman cannot be subjected on her contract to a personal judgment,[5] and statutes providing for separate estate do not permit the recovery of a personal judgment but only authorize a judgment against the property itself.[6]

C. Actions or Suits between Husband and Wife—1. ACTIONS AT LAW.—An action at law cannot be maintained between husband and wife.[7]

2. SUITS IN EQUITY.—It is well settled, however, that the husband may sue

99. **Declaration in ejectment by husband and wife.**—Woodward *v.* Brown, 13 Pet. 1, 10 L. Ed. 31.

1. Bank *v.* Banks, 101 U. S. 240, 243, 25 L. Ed. 850.

2. **Action to foreclose mortgage on wife's realty.**—Anderson *v.* Watt, 138 U. S. 694, 34 L. Ed. 1078.

If the husband is not named in the bill, he may appear at the hearing, with the consent of all the parties. Anderson *v.* Watt, 138 U. S. 694, 34 L. Ed. 1078 (where it was held that objection for want of consent could not be taken).

3. **Action to recover land held by husband and wife.**—Barrell *v.* Tilton, 119 U. S. 637, 642, 30 L. Ed. 511.

4. **Action to divest wife's title in real estate held in trust.**—O'Hara *v.* MacConnell, 93 U. S. 150, 23 L. Ed. 840. See, generally, the title TRUSTS AND TRUSTEES.

5. **Personal judgment.**—Bank *v.* Partee, 99 U. S. 325, 330, 25 L. Ed. 390; Clark *v.* Beecher, 154 U. S., appx., 631, 24 L. Ed. 705. See, generally, the title JUDGMENTS AND DECREES.

Suit to set aside conveyance from husband to wife.—In an action to set aside a conveyance from a bankrupt to his wife upon the ground that it was in fraud of creditors a personal decree for rents, issues and profits, and use and occupation of the premises, is erroneous. Clark *v.* Beecher, 154 U. S., appx., 631, 24 L. Ed. 705; Phipps *v.* Sedgwick, 95 U. S. 3, 24 L. Ed. 591; Trust Co. *v.* Sedgwick, 97 U. S. 304, 24 L. Ed. 954; Huntington *v.* Saunders, 120 U. S. 78, 30 L. Ed. 580. See the title BANKRUPTCY, vol. 2, p. 939.

"While the books of reports are full of cases in which real or personal property conveyed to the wife in fraud of the husband's creditors has been pursued and subjected to the payment of his debts after it had been identified in her hands, or in the hand of voluntary grantees or purchasers with notice, we are not aware of any well-considered case of high authority where the pursuit of the property has been abandoned, and a judgment in personam for its value taken against the wife." Phipps *v.* Sedgwick, 95 U. S. 3, 9, 24 L. Ed. 591.

Judgment for damages and costs in Texas.—In Texas, where a married woman is joined with her husband as defendant in a suit to try title to real estate held by them as community property, a personal judgment for damages for use and occupation, under the statute, and for costs, cannot be rendered against her. Cooke *v.* Avery, 147 U. S. 375, 396, 37 L. Ed. 209.

Decree against infant feme covert.—A decree in chancery will be reversed if rendered against a woman who is shown by the bill to be both a minor and feme covert, where no appearance by or for her has been entered, and no guardian ad litem appointed. O'Hara *v.* MacConnell, 93 U. S. 150, 23 L. Ed. 840.

6. **Effect of separate estate statutes.**—Bank *v.* Partee, 99 U. S. 325, 25 L. Ed. 390. See the title SEPARATE ESTATE OF MARRIED WOMEN.

7. **Action at law.**—Barber *v.* Barber, 21 How. 582, 590, 16 L. Ed. 226.

If a married woman claims some right in opposition to the rights claimed by the husband, and it becomes proper to vindicate her rights against her husband, she cannot maintain a suit against him at law. Barber *v.* Barber, 21 How. 582, 590, 16 L. Ed. 226.

his wife, or the wife the husband, in equity.[8] Where a wife sues her husband in equity it must be done under the protection of some other person who acts as her next friend, and the bill is accordingly exhibited in her name by such next friend.[9]

HYPOTHECARY ACTION.—See note 1.

HYPOTHECATION.—See the title BOTTOMRY AND RESPONDENTIA, vol. 3, p. 451.

HYPOTHETICAL QUESTIONS.—See the titles APPEAL AND ERROR, vol. 2, p. 31; EXPERT AND OPINION EVIDENCE, vol. 6. p. 206.

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IDENTICAL.—See the title PATENTS.

IDENTIFICATION.—See the title BOUNDARIES, vol. 3, pp. 465, 467.

8. **Suit in equity.**—Barber *v.* Barber, 21 How. 582, 590, 16 L. Ed. 226; Bein *v.* Heath, 6 How. 228, 12 L. Ed. 416; Adams *v.* Adams, 21 Wall. 185, 22 L. Ed. 504.

9. **Suit to be by wife's next friend.**—Barber *v.* Barber, 21 How. 582, 590, 16 L. Ed. 226; Bein *v.* Heath, 6 How. 228, 12 L. Ed. 416.

Actions by wife for alimony.—See the title DIVORCE AND ALIMONY, vol. 5, p. 412.

1. **Hypothecary action.**—As defined by the Louisiana code of practice: "An hypothecary action is a real action which the creditor brings against the property which has been hypothecated to him by his debtor, in order to have it seized and sold for the payment of his debt." Lovell *v.* Cragin, 136 U. S. 130, 142, 34 L. Ed. 372.

IDENTITY.

CROSS REFERENCES.

See the titles CRIMINAL LAW, vol. 5, p. 43; HANDWRITING, ante, p. 674; HEARSAY EVIDENCE, ante, p. 686; PAROL EVIDENCE; PHOTOGRAPHS; RES ADJUDICATA.

As to whether a question of identity raises a federal question so as to give the United States supreme court jurisdiction over the state courts, see the title APPEAL AND ERROR, vol. 1, p. 683. As to identity of design or invention in suits for the infringement of patents, see the title PATENTS. As to review on habeas corpus of decision of United States commissioner upon question of identity, see the title HABEAS CORPUS, ante, p. 610.

Identity of names is prima facie identity of persons where there is no proof to rebut such presumption.[1] But where the names are different, as for example John Hardy and Thomas M. Hardy, the proof must be clear and convincing to show that they are one and the same person.[2]

Comparison of handwritings is allowable to prove identity only where the standard of comparison is shown to be genuine. "It is a different proposition when the identity of a man is to be established by proving that a paper whose origin is disputed looks like one which he is proved to have signed."[3]

Weight and Sufficiency of Evidence.[4]—In any case, slight proof of identity is sufficient.[5] Accordingly it has been held in a prosecution against a vessel for violation of a law of the United States, that it is not necessary to adduce positive testimony of the identity of the vessel. It is sufficient if there be enough to satisfy the judicial mind.[6]

IDIOTS.—See the title INSANITY.

IGNORANCE.—As defense to crime, see the title CRIMINAL LAW, vol. 5, p. 67.

1. **Identity of names is evidence of identity of persons.**—Stebbins *v.* Duncan, 108 U. S. 32, 27 L. Ed. 641.

In tracing titles identity of names is prima facie evidence of identity of persons. Stebbins *v.* Duncan, 108 U. S. 32, 47, 27 L. Ed. 641.

2. **Rule where names are not indentical.**—Where it is claimed that persons of different names (John Hardy and Thomas M. Hardy) are identical, but the evidence shows that no reason existed for a change of name, such as the fact that he had committed crime and wished to conceal his departure, and the other evidence in the case is utterly inconsistent with the contention that the two parties are one and the same person, the case must fail for want of proof. "That a man from any cause, desirous of concealing himself from his relatives, should retain his family name and seek to effect that object by changing his Christian name only, we think is hardly credible." Hardy *v.* Harbin, 154 U. S., appx., 598, 601, 22 L. Ed. 378.

3. **Comparison of handwriting admissible to show identity.**—Hardy *v.* Harbin, 154 U. S., appx., 598, 22 L. Ed. 378. See, generally, the title HANDWRITING, ante, p. 674.

4. See the title EVIDENCE, vol. 5, p. 1004.

5. **Sufficiency of evidence to prove identity.**—Stebbins *v.* Duncan, 108 U. S. 32, 47, 27 L. Ed. 641. Compare Hardy *v.* Harbin, 154 U. S., appx., 598, 601, 22 L. Ed. 378.

Effect of signature by mark and in full.—The fact that the grantor in a deed in one case made his signature by a mark and in another case signed his name, is of little weight against the identity of the grantor in the two deeds, both being properly acknowledged. Mackay *v.* Easton, 19 Wall. 619, 22 L. Ed. 211.

6. **Prosecution for violation of nonintercourse act.**—The Jane, 7 Cranch 363, 3 L. Ed. 372. See the title EMBARGO AND NONINTERCOURSE LAWS, vol. 5, p. 732.

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I. Definition and General Consideration.

A. Definition.—The general term "illegal" means contrary to law or unlawful,[1] and when used in connection with contracts, it applies to all stipula-

1. Definition.—Bouvier's Law Dict., vol. 1, p. 979.

tions to overturn, or in evasion of, what the law has established; all promises interfering with the workings of the machinery of the government in any of its departments, or obstructing its officers in their official acts, or corrupting them; all detrimental to the public order and public good, in such manner and degree as the decisions of the courts have defined; all made to promote what a statute has declared to be wrong.[2]

B. Effect of Illegality.—Contracts clearly illegal and void, give no title. Such has been the ruling of the federal supreme court in an unbroken series of adjudications.[3]

C. Effect of Motive in Inducing Contract.—The motives which induce one to make a contract, whether justifiable or censurable, can have no influence on its validity.[4]

D. Effect of Open Avowal of Unlawful Purpose.—If a contract is made with an unlawful purpose, an open avowal of such does not make it the less unlawful.[5]

E. Construction of Contracts.—Where a contract is fairly open to two constructions, by one of which it would be lawful and the other unlawful, the former must be adopted,[6] as it is not to be presumed the parties intended to make a contract which the law does not allow.[7]

F. Validity Governed by Laws Existing at Time When Made.—It is the law in force at the time the transaction is consummated and made effectual, that must be looked to as determining its validity and effect.[8]

G. Meaning of Term "Void."—All that can be meant by the term "void," according to any legal usage, is that a court of law will not lend its aid to enforce the performance of a contract which appears to have been entered into by both the contracting parties for the express purpose of carrying into effect that which is prohibited by the law of the land.[9]

II. Public Policy and Contracts Contrary to.

A. Public Policy—1. MEANING OF TERM.—It is impossible to define with accuracy what is meant by that public policy for an interference and violation of which a contract may be declared invalid. It may be understood in general that contracts which are detrimental to the interests of the public as understood at

2. Gibbs *v.* Consolidated Gas Co., 130 U. S. 396, 410, 32 L. Ed. 979. Bishop on Contracts, § 549; Woodstock Iron Co. *v.* Richmond, etc., Extension Co., 129 U. S. 643, 32 L. Ed. 819; Trist *v.* Child, 21 Wall. 441, 22 L. Ed. 623; Irwin *v.* Williar, 110 U. S. 499, 28 L. Ed. 225.

3. Effect of illegality.—Coppell *v.* Hall, 7 Wall. 542, 548, 19 L. Ed. 244; United States *v.* Lane, 8 Wall. 185, 19 L. Ed. 445; United States *v.* Grossmayer, 9 Wall. 72, 19 L. Ed. 627; Montgomery *v.* United States, 15 Wall. 395, 21 L. Ed. 97; United States *v.* Lapene, 17 Wall. 601, 602, 21 L. Ed. 693; Mitchell *v.* United States, 21 Wall. 350, 22 L. Ed. 584; Desmare *v.* United States, 93 U. S. 605, 612, 23 L. Ed. 959. See post, "General Rule," II, B, 1; "Enforcement of Illegal Contracts," VII.

4. Effect of motive in inducing contract.—McDonald *v.* Smalley, 1 Pet. 620, 624, 7 L. Ed. 287.

5. Effect of open avowal of unlawful purpose.—McGourkey *v.* Toledo, etc., R. Co., 146 U. S. 536, 567, 36 L. Ed. 1079.

6. Construction of contracts.—United States *v.* Central Pac. R. Co., 118 U. S. 235, 236, 30 L. Ed. 173, affirming Hobbs *v.* McLean, 117 U. S. 567, 29 L. Ed. 940. See the titles CONTRACTS, vol. 4, p. 570; INTERPRETATION AND CONSTRUCTION.

"A contract is not to be assumed to contemplate unlawful results unless a fair construction requires it upon the established facts." Cincinnati, etc., Packet Co. *v.* Bay, 200 U. S. 179, 184, 50 L. Ed. 428.

7. Bang *v.* Adams Express Co., 93 U. S. 174, 181, 23 L. Ed. 872. See, generally, the title PRESUMPTIONS AND BURDEN OF PROOF.

"Where the validity of a contract is attacked on the ground of its illegal purpose, that purpose must clearly appear, and it will not be inferred simply because the performance of the contract might possibly result in a remote, incidental and unintentional aid to an illegal transaction." Houston, etc., Central R. Co. *v.* Texas, 177 U. S. 66, 95, 44 L. Ed. 673.

8. Validity governed by laws existing at time when made.—Memphis, etc., R. Co. *v.* Railroad Comm'rs, 112 U. S. 609, 623, 28 L. Ed. 837.

9. Meaning of term "void."—Ewell *v.* Daggs, 108 U. S. 143, 149, 27 L. Ed. 682.

the time fall within the ban.[10] The standard of such policy is not absolutely invariable or fixed, since contracts which at one stage of our civilization may seem to conflict with public interests, at a more advanced stage are treated as legal and binding.[11] But the principle of public policy is this—ex dolo malo non oritur actio. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.[12]

2. WHERE TO BE FOUND.—"The public policy of the government is to be found in its statutes, and when they have not directly spoken, then in the decisions of the courts and the constant practice of the government officials; but when lawmaking power speaks upon a particular subject, over which it has constitutional power to legislate, public policy in such a case is what the statute enacts."[13]

B. Contracts Contrary to Public Policy—1. GENERAL RULE.—Where a contract is made that is contrary to public policy, it is void.[14]

10. Meaning of term "public policy."—Pope Mfg. Co. *v.* Gormully, 144 U. S. 224, 233, 36 L. Ed. 414.

"The authorities all agree that a contract is not void as against public policy, unless it is injurious to the interests of the public, or contravenes some established interest of society." Hartford Fire Ins. Co. *v.* Chicago, etc., R. Co., 175 U. S. 91, 106, 44 L. Ed. 84.

The right of private contract is no small part of the liberty of the citizen, and the usual and most important function of courts of justice is rather to maintain and enforce contracts, then to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appear that they contravene public right or the public welfare. Baltimore, etc., Railway *v.* Voigt, 176 U. S. 498, 505, 44 L. Ed. 560.

11. Pope Mfg. Co. *v.* Gormully, 144 U. S. 224, 233, 36 L. Ed. 414.

12. Ewell *v.* Daggs, 108 U. S. 143, 149, 27 L. Ed. 682. See post, "Enforcement of Illegal Contracts," VII.

13. Where to be found.—United States *v.* Frans-Missouri Freight Ass'n, 166 U. S. 290, 340, 41 L. Ed. 1007.

14. General rule.—Marshall *v.* Baltimore, etc., R. Co., 16 How. 314, 14 L. Ed. 953; Irwin *v.* Williar, 110 U. S. 499, 28 L. Ed. 225; Hazelton *v.* Sheckells, 202 U. S. 71, 50 L. Ed. 939; Woodstock Iron Co. *v.* Richmond, etc., Extension Co., 129 U. S. 643, 32 L. Ed. 819; West *v.* Camden, 135 U. S. 507, 34 L. Ed. 254; Baltimore, etc., Railway *v.* Voigt, 176 U. S. 498, 44 L. Ed. 560; Pope Mfg. Co. *v.* Gormully, 144 U. S. 224, 36 L. Ed. 414; Tool Co. *v.* Norris, 2 Wall. 45, 17 L. Ed. 868; Doyle *v.* Continental Ins. Co., 94 U. S. 535, 24 L. Ed. 148; Trist *v.* Child, 21 Wall. 441, 22 L. Ed. 623; McMullen *v.* Hoffman, 174 U. S. 639, 655, 43 L. Ed. 1117; Teal *v* Walker, 111 U. S. 242, 252, 28 L. Ed. 415; Oscanyan *v.* Arms Co., 103 U. S. 261, 274, 26 L. Ed. 539; Meguire *v.* Corwine, 101 U. S. 108, 111, 25 L. Ed. 899. See ante, "Effect of Illegality," I, B.

A contract may be illegal and void because it is contrary to or inconsistent with sound policy. Trist *v.* Child, 21 Wall. 441, 448, 22 L. Ed. 623.

"The law will not enforce contracts and agreements that are against the public good, and, therefore, are forbidden by public policy." Ritter *v.* Mutual Life Ins. Co., 169 U. S. 139, 158, 42 L. Ed. 693.

It is a rule of the common law of universal application, that where a contract express or implied is as to the consideration or the thing to be done, contrary to sound policy and good morals, no alleged right founded upon it can be enforced in a court of justice. Trist *v.* Child, 21 Wall. 441, 448, 22 L. Ed. 623.

Contracts permissible by other countries are not enforceable in our courts if they contravene our policy. Oscanyan *v.* Arms Co., 103 U. S. 261, 277, 26 L. Ed 539.

In federal courts.—No contract can be enforced in the courts of the United States no matter where made or where to be executed, if in contravention of the government. Kennett *v.* Chambers, 14 How. 38, 14 L. Ed. 316.

Illustrations.—In Trist *v.* Child, 21 Wall. 441, 449, 22 L. Ed. 623, the court said: "Within the condemned category are: An agreement—to pay for supporting for election a candidate for sheriff; to pay for resigning a public position to make room for another; to pay for not bidding at a sheriff's sale of real property; to pay for not bidding for articles to be sold by the government at auction; to pay for not bidding for a contract to carry the mail on a specified route; to pay a person for his aid and influence in procuring an office, and for not being a candidate himself; to pay for procuring a contract from the government; to pay for procuring signatures to a petition to the governor for a pardon; to sell land to a particular person when the surrogate's order to sell should have been obtained; to pay for suppressing evidence and compounding a felony; to convey and assign a part of what should come from an ancestor by descent, devise, or distribution; to pay for promoting a marriage; to influence the

2. Immoral Contracts.—The court will not lend its aid to enforce a contract to do an act that is inconsistent with sound morals.[15] The whole doctrine of avoiding such contract is founded on public policy.[16]

3. Contracts in Furtherance of Crime.—Public policy forbids the insertion in a contract of a condition which would tend to induce crime, and as it forbids the introduction of such stipulation it also forbids the enforcement of a contract under circumstances which cannot be lawfully stipulated for.[17] For example: it is contrary to public policy to give the aid of the courts to a vendor who knew that his goods were purchased, or to a lender who knew that his money was borrowed, for the purpose of being employed in the commission of a criminal act, injurious to society or to any of its members.[18]

4. Contract Tending to Lessen Competition and Restrain Bidding—a. *Bidding for Public Contract.*—Where bidders for a public contract secretly agree to put in bids known to each; to conceal the fact of their combination; to put in fictitious bids without expectation or purpose of having them taken; and that if the contract is procured they shall perform the work as partners and share expenses and divide profits, the agreement is contrary to public policy and is illegal.[19]

b. *Judicial Sales.*—The rules about judicial sales which make void as against public policy agreements that persons competent to bid at them will not bid, forbid such agreements alone as are meant to prevent competition and induce a sacrifice of the property sold. An agreement to bid, the object of it being fair, is not void.[20]

disposition of property by will in a particular way."

15. Immoral contracts.—Marshall *v.* Baltimore, etc., R. Co., 16 How. 314, 14 L. Ed. 953; Trist *v.* Child, 21 Wall. 441, 446, 22 L. Ed. 623.

The court will not listen to claims founded upon services rendered in violation of common decency or public morality. Oscanyan *v.* Arms Co., 103 U. S. 261, 267, 26 L. Ed. 539.

Where a man married a woman by whom he had two children, and she subsequently found he had an undivorced wife living, and he assigned her a mortgage, the court held the assignment valid, saying: "We cannot doubt that in executing and delivering it to her he did a meritorious act, honorable and just, as the only atonement he could make for the deception he had practised upon her, and as placing in her hands the means of supporting the children of whom he was the father. It was not the case of a contract for future illicit intercourse of the class which the authorities hold to be against public policy, but an appropriate means of providing for the support of a woman whom he had married while he had a wife living, and of the children resulting from that marriage." Gay *v.* Parpart, 106 U. S. 679, 686, 27 L. Ed. 256.

Contracts permissible by other countries are not enforceable in our courts if they contravene our morality. Oscanyan *v.* Arms Co., 103 U. S. 261, 277, 26 L. Ed. 539.

16. Doctrine based on public policy.—Hanauer *v.* Doane, 12 Wall. 342, 348, 20 L. Ed. 439.

17. Contracts in furtherance of crime.—Burt *v.* Union Central Life Ins. Co., 187 U. S. 362, 365, 47 L. Ed. 216. See post, "Compounding Felonies," II, B, 8, c.

"History furnishes instances of robbery, arson, and other crimes committed for hire. If, after receiving a pardon, or suffering the punishment imposed upon him, the culprit should sue the instigator of the crime for the promised reward—if we may suppose that audacity could go so far—the court would not hesitate a moment in dismissing his case and sending him from its presence, whatever might be the character of the defense." Oscanyan *v.* Arms Co., 103 U. S. 261, 267, 26 L. Ed. 539.

18. Hanauer *v.* Doane, 12 Wall. 342, 20 L. Ed. 439.

Contrary cases.—"There are cases to the contrary; but they are either cases where the unlawful act contemplated to be done was merely malum prohibitum, or of inferior criminality; or cases in which the unlawful act was already committed, and the loan was an independent contract, made, not to enable the borrower to commit the act, but to pay obligations which he had already incurred in committing it. Of the latter class was the case of Armstrong *v.* Toler, 11 Wheat. 258, 6 L. Ed. 468." Hanauer *v.* Doane, 12 Wall. 342, 348, 20 L. Ed. 439.

19. Bidding for public contract.—McMullen *v.* Hoffman, 174 U. S. 639, 653, 43 L. Ed. 1117. See, generally, the titles MUNICIPAL CORPORATIONS; STATES; UNITED STATES.

20. Judicial sales.—Wicker *v.* Hoppock, 6 Wall. 94, 18 L. Ed. 752. See the title JUDICIAL SALES.

"In the case before us the agreement was that Wicker should bid. There was no stipulation that Hoppock should not.

c. *Auctions.*—This subject has been fully treated under another title.[21]

5. CONTRACTS OF INDEMNITY.—The law will not enforce a promise to indemnify a surety for doing an act planned and intended to enable his principal to commit a gross breach of trust. Such a transaction is against the policy of the law and plainly illegal.[22]

6. CONTRACTS IN DEROGATION OF MARRIAGE RELATION—a. *Deed of Separation.*—See the title HUSBAND AND WIFE, ante, p. 716.

b. *Marriage Brokerage Contracts.*—"Persons entering into the marriage relation should be free from extraneous or deceptive influences; hence the law avoids all contracts to pay money for procuring a marriage."[23]

7. CONTRACTS STIPULATING FOR EXEMPTION FROM LIABILITY FOR NEGLIGENCE.—**By Carriers.**—This subject is fully treated under another title.[24]

8. CONTRACT IMPEDING ADMINISTRATION OF JUSTICE—a. *Ousting Jurisdiction of Courts.*—See the title JURISDICTION.

b. *Agreements Not to Defend Action.*—An agreement that a party will not set up a defense to any action which another might bring against him, is invalid.[25]

There was nothing which forbade Hoppock to bid, if he thought proper to do so, and nothing which had any tendency to prevent bidding by others. The object of the contract obviously was to be secure—not to prevent bidding. The benefit and importance of the arrangement to the interests of the judgment debtors is made strikingly apparent when the subject is viewed in the light of the consequences which followed the breach of the agreement. Instead of the property selling for the amount of the judgments, Hoppock was the only bidder, and the property sold was struck off to him for a nominal sum." Wicker *v.* Hoppock, 6 Wall. 94, 98, 18 L. Ed. 752.

21. **Auctions.**—See the title AUCTIONS AND AUCTIONEERS, vol. 2, pp. 746, 747.

22. **Contracts of indemnity.**—Forsyth *v.* Woods, 11 Wall. 484, 486, 20 L. Ed. 207.

The acceptance of letters of administration being a trust—granted because of the confidence reposed in the grantee—a loss sustained by a surety in the administration bond, who has entered into the suretyship under a representation from a firm of which the administrator was a member, that they intended to take into the possession of the partnership all the assets of the intestate, to make the administration a matter of partnership business, and to share as partners the gains and losses resulting from the administration, so that in signing the bond he would become the surety of the firm and not of the individual partner, cannot be recovered by the surety from the firm. Such a transaction is against the policy of the law. Forsyth *v.* Woods, 11 Wall. 484, 20 L. Ed. 207.

23. **Marriage brokerage contracts.**—Marshall *v.* Baltimore, etc., R. Co., 16 How. 314, 333, 14 L. Ed. 953

24 See the title CARRIERS, vol. 3, p. 601.

25. **Agreement not to defend action.**—"A contract not to set up any defense whatever to any suit that may be begun upon fifty different causes of action is in violation of public policy." Pope Mfg. Co. *v.* Gormully, 144 U. S. 224, 236, 36 L. Ed. 414.

A contract between a licensee and the owner of a patent, is contrary to public policy, where the licensee agrees not to dispute or contest the validity of such patents or the owner's title thereto, and that if, after the termination of his license, he shall continue to make, sell or use any machine or part thereof containing such patented inventions, the plaintiff shall have the right to treat him as an infringer, and to sue out an injunction against him without notice. Pope Mfg. Co. *v.* Gormully, 144 U. S. 224, 36 L. Ed. 414.

"In certain cases a man may doubtless agree that he will interpose no defense to a specified claim, and that another may take judgment against him without notice. This is a matter of everyday occurrence in connection with what are termed judgment notes. But if one should agree for a valuable consideration that he would set up no defense to any action which another might bring against him and such other person might enter up judgment against him in any such action without notice, we think that no court would hesitate to pronounce such an agreement invalid. * * * It is as important to the public that competition should not be repressed by worthless patents, as that the patentee of a really valuable invention should be protected in his monopoly; and it is a serious question whether public policy permits a man to barter away beforehand his right to defend unjust actions or classes of actions, though, in an individual case, he may doubtless assent that a judgment be rendered against him, even without notice." Pope Mfg. Co. *v.* Gormully, 144 U. S. 224, 234, 36 L. Ed. 414.

c. *Compounding Felonies.*—"A contract, the consideration of which is the compounding of felony, is admitted to be void."[26]

9. Gambling Contracts.—See the title Gambling Contracts, ante, p. 537.

10. Contracts Constituting Champerty and Maintenance.—See the title Champerty and Maintenance, vol. 3, p. 668.

11. Contracts in Restraint of Trade.—See the title Restraint of Trade.

12. Usurious Contracts.—See the title Usury.

13. Ultra Vires Contracts.—See the titles Corporations, vol. 4, p. 621; Municipal Corporations; Railroads.

14. Contracts Made with the Public Enemy.—See the title War.

15. Slave Contracts.—See the title Slavery and Involuntary Servitude.

16. Contracts Detrimental to the Public Service—a. *Corruption of Public Officers*—(1) *In General.*—The law is general that agreements upon pecuniary considerations, or the promise of them, to influence the conduct of officers charged with duties affecting the public interest, are against the true policy of the state, which is to secure fidelity in the discharge of all such duties. Agreements of that character introduce mercenary considerations to control the conduct of parties, instead of considerations arising from the nature of their duties and the most efficient way of discharging them. They are, therefore, necessarily corrupt in their tendencies.[27]

(2) *Contracts to Procure Legislation—Lobbying Contracts*—(aa) *In General.*—Legislation should be prompted solely from considerations of the public good, and the best means of advancing it;[28] and in furtherance thereof, the legislators

Equity will not, in an action where all are liable (as ex. gr. an action of trespass against tort feasors), enforce a secret agreement made by the plaintiff with certain of the defendants, that if they will desist from resistance to his suit, he will, if he recovers judgment, not levy execution on their property, litigants being bound to act fairly to each other, and such an agreement operating as a fraud. Selz *v.* Unna, 6 Wall. 327, 18 L. Ed. 799.

26. Compounding felonies.—Brooks *v.* Marbury, 11 Wheat. 78, 87, 6 L. Ed. 423.

If a conveyance preferring creditors has been induced by a consideration for the compounding of a felony, or the promise of it, or had depended on it, the fault that it was made for the payment of debts justly due would not have secured it from the effect of this contaminating ingredient. Brooks *v.* Marbury, 11 Wheat. 78, 87, 6 L. Ed. 423.

Property conveyed pursuant to a contract made in consideration of the compounding of a crime, and the stifling of a criminal prosecution, and therefore clearly illegal, cannot be recovered back at law, nor the conveyance set aside in equity, unless obtained by such fraud or oppression on the part of the grantee that the conveyance cannot be considered the voluntary act of the grantor." St. Louis, etc., R. Co. *v.* Terre Haute, etc., R. Co., 145 U. S. 393, 407, 36 L. Ed. 738.

27. In general.—Woodstock Iron Co. *v.* Richmond, etc., Extension Co., 129 U. S. 643, 662, 32 L. Ed. 819.

"It is an undoubted principle of the common law that it will not lend its aid to enforce a contract to do an act that is illegal; or which is inconsistent with sound morals or public policy; or which tends to corrupt or contaminate, by improper influences, the integrity of our social or political institutions." Marshall *v.* Baltimore, etc., R. Co., 16 How. 314, 333, 14 L. Ed. 953.

"To enforce a contract which began with the corruption of a public officer, and progressed in the practice of known and willful deception in its execution, can never be consummated or sanctioned by any court." Bartle *v.* Coleman, 4 Pet. 184, 188, 7 L. Ed. 825.

28. Lobbying contracts in general.—Tool Co. *v.* Norris, 2 Wall. 45, 54, 17 L. Ed. 868.

"The foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the foundation is undermined, the structure is weakened. When it is destroyed, the fabric must fall. Such is the voice of universal history. The theory of our government is, that all public stations are trusts, and that those clothed with them are to be animated in the discharge of their duties solely by considerations of right, justice, and the public good. They are never to descend to a lower plane. But there is a correlative duty resting upon the citizen. In his intercourse with those in authority, whether executive or legislative, touching the performance of their functions, he is bound to exhibit truth, frankness, and integrity. Any departure from the line of rectitude in such cases is not only bad in morals, but involves a public wrong. No people can have any higher public interest, except the preservation of their liberties, than integrity in the administration of their government in all its de-

should act with a single eye to the true interest of the whole people;[29] therefore, all contracts for a contingent[30] compensation for obtaining legislation, or to use personal[31] or any secret[32] or sinister influence on legislators, are void by the policy of the law.[33] But such contracts should be distinguished from agree-

partments." Trist *v.* Child, 21 Wall. 441, 450, 22 L. Ed. 623.

29. Marshall *v.* Baltimore, etc., R. Co., 16 How. 314, 334, 14 L. Ed. 953.

"Legislators should act from high considerations of public duty. Public policy and sound morality do therefore imperatively require that courts should put the stamp of their disapprobation on every act, and pronounce void every contract the ultimate or probable tendency of which would be to sully the purity or mislead the judgments of those to whom the high trust of legislation is confided." Marshall *v.* Baltimore, etc., R. Co., 16 How. 314, 333, 14 L. Ed. 953.

30. "Agreements for compensation contingent upon success, suggest the use of sinister and corrupt means for the accomplishment of the end desired. The law meets the suggestion of evil, and strikes down the contract from its inception." Tool Co. *v.* Norris, 2 Wall. 45, 54, 17 L. Ed. 868.

"Bribes, in the shape of high contingent compensation, must necessarily lead to the use of improper means and the exercise of undue influence. Their necessary consequence is the demoralization of the agent who covenants for them; he is soon brought to believe that any means which will produce so beneficial a result to himself are 'proper means;' and that a share of these profits may have the same effect of quickening the perceptions and warming the zeal of influential or 'careless' members in favor of his bill. The use of such means and such agents will have the effect to subject the state governments to the combined capital of wealthy corporations, and produce universal corruption, commencing with the representative ending with the elector." Marshall *v.* Baltimore, etc., R. Co., 16 How. 314, 334, 14 L. Ed. 953.

A contract is void, as against public policy, and can have no standing in court by which one party stipulates to employ a number of secret agents in order to obtain the passage of a particular law by the legislature of a state, and the other party promises to pay a large sum of money in case the law should pass. Marshall *v.* Baltimore, etc., R. Co., 16 How. 314, 14 L. Ed. 953.

31. Marshall *v.* Baltimore, etc., R. Co., 16 How. 314, 335, 14 L. Ed. 953.

"In Trist *v.* Child, reported in 21st of Wallace (21 Wall. 441, 22 L. Ed. 623), the distinction is drawn between the use of personal influence to secure legislation, and legitimate professional services in making the legislature acquainted with the merits of the measures desired. Whilst the former is condemned, the latter are, within certain limits, regarded as appropriate subjects for compensation." Oscanyan *v.* Arms Co., 103 U. S. 261, 275, 26 L. Ed. 539.

"All persons whose interests may in any way be affected by any public or private act of the legislature, have an undoubted right to urge their claims and arguments, either in person or by counsel professing to act for them, before legislative committees, as well as in courts of justice. But where persons act as counsel or agents, or in any representative capacity, it is due to those before whom they plead or solicit, that they should honestly appear in their characters, so that their arguments and representations, openly and candidly made, may receive their just weight and consideration. A hired advocate or agent, assuming to act in a different character, is practicing deceit on the legislature. Advice or information flowing from the unbiased judgment of disinterested persons, will naturally be received with more confidence and less scrupulously examined than where the recommendations are known to be the result of pecuniary interest, or the arguments prompted and pressed by hope of a large contingent reward, and the agent 'stimulated to active partisanship by the strong lure of high profit.' Any attempts to deceive persons intrusted with high functions of legislation, by secret combinations, or to create or bring into operation undue influence of any kind, have all the injurious effects of a direct fraud on the public." Marshall *v.* Baltimore, etc., R. Co., 16 How. 314, 334, 14 L. Ed. 953.

32. Marshall *v.* Baltimore, etc., R. Co., 16 How. 314, 335, 14 L. Ed. 953.

"Secrecy, as to the character under which the agent or solicitor acts, tends to deception, and is immoral and fraudulent; and where the agent contracts to use secret influences, or voluntarily, without contract with his principal, uses such means, he cannot have the assistance of a court to recover compensation." Marshall *v.* Baltimore, etc., R. Co., 16 How. 314, 14 L. Ed. 953.

"Speculators in legislation, public and private, a compact corps of venal solicitors, vending their secret influences, will infest the capital of the Union and of every state, till corruption shall become the normal condition of the body politic, and it will be said of us as of Rome—'omne Romæ Venale.'" Marshall *v.* Baltimore, etc., R. Co., 16 How. 314, 335, 14 L. Ed. 953.

33. Cases relating to agreements for compensation to procure legislation have

ments for services in presenting information on the subject for the consideration of the government.[34]

(bb) *Procuring Passage of Bill.*—A contract to procure by lobby service the passage of a bill providing for the payment of a claim is void.[35] But such a contract is to be distinguished from one for purely professional services, which is valid.[36]

(cc) *Procuring Contract from the Government.*—An agreement for compensation for procuring a contract from the government to furnish its supplies is against public policy, and cannot be enforced by the courts.[37]

b. *Sale of Offices.*—Public offices are trusts, held solely for the public good, and should be conferred from considerations of the ability, integrity, fidelity, and fitness for the position of the appointee. No other considerations can properly be regarded by the appointing power. Whatever introduces other elements to control this power, must necessarily lower the character of the appointments, to the great detriment of the public. Agreements for compensation to procure

been uniformly declared invalid. Tool Co. *v.* Norris, 2 Wall. 45, 54, 17 L. Ed. 868.

Where a partial consideration of a contract to convey land was services in procuring legislation upon a matter of public interest, in respect of which neither of the parties had any claim against the United States, the contract was void as against public policy. Hazelton *v.* Sheckells, 202 U. S. 71, 78, 50 L. Ed. 939.

A contract to sell land during a session of congress, part of the consideration being for services rendered both before and after the making of the contract, by the vendee in bringing the property to the attention of the committees of congress as a suitable and appropriate site for a hall of records, the vendee being under no obligation to take and pay for the land, is void because against public policy. Hazelton *v.* Sheckells, 202 U. S. 71, 78, 50 L. Ed. 939.

34. "In Tool Co. *v.* Norris, reported in the 2d of Wallace (2 Wall. 45, 17 L. Ed. 868), this court held that an agreement for compensation to procure a contract with the government to furnish it with supplies was against public policy and could not be enforced. That was a case where the compensation was made contingent upon success in procuring the contract, and, as we shall hereafter show, should be distinguished from agreements for services in presenting information on the subject for the consideration of the government." Oscanyan *v.* Arms Co., 103 U. S. 261, 273, 26 L. Ed. 539.

"It is legitimate to lay before the officers authorized to contract, all such information as may apprise them of the character and value of the articles offered, and enable them to act for the best interests of the country. And for such services compensation may be had as for similar services with private parties, either upon a quantum meruit, or, where a sale, is effected, by the ordinary brokerage commissioner. * * * But where, instead of placing before the officers of the government the information which should properly guide their judgments, personal influence is the means used to secure the sales, and is allowed to prevail, the public good is lost sight of, unnecessary expenditures are incurred, and, generally, defective supplies are obtained, producing inefficiency in the public service." Oscanyan *v.* Arms Co., 103 U. S. 261, 275, 26 L. Ed. 539.

35. Procuring passage of bill.—Trist *v.* Child, 21 Wall. 441, 448, 22 L. Ed. 623.

A contract to take charge of a claim before congress, and prosecute it as an agent and attorney for the claimant (the same amounting to a contract to procure by "lobby services"—that is to say, by personal solicitation by the agent, and others supposed to have personal influence in any way with members of congress—the passage of a bill providing for the payment of the claim), is void. Trist *v.* Child, 21 Wall. 441, 22 L. Ed. 623.

36. Trist *v.* Child, 21 Wall. 441, 450, 22 L. Ed. 623.

A contract to bring about the passage of a law by personal solicitation is distinguishable from one for purely professional services, within which category are included, drafting a petition which sets forth the claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitted them either orally or in writing to a committee or other proper authority, with other services of like character intended to reach only the understanding of the persons sought to be influenced. They rest on the same principle of ethics as professional services rendered in a court of justice, and are no more exceptionable. Trist *v.* Child, 21 Wall. 441, 22 L. Ed. 623.

37. Procuring contracts from the government.—Tool Co. *v.* Norris, 2 Wall. 45, 17 L. Ed. 868.

Personal influence to be exercised over an officer of government in the procurement of contracts, is not a vendible article in our system of laws and morals, and the courts of the United States will not lend their aid to the vendor to collect the price of the article. Oscanyan *v.*

these appointments tend directly and necessarily to introduce such elements. The law, therefore, from this tendency alone, adjudges these agreements inconsistent with sound morals and public policy.[38]

c. *Procuring Pardon.*—"The pardoning power, committed to the executive, should be exercised as free from any improper bias or influence as the trial of the convict before the court; consequently, the law will not enforce a contract to pay money for soliciting petitions or using influence to obtain a pardon."[39]

d. *Bribery.*—This subject is treated under its specific title.[40]

17. Corruption of Officers of Foreign Government.—"A contract to bribe or corruptly influence officers of a foreign government will not be enforced in the courts of this country—not from any consideration of the interests of that government or any regard for its policy, but from the inherent viciousness of the transaction, its repugnance to our morality, and the pernicious effect which its enforcement by our courts would have upon our people."[41]

18. Contracts of Life Insurance.—As to legality of provision for paying life insurance in case of suicide, see the title Insurance.

19. Corporate Contracts.—As to agreements disabling from performance of public duty, see the title Corporations, vol. 4, p. 736.

20. Contracts in Fraud of Pre-Emption Laws.—A contract between two persons, neither of them being settlers or housekeepers, that one of them shall enter land for the benefit of both under the pre-emption laws, is a combination to defraud the government, contrary to public policy, illegal, and void.[42]

Arms Co., 103 U. S. 261, 273, 26 L. Ed. 539.

And if there was no agreement to that effect, there can be no recovery upon the contract, if in fact the agent did conceal from the members of the legislature that he was an agent who was to receive compensation for his services in case of the passage of the law. Marshall *v.* Baltimore, etc., R. Co., 16 How. 314, 14 L. Ed. 953.

It was also void if, when it was made, the parties agreed to conceal from the members of the legislature the fact that the one party was the agent of the other, and was to receive a compensation for his services in case of the passage of the law. Marshall *v.* Baltimore, etc., R. Co., 16 How. 314, 14 L. Ed. 953.

"There is no real difference in principle between agreements to procure favors from legislative bodies, and agreements to procure favors in the shape of contracts from the heads of departments. The introduction of improper elements to control the action of both is the direct and inevitable result of all such arrangements." Tool Co. *v.* Norris, 2 Wall. 45, 55, 17 L. Ed. 868.

38. **Sale of office.**—Tool Co. *v.* Norris, 2 Wall. 45, 55, 17 L. Ed. 868.

"It is the interest of the state that all places of public trust should be filed by men of capacity and integrity, and that the appointing power should be shielded from influences which may prevent the best selection; hence the law annuls every contract for procuring the appointment or election of any person to an office." Marshall *v.* Baltimore, etc., R. Co., 16 How. 314, 333, 14 L. Ed. 953.

In Meguire *v.* Corwine, 101 U. S. 108, 111, 25 L. Ed. 899, an agreement to pay the plaintiff—in consideration of his appointment as government counsel—one-half the fees he might recover, was adjudged invalid. Transactions of the kind were declared to be "an unmixed evil;" and the court said that whether forbidden by statute or condemned by public policy, "no legal right can spring from such a source."

39. Marshall *v.* Baltimore, etc., R. Co., 16 How. 314, 333, 14 L. Ed. 953.

40. See the title BRIBERY, vol. 3, p. 514.

41. **Corruption of officers of foreign government.**—Oscanyan *v.* Arms Co., 103 U. S. 261, 277, 26 L. Ed. 539.

"An illustration of this rule is found in Oscanyan *v.* Arms Co., 103 U. S. 261, 26 L. Ed. 539. There a large sum was claimed from the vendor of firearms as commissions on sale that, through the influence of the plaintiff, had been made to the Turkish government, of which he was then an officer. The defendant pleaded the general issue; and it was contended that the illegality of the contract could not be noticed, because not affirmatively pleaded. But the court held that, assuming the contract to be a corrupt one, forbidden by morality and public policy, the objection to a recovery could not be obviated or waived by any system of pleading, or even by the express stipulation of the parties; that it was one which the court itself was bound to raise in the interest of the due administration of justice." Lee *v.* Johnson, 116 U. S. 48, 52, 29 L. Ed. 570.

42. **Contracts in fraud of pre-emption laws.**—Harkness *v.* Underhill, 1 Black 316, 17 L. Ed. 208.

Such a contract will not operate by way of estoppel to prevent one of the parties,

21. Contracts Made to Injure Third Persons—a. *Fraudulent Contracts.*—See the titles Fraud and Deceit, ante, p. 394; Fraudulent and Voluntary Conveyances, ante, p. 472.

b. *Injury to Creditors.*—Though a debtor has a right to prefer one creditor to another, yet any unlawful consideration moving from the preferred creditor to induce this preference will avoid the deed which gives it.[43]

c. *Injury to Employers.*—Where an employee has agreed, for a money consideration, to violate his obligation to his employer, the contract is illegal and void.[44]

d. *Injury to Public.*—All arrangements by which directors or stockholders or other persons may acquire gain, by inducing corporations to disregard their duties to the public are illegal and lead to unfair dealing, and thus being against public policy, will not be enforced by the courts.[45]

e. *Injury to Corporations.*—An agreement to keep a person permanently in the position of vice president of a company, irrespective of its interests, is contrary to public policy and is void.[46]

III. Contracts in Violation of Positive Law.

A. General Rule.—A contract to do an act forbidden by law is void, and cannot be enforced in a court of justice.[47] And the rule is unaffected by the

his heirs or alienees, from setting up a good legal title subsequently acquired, against the fraudulent title obtained by the other in accordance with the contract. Harkness *v.* Underhill, 1 Black 316, 17 L. Ed. 208.

43. Injury to creditors.—Marbury *v.* Brooks, 7 Wheat. 556, 577, 5 L. Ed. 522. See, generally, the titles ASSIGNMENTS FOR BENEFIT OF CREDITORS, vol. 2, p. 599; BANKRUPTCY, vol. 2, p. 939; FRAUDULENT AND VOLUNTARY CONVEYANCES, ante, p. 472.

44. Injury to employers.—Woodstock Iron Co. *v.* Richmond, etc., Extension Co., 129 U. S. 643, 656, 32 L. Ed. 819. See, generally, the titles MASTER AND SERVANT; TRADEMARKS, TRADE-NAMES AND UNFAIR COMPETITION.

A contract by an employee of a railroad company with a third party, for a consideration to be received from that third party, to violate its engagement with its employer in the important business of locating and constructing a railroad, and instead of selecting the shortest, cheapest and most suitable route, to locate the road by a longer route, and thus impose an unnecessary and heavy burden upon its employer is a void contract, immoral in its conception and corrupting in its tendency. The transaction on the part of the third party was none the less offensive, because of the threats of the employee that, if the land and money mentioned were not donated, it would cause the road to be located on another route. The threats did not excuse, much less justify, the offer. Woodstock Iron Co. *v.* Richmond, etc., Extension Co., 129 U. S. 643, 656, 32 L. Ed. 819.

"In this case the extension company, to which the duty of locating and constructing the railroad between its termini was entrusted, in agreeing, for a consideration offered by a third party, to disregard that duty and locate and construct the road by a longer route than was required, not only committed a wrong upon the railroad company by thus imposing unnecessary burdens upon it, to meet which larger charges for transportation might be called for, but also a wrong upon the public." Woodstock Iron Co. *v.* Richmond, etc., Extension Co., 129 U. S. 643, 657, 32 L. Ed. 819.

45. Injury to public.—Woodstock Iron Co. *v.* Richmond, etc., Extension Co., 129 U. S. 643, 657, 32 L. Ed. 819.

46. Injury to corporations.—West *v.* Camden, 135 U. S. 507, 520, 34 L. Ed. 254.

47. General rule.—Tiffany *v.* Boatman's Institution, 18 Wall. 375, 385, 21 L. Ed. 868; Craig *v.* Missouri, 4 Pet. 410, 436, 7 L. Ed. 903; Gibbs *v.* Consolidated Gas Co., 130 U. S. 396, 412, 32 L. Ed. 979; Embrey *v.* Jemison, 131 U. S. 336, 348, 33 L. Ed. 172; Connolly *v.* Union Sewer Pipe Co., 184 U. S. 540, 548, 46 L. Ed. 679; Coppell *v.* Hall, 7 Wall. 542, 19 L. Ed. 244; Cooper Mfg. Co. *v.* Ferguson, 113 U. S. 727, 733, 28 L. Ed. 1137; Bank *v.* Ownes, 2 Pet. 527, 7 L. Ed. 508; Groves *v.* Slaughter, 15 Pet. 449, 10 L. Ed. 800; Harris *v.* Runnels, 12 How. 79, 13 L. Ed. 901; Brown *v.* Tarkington, 3 Wall. 377, 18 L. Ed. 255; Davidson *v.* Lanier, 4 Wall. 447, 18 L. Ed. 377; Hanauer *v.* Doane, 12 Wall. 342, 20 L. Ed. 439; Oscanyan *v.* Arms Co., 103 U. S. 261, 267, 26 L. Ed. 539; Trist *v.* Child, 21 Wall. 441, 448, 22 L. Ed. 623.

Object of law.—"The object of all law is to repress vice and to promote the general welfare of society; and it does not give its assistance to a person to enforce a demand, originating in his breach or violation of its principles and enactments.

consent of the opposite party.[48] Nor is ignorance of the law a good defense.[49]

B. Construction of Statutes.—Where a statute prohibits an act or annexes a penalty to its commission, it is true that the act is made unlawful, but it does not follow that the unlawfulness of the act was meant by the legislature to avoid a contract made in contravention of it. When the statute is silent, and contains nothing from which the contrary can properly be inferred, a contract in contravention of it is void. But the whole statute must be examined in order to decide whether or not it does contain anything from which the contrary can be properly inferred.[50]

Contracts in violation of statutes are void; and they are so whether the consideration to be performed or the act to be done be a violation of the statute." Harris *v.* Runnels, 12 How. 79, 82, 13 L. Ed. 901.

In federal courts.—No contract can be enforced in the courts of the United States, no matter where made or where to be executed, if it is in violation of the laws of the United States, or is in conflict with subsisting treaties. Kennett *v.* Chambers, 14 How. 38, 14 L. Ed. 316.

A debt arising out of a transaction between an alien and a citizen of the United States, involving a violation of the positive laws of the United States, excluding an alien from any interest in an American registered vessel, as well as a violation of the impost laws, cannot be recovered in any court of justice of the United States. Maybin *v.* Coulon, 4 Dall. 298, 1 L. Ed. 841.

The courts of the United States will not enforce an agreement entered into in fraud of a law of the United States; although that agreement was made between persons who were then enemies of the United States, and the object of the agreement a mere stratagem of war. Dobynes *v.* United States, 3 Cranch 241, 242, 2 L. Ed. 427.

The act of August 23d, 1842, declaring that no officer of the government drawing a fixed salary shall receive additional compensation for any service, unless it is authorized by law, and a specific appropriation made to pay it, is not repealed by the twelfth section of the act of August 26, the same year. An agreement by the secretary of the interior to pay a clerk in his department for services rendered to the government by labors abroad—the clerk still holding his place and drawing his pay as clerk in the interior—was, accordingly, held void. Stansbury *v.* United States, 8 Wall. 33, 19 L. Ed. 315.

Honorary obligations of foreign nations.—"The courts of the United States can hardly be authorized to sanction and enforce what are called honorary obligations of a foreign nation, when those obligations have arisen from temptations offered to our own citizens to violate the laws of their own country." Williams *v.* Gibbes, 17 How. 239, 268, 15 L. Ed. 135.

In Pennsylvania.—In an early Pennsylvania case the court refused to enforce a bond for the purchase of land, where entry under the title was forbidden by law. Mitchell *v.* Smith, 4 Dall. 269, 1 L. Ed. 828.

In an early Pennsylvania case it was held that one could not maintain an action of trover for a vessel, where his claim to the ship was founded upon a transaction in fraud of the positive laws and public policy of the United States. Duncanson *v.* McLure, 4 Dall. 308, 313, 1 L. Ed. 845.

Violation of constitution.—"An act forbidden by the constitution of the United States, which is the supreme law, is against law." Craig *v.* Missouri, 4 Pet. 410, 436, 7 L. Ed. 903.

Violation of act of congress.—"Any one sued upon a contract may set up as a defense that it is a violation of the act of congress, and if found to be so, that fact will constitute a good defense to the action." Bement *v.* National Harrow Co., 186 U. S. 70, 88, 46 L. Ed. 1058.

48. "Courts of justice, even with the consent of the opposite party, will not enforce a right or contract in violation of a statute, although not expressly declared void by the enactment." Burbank *v.* Conrad, 96 U. S. 291, 302, 24 L. Ed. 731.

49. "We regard the contention that complainants are exempt from the doctrine in pari delicto because the parties acted in good faith and without intention to violate the law as without merit. With knowledge of the facts and of the statute, the parties turned out to be mistaken in supposing that the statute would not be held applicable to the facts. Neither can plead ignorance of the law as against the other, and defendant secured no unfair advantage in retaining the consideration voluntarily delivered for the price agreed." Harriman *v.* Northern Securities Co., 197 U. S. 244, 298, 49 L. Ed. 739.

50. Construction of statutes.—Harris *v.* Runnels, 12 How. 79, 13 L. Ed. 901. See the title STATUTES.

"It has never been doubted that, as a general rule, a contract made in contravention of a statute is void and cannot be enforced, and the only exception arise when, from an examination of the statute, the courts are able to discern a different or a limited purpose on the part of the lawmakers." Burck *v.* Taylor, 152 U. S. 634, 649, 38 L. Ed. 578.

"In order to adjudge a contract unlawful, as prohibited by a statute, the prohibition must be found in the statute."

C. Distinction between Malum in Se and Malum Prohibitum.—There is no distinction, as to vitiating the contract for violating a statute, between malum in se and malum prohibitum.[51]

D. Effect of Repeal of Statute.—"Where the consideration of a contract declared void by statute is morally good, a repeal of the statute will validate the contract."[52]

E. Evasion of Revenue Laws.—"All contracts to evade the revenue laws are void."[53]

F. Sale of Intoxicating Liquors.—See the title INTOXICATING LIQUORS.

G. Contracts in Violation of Sunday Laws.—See the title SUNDAYS AND HOLIDAYS.

IV. Contracts Growing Out of and Connected with Illegal Contracts. Where a contract grows immediately out of, and is connected with, an illegal or immoral act, a court of justice will not lend its aid to enforce it.[54] So, if the contract be in part only connected with the illegal consideration, and growing immediately out of it, though it be, in fact, a new contract, it is equally tainted by it.[55] But if the promise be entirely disconnected with the illegal act, and is founded on a new consideration,[56] it is not affected by the act, although it was

Thompson *v.* Saint Nicholas Nat. Bank, 146 U. S. 240, 250, 36 L. Ed. 956.

"It is familiar law that not every contract in contravention of the terms of a statute is void, and the courts will search the language of the statute to see whether it was the intent of the makers that a contract in contravention of it should be void or not. Harris *v.* Runnels, 12 How. 79, 13 L. Ed. 901; Miller *v.* Ammon, 145 U. S. 421, 36 L. Ed. 759." Burck *v.* Taylor, 152 U. S. 634, 648, 38 L. Ed. 578.

"In Harris *v.* Runnels, 12 How. 79, 13 L. Ed. 901, where the defendant sued upon a note set up the illegality of its consideration, it was held that the whole statute then in question must be examined to discover whether it intended to prevent courts of justice from enforcing contracts in relation to the act prohibited; and that when a statute prohibits an act, or annexes a penalty for its commission, it does not follow that the unlawfulness of the act was meant to avoid a contract made in contravention of it." Gold Mining Co. *v.* National Bank, 96 U. S. 640, 642, 24 L. Ed. 648.

51. Distinction between malum in se and malum prohibitum.—Bank *v.* Owens, 2 Pet. 527, 539, 7 L. Ed. 508.

"The distinction between malum in se and malum prohibitum has long since been exploded." Gibbs *v.* Consolidated Gas Co., 130 U. S. 396, 411, 32 L. Ed. 979.

"A distinction is made between acts which are mala in se, which are generally regarded as absolutely void, in the sense that no right or claim can be derived from them; and acts which are mala prohibita, which are void or voidable, according to the nature and effect of the act prohibited." Ewell *v.* Daggs, 108 U. S. 143, 150, 27 L. Ed. 682.

There is no moral turpitude in making a contract which is malum prohibitum and not malum in se. Spring Co. *v.* Knowlton, 103 U. S. 49, 57, 26 L. Ed. 317.

52. Effect of repeal of statute.—Little Rock *v.* National Bank, 98 U. S. 308, 314, 25 L. Ed. 108.

53. Evasion of revenue laws.—Marshall *v.* Baltimore, etc., R. Co., 16 How. 314, 333, 14 L. Ed. 953. See the title REVENUE LAWS.

54. Contracts growing out and connected with illegal contracts.—Armstrong *v.* Toler, 11 Wheat. 258, 6 L. Ed. 468; Kimbro *v.* Bullitt, 22 How. 256, 269, 16 L. Ed. 313.

"When a contract is connected by its consideration with an illegal transaction a court of justice will not aid its enforcement." Hanauer *v.* Woodruff, 15 Wall. 439, 442, 21 L. Ed. 224.

"A subsequent collateral contract, if made in aid and in furtherance of the execution of one infected with illegality, partakes of its nature, and is equally in violation of law." McBlair *v.* Gibbes, 17 How. 232, 235, 15 L. Ed. 132.

55. Armstrong *v.* Toler, 11 Wheat. 258, 6 L. Ed. 468.

56. Armstrong *v.* Toler, 11 Wheat. 258, 6 L. Ed. 468.

An obligation will be enforced, though indirectly connected with an illegal transaction, if it is supported by an independent consideration, so that the plaintiff does not require the aid of the illegal transaction to make out his case. Armstrong *v.* American Exchange Nat. Bank, 133 U. S. 433, 469, 33 L. Ed. 747.

"A new contract, founded on a new and independent consideration, although in relation to property respecting which there had been unlawful or fraudulent transactions between the parties, will be dealt with by the courts on its own merits. If the new contract be fair and lawful, and the new consideration be valid and adequate, it will be enforced. If, however, it be unfair or fraudulent, or the new consideration so inadequate as to import fraud, imposition or undue influence, it

known to the party to whom the promise was made, and although he was the contriver and conductor of the illegal act.[57]

V. Contracts Indirectly and Remotely Illegal.

A contract may be valid, notwithstanding it is remotely connected with an independent illegal transaction, which, however, it is not designed to aid or promote.[58]

VI. Entire and Separable Contracts.

Whenever the unlawful part of the contract can be separated from the rest, it will be rejected and the remainder established.[59]

will be rescinded and justice done to the parties. Armstrong *v.* Toler, 11 Wheat. 258, 6 L. Ed. 468; McBlair *v.* Gibbes, 17 How. 232, 15 L. Ed. 132; Brooks *v.* Martin, 2 Wall. 70, 17 L. Ed. 732; Planters' Bank *v.* Union Bank, 16 Wall. 483, 21 L. Ed. 473; Railroad Co. *v.* Durant, 95 U. S. 576, 24 L. Ed. 391." Dent *v.* Ferguson, 132 U. S. 50, 66, 33 L. Ed. 242.

57. "Where losses have been made in an illegal transaction, a person who lends money to the loser with which to pay the debt can recover the loan, notwithstanding his knowledge of the fact that the money was to be so used. Armstrong *v.* Toler, 11 Wheat. 258, 6 L. Ed. 468; Kimbro *v.* Bullitt, 22 How. 256, 269, 16 L. Ed. 313; Planters' Bank *v.* Union Bank, 16 Wall. 483, 500, 21 L. Ed. 473." Armstrong *v.* American Exchange Nat. Bank, 133 U. S. 433, 469, 33 L. Ed. 747.

Thus, where A, during a war, contrived a plan for importing goods on his own account, from the enemy's country, and goods were sent to B by the same vessel; A, at the request of B, became surety for the payment of the duties on B's goods, and became responsible for the expenses on a prosecution, for the illegal importation of the goods, and was compelled to pay them; held, that A might maintain an action on the promise of B, to refund the money. Armstrong *v.* Toler, 11 Wheat. 258, 6 L. Ed. 468.

Tests.—"It is sometimes said that the test whether a demand connected with an illegal transaction is capable of being enforced at law, is, whether the plaintiff requires any aid from the illegal transaction to establish his case. * * * But it is too narrow in its terms and excludes many cases where the plaintiff might establish his case independently of the illegal transaction, and yet would find his demand tainted by that transaction. He might, in some instances, establish his case by showing a simple loan of money, or a simple sale of goods, yet the court would hold the contract of loan or sale to be invalid if at the time the money was loaned or the goods were sold he knew they were to be used for an illegal and criminal transaction, and the contract was made to further its execution." Hanauer *v.* Woodruff, 15 Wall. 439, 443, 21 L. Ed. 224.

58. **Contracts indirectly and remotely connected.**—Ocean Ins. Co. *v.* Polleys, 13 Pet. 157, 164, 10 L. Ed. 105. The case of Armstrong *v.* Toler, 11 Wheat. 258, 6 L. Ed. 468, presented a question of this sort, and was decided in favor of such a contract. See ante, "Contracts Growing Out of and Connected with Illegal Contracts," IV.

A policy of insurance on a vessel, sailing under a register which has been obtained without conforming to the requisitions of the laws of the United States relative to the registry and enrolling of vessels of the United States, is not void; and an action may be maintained on such a policy, to recover a loss sustained by the assured. The policy may not have been designed to aid, assist or advance any unlawful purpose; it is a lawful contract in itself, and only remotely connected with the use of the certificate of registry. There are cases in which a contract may be valid, notwithstanding it is remotely connected with an independent illegal transaction; which, however, it is not designed to aid or promote. Suppose a vessel had been actually forfeited, for some antecedent illegal act, are all the contracts of her future employment void, although there is no illegal object in view, and the forfeiture may never be enforced? Ocean Ins. Co. *v.* Polleys, 13 Pet. 157, 10 L. Ed. 105.

Assignment.—An assignment of a contract, collateral to, and disconnected from the illegal transaction out of which the original illegal contract arose, and for a valuable consideration, is valid and binding. McBlair *v.* Gibbes, 17 How. 232, 237, 15 L. Ed. 132.

Money received as new consideration.—Though an illegal contract will not be enforced by courts, yet it is the doctrine of the federal supreme court that where such a contract has been executed by the parties themselves, and the illegal object has been accomplished, the money or thing which was the price of it may be a legal consideration between the parties for a promise express or implied, and that the court will not unravel the transaction to discover its origin. Planters' Bank *v.* Union Bank, 16 Wall. 483, 21 L. Ed. 473.

59. **Entire and separable contracts.**—McCullough *v.* Virginia, 172 U. S. 102, 115, 43 L. Ed. 382. See the title CONTRACTS, vol. 4, p. 567.

"So in Gelpcke *v.* Dubuque, 1 Wall. 175, 17 L. Ed. 520, this court said, in reference

VII. Enforcement of Illegal Contracts.

A. General Rule.—Ordinarily the law leaves to parties the right to make such contracts as they please,[60] but when the parties make a contract that is illegal, the courts make an exception and refuse to enforce it.[61] Such refusal is expressed by the common-law maxims, ex turpi causa non oritur actio; ex dolo malo non oritur actio; ex parto illicto non oritur actio.[62] The parties are left as found; the courts applying the well-known doctrine, in pari delicto potior est

to a similar contention in a suit on a contract made by the officials of the city of Dubuque (p. 222): 'We have not, therefore, considered the questions which they present. They relate to certain provisions of the contract which are claimed to be invalid. Conceding this to be so, they are clearly separable and severable from the other parts which are relied upon. The rule in such cases, where there is no imputation of malum in se, is that the bad parts do not affect the good. The valid may be enforced.'" McCullough *v.* Virginia, 172 U. S. 102, 115, 43 L. Ed. 382.

In United States *v.* Bradley, 10 Pet. 343, 9 L. Ed. 448, suit was brought on a paymaster's bond, and it was claimed that as some of the stipulations were in excess of those required by the statute and illegally inserted, the whole bond was void. But the court overruled the contention, saying (p. 360): "That bonds and other deeds may, in many cases, be good in part, and void for the residue, where the residue is founded in illegality but not malum in se, is a doctrine well founded in the common law, and has been recognized from a very early period."

Pigot's case.—"Thus, in Pigot's Case, 11 Co. 27b, it was said, that it was unanimously agreed in 14 Hen. VIII 25-6, that if some of the covenants of an indenture, or of the conditions indorsed upon a bond are against law, and some are good and lawful, that in this case, the covenants or conditions which are against law, are void ab initio; and the others stand good. And, notwithstanding the decision in Lee *v.* Colshill, Cro. Elliz. 529, which, however, is distinguishable, being founded on a statute, the doctrine has been maintained, and is settled law at the present day, in all cases where the different covenants or conditions are severable, and independent of each other, and do not import malum in se." United States *v.* Bradley, 10 Pet. 343, 360, 9 L. Ed. 448, cited in McCullough *v.* Virginia, 172 U. S. 102, 115, 43 L. Ed. 382.

60. General rule.—Pope Mfg. Co. *v.* Gormully, 144 U. S. 224, 233, 36 L. Ed. 414.

61. Pope Mfg. Co. *v.* Gormully, 144 U. S. 224, 233, 36 L. Ed. 414; McMullen *v.* Hoffman, 174 U. S. 639, 655, 43 L. Ed. 1117; Bank *v.* Ownes, 2 Pet. 527, 538, 7 L. Ed. 508.

The law will not enforce an illegal contract. Forsyth *v.* Woods, 11 Wall. 484, 486, 20 L. Ed. 207.

Courts of justice will never yield the locus standi in judicio to the suitor, who is compelled to trace his title through his own criminal acts. The Arrogante Barcelones, 7 Wheat. 496, 519, 5 L. Ed. 507.

Where a party in privy has brought about a contract forbidden by statute, or by public policy, he cannot recover for his services. Gibbs *v.* Consolidated Gas Co., 130 U. S. 396, 406, 32 L. Ed. 979.

The rule of is of universal operation, that none shall, by the aid of a court of justice, obtain the fruits of an unlawful bargain. Gibbs *v.* Consolidated Gas Co., 130 U. S. 396, 412, 32 L. Ed. 979.

A party who says in his pleading that the money which he seeks to recover was paid out for the accomplishment of a purpose made an offense by the law, and who testifies and insists to the end of his suit that the contract on which he advanced his money was illegal, criminal, and void, cannot recover it back in a court whose duty it is to give effect to the law which the party admits he intended to violate. Higgins *v.* McCrea, 116 U. S. 671, 685, 29 L. Ed. 764.

62. Common-law maxims.—Courts are instituted to carry into effect the laws of a country; and therefore they cannot become auxiliary to the consummation of violations of law. There can be no civil right, where there can be no legal remedy; and there can be no legal remedy, for that which is itself illegal. That this is true of contracts violating the laws of morality, is recognized in the familiar maxim, "ex turpi causa non oritur actio." Bank *v.* Ownes, 2 Pet. 527, 538, 7 L. Ed. 508.

"The common-law maxims are ex turpi causa, non oritur actio—ex dolo malo non oritur actio." Harris *v.* Runnels, 12 How. 79, 82, 13 L. Ed. 901.

"There are several old and very familiar maxims of the common law which formulate the result of that law in regard to illegal contracts. They are cited in all law books upon the subject and are known to all of us. They mean substantially the same thing and are founded upon the same principles and reasoning. They are: Ex dolo malo non oritur actio; Ex pacto illicto non oritur actio; Ex turpi causa non oritur actio. About the earliest illustration of this doctrine is almost traditional in the famous case of The Highwayman. It is stated that Lord Kenyon once said, by way of illustration, that he would not sit to take an account between two robbers on Hounslow Heath, and it was questioned whether the legend

conditio defendentis.[63] This rule applies if the plaintiff cannot open his case without showing that he has broken the law.[64] Nor will the consent of parties change the application of the rule.[65] Therefore, there can be no recovery of property delivered under an illegal executed contract,[66] by parties in pari delicto,[67]

in regard to the highwayman did not arise from that saying. It seems, however, that the case was a real one. He did file a bill in equity for an accounting against his partner, although it was no sooner filed and its real nature discovered than it was dismissed with costs, and the solicitors for the plaintiff were summarily dealt with by the court as for a contempt in bringing such a case before it. (1 Lindley on Partnership, 5th Ed. 94, note n; 9 Law Quarterly Review (London), pp. 105-197." McMullen *v.* Hoffman, 174 U. S. 639, 654, 43 L. Ed. 1117.

63. Parties left as found.—McMullen *v.* Hoffman, 174 U. S. 639, 655, 43 L. Ed. 1117; Randall *v.* Howard, 2 Black 585, 588, 17 L. Ed. 269; Thomas *v.* Richmond, 12 Wall. 349, 20 L. Ed. 453; Spring Co. *v.* Knowlton, 103 U. S. 49, 26 L. Ed. 347; Sample *v.* Barnes, 14 How. 70, 14 L. Ed. 330; Harris *v.* Runnels, 12 How. 79, 85, 13 L. Ed. 901; St. Louis, etc., R. Co. *v.* Terre Haute, etc., R. Co., 145 U. S. 393, 407, 36 L. Ed. 738; Harriman *v.* Northern Securities Co., 197 U. S. 244, 296, 49 L. Ed. 739; Whitfield *v.* United States, 92 U. S. 165, 169, 23 L. Ed. 705.

The law leaves the parties to such a contract as it found them; if either has sustained a loss by the bad faith of a particeps criminis, it is but a just infliction for premeditated and deeply practiced fraud; he must not expect that a judicial tribunal will degrade itself, by an exertion of its powers, to shift the loss from one to the other, or to equalize the benefits or burdens which may have resulted from the violation of every principle of morals and of law. Bartle *v.* Coleman, 4 Pet. 184, 7 L. Ed. 825.

It is against the policy of the law to enable either party, in controversies between themselves, to enforce an agreement in fraud of the law, or which was made to injure another. The maxim, in pari delicto potior est conditio defendentis, must prevail. Dent *v.* Ferguson, 132 U. S. 50, 60, 33 L. Ed. 242.

64. Showing illegality in equity case.—"If a plaintiff cannot open his case without showing that he has broken the law, courts of justice will not assist him to recover, whatever the equities of his case may be." Burbank *v.* Conrad, 96 U. S. 291, 302, 24 L. Ed. 731.

"If, from the plaintiff's own stating or otherwise, the cause of action appear to arise ex turpi causa, or the transgression of a positive law of this country, then the court says he has no right to be assisted." Ewell *v.* Daggs, 108 U. S. 143, 149, 27 L. Ed. 682.

Directing verdict.—The court may direct the jury to find a verdict for the defendant where the opening statement of counsel for the plaintiff shows that the contract is illegal, because in violation of a positive law or against public policy. Oscanyan *v.* Arms Co., 103 U. S. 261, 264, 26 L. Ed. 539.

"Of course, in all such proceedings nothing would be taken, without full consideration, against the party making the statement or admission. He should be allowed to explain and qualify it, so far as the truth will permit; but if, with such explanation and qualification, it should clearly appear that there could be no recovery, the court should not hesitate to so declare and give such direction as will dispose of the action." Oscanyan *v.* Arms Co., 103 U. S. 261, 264, 26 L. Ed. 539.

Example.—A contract was made for rebuilding Fort Washington, by M., a public agent, and a deputy quartermaster general, with B., in the profits of which M. was to participate; false measures of the work were attempted to be imposed on the government, the success of which was prevented by the vigilance of the accounting officers of the treasury; a bill was filed to compel an alleged partner in the contract to account for and pay to one of the partners in the transaction, one-half of the loss sustained in the execution of the contract. Held, that to state such a case is to decide it; public morals, public justice, and the well-established principles of all judicial tribunals, alike forbid the interposition of courts of justice to lend their aid to purposes like this; to enforce a contract which began with the corruption of a public officer, and progressed in the practice of known willful deception in its execution, can never be approved or sanctioned by any court. Bartle *v.* Coleman, 4 Pet. 184, 7 L. Ed. 825.

65. Consent of parties.—Burbank *v.* Conrad, 96 U. S. 291, 302, 24 L. Ed. 731; Cocks *v.* Izard, 7 Wall. 559, 542, 19 L. Ed. 275; United States *v.* Grossmayer, 9 Wall. 72, 19 L. Ed. 627.

66. No recovery when contract executed.—Daniels *v.* Tearney, 102 U. S. 415, 421, 26 L. Ed. 187; Harriman *v.* Northern Securities Co., 197 U. S. 244, 296, 49 L. Ed. 739.

"Where money has been paid upon an illegal contract, it is a general rule that if the contract be executed and both parties are in pari delicto, neither of them can recover from the other the money so paid." Spring Co. *v.* Knowlton, 103 U. S. 49, 58, 26 L. Ed. 347.

67. Parties in pari delicto.—If the parties are in pari delicto, they are without legal remedy, and parties are left to themselves. Thomas *v.* Richmond, 12 Wall. 349, 356, 20 L. Ed. 453; Whitfield

either at law or in equity.[68]

B. Object of Rule.—The object of the rule, rendering illegal contracts unenforceable, is not for the sake of the defendant; but is founded on general principles of policy.[69] Such a rule tends toward reducing the number of illegal transactions to a minimum.[70]

C. Exceptions to General Rule—1. WHERE THE CONTRACT IS NOT EXECUTED.—"Where the illegality consists in the contract itself, and that contract is not executed, * * * there is a locus pœnitentiæ, the delictum is incomplete, and the contract may be rescinded by either party."[71]

v. United States, 92 U. S. 165, 169, 23 L. Ed. 705; St. Louis, etc., R. Co. *v.* Terre Haute, etc., R. Co., 145 U. S. 393, 407, 36 L. Ed. 738; Harriman *v.* Northern Securities Co., 197 U. S. 244, 295, 49 L. Ed. 739; Harris *v.* Runnels, 12 How. 79, 85, 13 L. Ed. 901.

Where there was a judgment at law against a defendant in Mississippi, and he sought relief in equity, upon the ground that the consideration of the contract was illegal, a court of equity will not grant relief, because the complainant was in pari delicto with the other party. Moreover, such a defense would have been good at law, and the averments, that deception was practised to prevent the complainant from making the defense, are not sustained by the evidence in the case. And, further, after the judgment, the complainant gave a forthcoming bond, thus recognizing the validity of the judgment. Sample *v.* Barnes, 14 How. 70, 14 L. Ed. 330.

68. Equity.—St. Louis, etc., R. Co. *v.* Terre Haute, etc., R. Co., 145 U. S. 393, 36 L. Ed. 738.

The following principles of equity jurisprudence may be affirmed to be without exception; namely, that whosoever would seek admission into a court of equity must come with clean hands; that such a court will never interfere in opposition to conscience or good faith; that it will never be called into activity to remedy the consequences of laches or neglect, or the want of reasonable diligence. Therefore, where a complainant prays to be relieved from the fulfillment of a contract, which was intentionally made in fraud of the law, the answer is, that however unworthy may have been the conduct of his opponent, the parties are in pari delicto. The complainant cannot be admitted to plead his own demerits. Creath *v.* Sims, 5 How. 192, 12 L. Ed. 111.

69. Coppell *v.* Hall, 7 Wall. 542, 548, 19 L. Ed. 244; Embrey *v.* Jemison, 131 U. S. 336, 348, 33 L. Ed. 172.

The rule is not invoked for the sale of the plaintiff, but because the courts will not lend their aid to such a plaintiff. Ewell *v.* Daggs, 108 U. S. 143, 149, 27 L. Ed. 682.

"Lord Mansfield said, with a very proper sensibility of the injustice of such a plea and of the policy which permits it to be insisted upon· 'The objection that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of a defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded on general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff.'" Harris *v.* Runnels, 12 How. 79, 85, 13 L. Ed. 901; Higgins *v.* McCrea, 116 U. S. 671, 685, 29 L. Ed. 764.

70. "To refuse to grant either party to an illegal contract judicial aid for the enforcement of his alleged rights under it tends strongly towards reducing the number of such transactions to a minimum. The more plainly parties understand that when they enter into contracts of this nature they place themselves outside the protection of the law, so far as that protection consists in aiding them to enforce such contracts, the less inclined will they be to enter into them. In that way the public secures the benefit of a rigid adherence to the law." McMullen *v.* Hoffman, 174 U. S. 639, 669, 43 L. Ed. 1117.

71. Where the contract is not executed.—Thomas *v.* Richmond, 12 Wall. 349, 355, 20 L. Ed. 453.

"If money is paid or goods delivered for an illegal purpose, the person who had so paid the money or delivered the goods may recover them back before the illegal purpose is carried out; but if he waits till the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither can he maintain an action; the law will not allow that to be done." Spring Co. *v.* Knowlton, 103 U. S. 49, 59, 26 L. Ed. 347.

"If the contract continues executory and the party paying the money be desirous of rescinding it, he may do so and recover back by action of indebitatus assumpsit for money had and received." Spring Co. *v.* Knowlton, 103 U. S. 49, 58, 26 L. Ed. 347.

"Money paid on an illegal contract, which remains executory, can be recovered back in an action founded on a disaffirmance, and on the ground that it is void." Spring Co. *v.* Knowlton, 103 U. S. 49, 59, 26 L. Ed. 347.

"All contracts which provide that anything shall be done which is distinctly prohibited by law, or morality, or public

2. Parties Not in Pari Delicto.—If two contracting parties are in delicto, one less so than the other, the former may in many cases maintain an action for his benefit against the latter.[72]

3. Where the Law Is for the Plaintiff's Protection.—Where the law that creates the illegality in the transaction was designed for the coercion of one party and the protection of the other, there is no parity of delictum at all between the parties, and the party so protected by the law, may, at any time, resort to the law for his remedy, though the illegal transaction be completed.[73]

4. Where Plaintiff Does Not Rely on Contract to Recover.—If the plaintiff can recover from the defendant moneys received by him without resorting to the illegal contract, the court will permit a recovery.[74] But he cannot refer to one portion only of the contract; the whole contract must come in, although the portion upon which he founds his cause of action may be legal.[75]

VIII. Assertion of Title to Funds Arising from Illegal Contracts.

Where the illegal transaction is completed and closed, an action may be brought for the purpose of asserting title to the funds that have been realized.[76]

policy, are void, so he who advances money in consideration of a promise or undertaking to do such a thing, may at any time before it is done rescind the contract and prevent the thing from being done and recover back his money." Spring Co. *v.* Knowlton, 103 U. S. 49, 58, 26 L. Ed. 347, citing Parsons on Contracts, vol. 2, p. 746.

"While an unlawful contract, the parties to which are in pari delicto, remains executory, its invalidity is a defense in a court of law; and a court of equity will order its cancellation only as an equitable mode of making that defense effectual, and when necessary for that purpose. Adams on Eq. 175." St. Louis, etc., R. Co. *v.* Terre Haute, etc., R. Co., 145 U. S. 393, 407, 36 L. Ed. 738.

72. Parties not in pari delicto.—Daniels *v.* Tearney, 102 U. S. 415, 420, 26 L. Ed. 187; St. Louis, etc., R. Co. *v.* Terre Haute, etc., R. Co., 145 U. S. 393, 407, 36 L. Ed. 738.

"Where the parties are not in pari delicto, actions are sustained to recover back the money or other consideration received for such obligations, though the obligations themselves, being against law, cannot be sued on." Thomas *v.* Richmond, 12 Wall. 349, 356, 20 L. Ed. 453.

73. When the law is for the plaintiff's protection.—Thomas *v.* Richmond, 12 Wall. 349, 355, 20 L. Ed. 453; St. Louis, etc., R. Co. *v.* Terre Haute, etc., R. Co., 145 U. S. 393, 407, 36 L. Ed. 738.

74. Where plaintiff does not rely on contract to recover.—Armstrong *v.* Toler, 11 Wheat. 258, 269, 6 L. Ed. 468; McBlair *v.* Gibbes, 17 How. 232, 235, 14 L. Ed. 132; Brooks *v.* Martin, 2 Wall. 70, 17 L. Ed. 732; Planters' Bank *v.* Union Bank, 16 Wall. 483, 21 L. Ed. 473; Armstrong *v.* American Exchange Nat. Bank, 133 U. S. 433, 466, 33 L. Ed. 747.

"In no way and through no channels, directly or indirectly, will the courts allow an action to be maintained for the recovery of property delivered under an illegal contract where, in order to maintain such recovery, it is necessary to have recourse to that contract. The right of recovery must rest upon a disaffirmance of the contract, and it is permitted only because of the desire of courts to do justice as far as possible to the party who has made payment or delivered property under a void agreement, and which in justice he ought to recover. But courts will not in such endeavor permit any recovery which will weaken the rule founded upon the principles of public policy." Pullman's Palace Car Co. *v.* Central Transportation Co., 171 U. S. 138, 151, 43 L. Ed. 108.

"And this distinction is taken in the books that where the action is in affirmance of an illegal contract, the object of which is to enforce the performance of an engagement prohibited by law, clearly such an action can in no case be maintained, but where the action proceeds in disaffirmance of such a contract, and instead of endeavoring to enforce it presumes it to be void and seeks to prevent the defendant from retaining the benefit which he derived from an unlawful act, then it is consonant to the spirit and policy of the law that the plaintiff should recover." Spring Co. *v.* Knowlton, 103 U. S. 49, 58, 26 L. Ed. 347, citing 2 Comyn on Contracts, 361.

75. Embrey *v.* Jemison, 131 U. S. 336, 348, 33 L. Ed. 172; McMullen *v.* Hoffman, 174 U. S. 639, 656, 43 L. Ed. 1117.

"Every part of the consideration goes equally to the whole promise and therefore, if any part of it is contrary to public policy, the whole promise fails." Hazelton *v.* Sheckells, 202 U. S. 71, 78, 50 L. Ed. 939.

Where a partnership agreement is part of an entire agreement, which contains utterly illegal provisions, an action cannot be maintained on the partnership agreement for an accounting. McMullen *v.* Hoffman, 174 U. S. 639, 655, 43 L. Ed. 1117.

76. Assertion of title to funds arising from illegal contract.—There is a distinction between enforcing an illegal or

IX. Pleading.

For the illegality of a contract to be noticed, it is not necessary that it be affirmatively pleaded.[77]

X. Evidence.

"Whatever may be stated in a contract for an illegal purpose, a defendant, against whom it is sought to be enforced, may, to prevent it, show both the turpitude of himself and the plaintiff."[78]

XI. Waiver.

As the consent of the parties will not change the rule as to the enforcibility of an illegal contract,[79] so the illegality cannot be waived.[80] But "if the party who might set up the illegality chooses to waive it, and pay the money, he cannot afterwards reclaim it. And, if even the money be paid to a third person for the other party, such third person cannot set up the illegality of the contract on which the payment has been made, and withhold it for himself."[81]

prohibited contract, and the assertion of a title to funds that had been realized out of such transactions. Burck *v.* Taylor, 152 U. S. 634, 668, 38 L. Ed. 578; McBlair *v.* Gibbes, 17 How. 232, 239, 15 L. Ed. 132; Brooks *v.* Martin, 2 Wall. 70, 87, 17 L. Ed. 732; Railroad Co. *v.* Durant, 95 U. S. 576, 24 L. Ed. 391.

After a partnership contract confessedly against public policy has been carried out, and money contributed by one of the partners has passed into other forms —the results of the contemplated operation completed—a partner, in whose hands the profits are, cannot refuse to account for and divide them on the ground of the illegal character of the original contract. Brooks *v.* Martin, 2 Wall. 70, 17 L. Ed. 732.

"Even where money has been received, either by an agent or a joint owner, by force of a contract which was illegal, the agent or joint owner cannot protect himself from accounting for what was so received, by setting up the illegality of the transaction in which it was paid to him." Kinsman *v.* Parkhurst, 18 How. 289, 293, 15 L. Ed. 385.

77. **Pleading.**—Oscanyan *v.* Arms Co., 103 U. S. 261, 266, 26 L. Ed. 539.

78. **Evidence.**—Harris *v.* Runnels, 12 How. 79, 85, 13 L. Ed. 901.

"Everything which disaffirms the contract, everything which shows it to be void, may be given in evidence on the general issue, in an action of assumpsit." Craig *v.* Missouri, 4 Pet. 410, 426, 7 L. Ed. 903.

Where a contract was made to obtain a certain law from the legislature of Virginia, and stated to be made on the basis of a prior communication, this communication is competent evidence in a suit upon the contract. Marshall *v.* Baltimore, etc., R. Co., 16 How. 314, 14 L. Ed. 953.

79. **What constitutes waiver.**—Burbank *v.* Conrad, 96 U. S. 291, 302, 24 L. Ed. 731.

80. **Waiver.**—"The instruction given to the jury, that if the contract was illegal the illegality had been waived by the reconventional demand of the defendants, was founded upon a misconception of the law. In such cases there can be no waiver. The defense is allowed, not for the sake of the defendant, but of the law itself. The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced. The maxim, ex dolo malo non oritur actio, is limited by no such qualification. The proposition to the contrary strikes us as hardly worthy of serious refutation. Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection, would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches, it destroys. The principle to be extracted from all the cases is, that the law will lend its support to a claim founded upon its violation." Cocks *v.* Izard, 7 Wall. 559, 19 L. Ed. 275.

Where suit is brought upon a contract which is void as against public policy and the laws, a party who pleads such invalidity of it does not render the plea ineffective by a further defense in "reconvention;" a defense of this sort, to wit, that, if the contract be valid, he himself takes the position of a plaintiff, and makes a claim for damages for its nonperformance. Coppell *v.* Hall, 7 Wall. 542, 19 L. Ed. 244.

81. **Effect of waiver.**—McBlair *v.* Gibbes, 17 How. 232, 235, 15 L. Ed. 132.

"Where A claims money from B, although due upon an illegal contract, and B acknowledges the obligation and waives the defense of illegality and pays the money to a third party upon his promise to pay it to A, the third party cannot successfully defend an action brought by A to recover the money by alleging that the original contract between A and B was illegal. This is the principle decided, and we think correctly decided, in the

XII. Ratification.

A transaction originally unlawful cannot be made lawful by any ratification.[82]

XIII. Conflict of Laws.

See the title CONFLICT OF LAWS, vol. 3, p. 1040.

ILLEGITIMATES.—See the title BASTARDY, vol. 3, p. 204.

ILLICIT COHABITATION.—See the title ADULTERY, FORNICATION AND LEWDNESS, vol. 1, p. 195.

ILLINOIS.—See the titles BOUNDARIES, vol. 3, p. 494; CHATTEL MORTGAGES, vol. 3, p. 714; COMMON LAW, vol. 3, p. 962.

ILLNESS.—"Illness is a word which may include, properly, an attack of a less grave and serious character than disease; an illness may be slight or severe, in either case it is an illness."[1]

ILLUSTRATION.—As to the use of the term illustrations in the copyright laws, see the title COPYRIGHT, vol. 4, p. 606.

IMBECILITY.—See the title INSANITY.

IMMATERIAL ISSUE.—"An immaterial issue is where a material allegation in the pleadings is not answered, but an issue is taken on some point which will not determine the merits of the case, and the court is often at a loss for which of the parties to give judgment."[2]

IMITATION.—See the titles PATENTS; TRADEMARKS, TRADENAMES AND UNFAIR COMPETITION.

IMMIGRATION.—See the titles INTERSTATE AND FOREIGN COMMERCE; TAXATION. As to sufficiency of pleading in an action of assumpsit to recover back money illegally exacted from an immigrant, see the title ASSUMPSIT, vol. 2 pp. 654, 655. As to admission or exclusion of immigrants, see the titles ALIENS vol. 1, p. 245; CHINESE EXCLUSION ACTS, vol. 3, p. 769; CONTRACT LABOR LAW vol. 4, p. 549.

IMMEDIATE.—See note 3.

cases cited. It was certainly no business of the third party to inquire into the reasons which impelled the person to give him the money to pay to the plaintiff. That was a matter between those parties, and if the party from whom the money was due admitted his indebtedness and chose to pay it, the defendant, who received it upon his promise to pay the plaintiff, would have no possible defense to an action by the plaintiff to compel such payment. Such an action is in one sense founded upon an illegal contract. That matter was closed when the party owing the money under it paid it to a third person to be paid to the plaintiff. The action by the plaintiff in such case is founded upon a new contract upon a totally different consideration and of a perfectly legitimate character." McMullen *v.* Hoffman, 174 U. S. 639, 660, 43 L. Ed. 1117.

82. Ratification.—United States *v.* Grossmayer, 9 Wall. 73, 19 L. Ed. 627.

1. Connecticut Mut. Life Ins. Co. *v.* Union Trust Co., 112 U. S. 250, 259, 28 L. Ed. 708. See, also, the title INSURANCE.

2. Garland *v.* Davis, 4 How. 131, 146, 11 L. Ed. 907.

3. Immediate delivery.—A bill of sale of goods, twenty-three miles distant, was made at nine o'clock in the evening and the vendee took possession of them at four o'clock the next morning. This was held to constitute an **immediate** delivery of possession under a statute rendering conclusively fraudulent, sales of personal property unaccompanied by **immediate** delivery. Kleinschmidt *v.* McAndrews, 117 U. S. 282, 287, 29 L. Ed. 905. See, also, the title FRAUDULENT AND VOLUNTARY CONVEYANCES, ante, p. 472.

Immediate descendants.—See McArthur *v.* Scott, 113 U. S. 340, 383, 28 L. Ed. 1015. See, also, the titles PERPETUITIES; WILLS.

Immediate descent.—See the title DESCENT AND DISTRIBUTION, vol. 5, p. 336.

Immediate issue.—See McArthur *v.* Scott, 113 U. S. 340, 383, 28 L. Ed. 1015. See, also, the titles PERPETUITIES; WILLS.

Immediately.—A bond of indemnity given by a company to hold a bank harmless against a fraud of a specified officer contained a requirement "that the employer shall **immediately** give the company notice in writing of the discovery of any default or loss." It was held that this requirement ought not to receive a construction that it was intended by the parties that notice of a default should be

IMMUNITY.—As to the privileges and immunities secured by article 4, § 2, of the federal constitution, see the title CONSTITUTIONAL LAW, vol. 4, pp. 467, 471. As to the privileges and immunities protected by the 14th amendment of the federal constitution, see the title CONSTITUTIONAL LAW, vol. 4, pp. 471, 483. And see, generally, the titles CITIZENSHIP, vol. 3, p. 805; CIVIL RIGHTS, vol. 3, p. 816. See note 1.

IMPAIR.—"The lexical definition of 'impair' is 'to make worse; to diminish in quantity, value, excellence, or strength; to lessen in power; to weaken, to enfeeble; to deteriorate.'"[2]

given instantly on the discovery of a default, but that what was meant was that notice should be given within a reasonable time, having in view the circumstances of the case. Fidelity, etc., Co. *v.* Courtney, 186 U. S. 342, 346, 46 L. Ed. 1193. See the title BANKS AND BANKING, vol. 3, p. 103.

1. Immunity.—The state of Tennessee in its act of incorporation of the B. Insurance Company conferred an exemption from taxation beyond a defined limit. Later it granted to the D. Insurance Company "all the rights, privileges and immunities" that were granted to the B. company. And a still later act granted to the W. company "all the rights and privileges" of the B. company. It was held that the grant to the W. company did not confer upon it the exemption from taxation granted to the other company. And the court said: "The word immunities is omitted. Is there any meaning to be attached to that omission? And, if so, what? We think some meaning is to be attached to it. The word immunity expresses more clearly and definitely an intention to include therein an exemption from taxation than does either of the other words. Exemption from taxation is more accurately described as an immunity than as a privilege, although it is not to be denied that the latter word may sometimes and under some circumstances include such exemption." Phœnix Fire, etc., Ins. Co. *v.* Tennessee, 161 U. S. 174, 177, 40 L. Ed. 660. See the title TAXATION.

2. Edwards *v.* Kearzey, 96 U. S. 595, 600, 24 L. Ed. 793. See the title IMPAIRMENT OF OBLIGATION OF CONTRACTS.

IMPAIRMENT OF OBLIGATION OF CONTRACTS.

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CROSS REFERENCES.

See the titles CORPORATIONS, vol. 4, pp. 621, 677; FOREIGN CORPORATIONS, ante, p. 305; POLICE POWER; STREET RAILWAYS.

As to jurisdiction of courts under the contract clause, see the titles APPEAL AND ERROR, vol. 1, p. 703; COURTS, vol. 4, p. 910. As to right to enact retroactive laws, see the title STATUTES. As to whether regulation of rates to be charged by a corporation comes within the constitution prohibition, see the titles CORPORATIONS, vol. 4, p. 621; CARRIERS, vol. 3, p. 622. As to repeal or modification of law imposing liability on stockholders, see the title STOCK AND STOCKHOLDERS.

As to impairment of the contract rights of bank-bill holders, or creditors, see the title BANKS AND BANKING, vol. 3, p. 1. As to whether dissolution of a corporation works an impairment, see the title CORPORATIONS, vol. 4, p. 795. As to vested rights, see the title CONSTITUTIONAL LAW, vol. 4, p. 412.

I. General Consideration.

A. Academic Discussion of the Constitutional Provision.—In General.—Mr. Madison denounced laws impairing the obligation of contracts as among those not only violating the constitution, but "contrary to the first principles of the social compact and to every principle of sound legislation."[1] Therefore, the constitution of the United States contains a provision which declares (Art. 1, § 10) that no state shall pass any law impairing the obligation of contracts. Public credit was thereby reanimated. The owners of property and holders of money freely parted with both, well knowing that no future law could impair the obligation of the contract.[2] No provision of the constitution of the United States has received more frequent consideration by the federal supreme court than this one. This very frequency would appear to have rendered it difficult to apply the result of the court's deliberations to new cases differing somewhat in their facts from those previously considered.[3] The case of Fletcher *v.* Peck, 6 Cranch 87, 3 L. Ed. 162, was the first one in the federal supreme court in which this important provision came under consideration.

Importance of the Provision.—There is no more important provision in the federal constitution than this one, and it is one of the highest duties of this court to take care that the prohibition shall neither be evaded nor frittered away. Complete effect must be given to it in all its spirit. The inviolability of contracts, and the duty of performing them, as made, are foundations of all well-ordered society, and to prevent the removal or disturbance of these foundations was one

1. **Mr. Madison's view.**—Planters' Bank *v.* Sharp, 6 How. 301, 319, 12 L. Ed. 447; Edwards *v.* Kearzey, 96 U. S. 595, 606, 24 L. Ed. 793. See, also, Federalist, Nos. 7 and 44.

2. **Effect of provision was beneficial on credit.**—Edwards *v.* Kearzey, 96 U. S. 595, 607, 24 L. Ed. 793, citing Ramsey's History of South Carolina 433, and discussing at length the causes that led to this provision.

3. **The provision has been often con-**

of the great objects for which the constitution was framed.[4]

B. Reasons for Its Enactment.—The reason for this provision in the constitution was, that the transcendent power of parliament devolved on the several states by the revolution, so that there was no power by which the state could be prevented from revoking all public grants of property or franchise as parliament could do.[5] In the Dartmouth College Case, Mr. Chief Justice Marshall said: "Anterior to the formation of the constitution, a course of legislation had prevailed in many, if not in all, of the states, which weakened the confidence of man in man, and embarrassed all transactions between individuals, by dispensing with a faithful performance of engagements. To correct this mischief by restraining the power which produced it, the state legislatures were forbidden 'to pass any law impairing the obligation of contracts.'"[6]

C. Definitions and Distinctions—1. DEFINITIONS—a. *"Impair."*—The lexical definition of "impair" is "to make worse; to diminish in quantity, value, excellence, or strength; to lessen in power; to weaken; to enfeeble; to deteriorate."[7]

b. *Contract.*—A contract within the contemplation of the federal constitutional provision is a transaction between two or more persons, in which each party comes under an obligation to the other, and each reciprocally acquires a right to whatever is promised by the other.[8] It is further defined as a compact between two or more parties, and is either executory or executed.[9]

2. OBLIGATION AND CONTRACT DISTINGUISHED.—"The terms contract, and obligation, although sometimes used loosely as convertible terms, do not properly import the same idea. The constitution plainly presupposes that a contract and its obligation are different things. Were they the same thing, and the terms, contract and obligation, convertible, the constitution, instead of being read as it now is, 'that no state shall pass any law impairing the obligation of contracts,' might, with the same meaning, be read, 'that no state shall pass any law impairing the obligation of obligations,' or, 'the contract of contracts;' and to give to the constitution the same meaning which either of these readings would import, would be ascribing to its framers a useless and palpably absurd tautology. The illustrious framers of the constitution could not be ignorant that there were, or might be, many contracts, without obligations, and many obligations, without contracts."[10]

3. WHAT IS THE "OBLIGATION OF A CONTRACT"—a. *"Obligation" Defined.*—"Obligation" is defined to be "the act of obliging or binding; that which obli-

strued.—Barnitz *v.* Beverly, 163 U. S. 118, 121, 41 L. Ed. 93.

4. Importance of provision.—Murray *v.* Charleston, 96 U. S. 432, 448, 24 L. Ed. 760.

5. Reasons for enactment of provision.—Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 583e, 9 L. Ed. 773, opinion of Baldwin, J.

6. Opinion of Mr. Chief Justice Marshall.—Dartmouth College *v.* Woodward, 4 Wheat. 518, 4 L. Ed. 629; Newton *v.* Commissioners, 100 U. S. 548, 557, 25 L. Ed. 710.

The constitutional provisions that "no state shall emit bills of credit or make anything but gold and silver coin a legal tender in payment of debts," or "pass any law impairing the obligation of contracts" grew out of, and were intended to correct, previous abuses. See discussion in Edwards *v.* Kearzey, 96 U. S. 595, 606, 24 L. Ed. 793.

7. Impair defined.—Edwards *v.* Kearzey, 96 U. S. 595, 600, 24 L. Ed. 793, citing Webster's Dict. See IMPAIR, ante, p. 757.

8. Definition of contract.—Opinion of Washington, J., in Dartmouth College *v.* Woodward, 4 Wheat. 518, 656, 4 L. Ed. 629. See the title CONTRACTS, vol. 4, p. 555.

A contract within the constitutional provision prohibiting the impairment of the obligation of contracts, is defined to be an agreement in which a party undertakes to do, or not to do, a particular thing. Opinion of Trimble, J., citing Sturges *v.* Crowninshield, 4 Wheat. 122, 127, 197, 4 L. Ed. 529, in Ogden *v.* Saunders, 12 Wheat. 213, 316, 317, 6 L. Ed. 606.

9. Contract is an executory or executed compact.—Fletcher *v.* Peck, 6 Cranch 87, 136, 3 L. Ed. 162.

10. Obligation and contract distinguished.—Opinion of Trimble, J., in Ogden *v.* Saunders, 12 Wheat. 213, 316, 6 L. Ed. 606.

gates; the binding power of a vow, promise, oath, or contract."[11] The word is derived from the Latin word obligatio, tying up; and that from the verb obligo, to bind or tie up; to engage by the ties of a promise or oath, or form of law; and obligo is compounded of the verb ligo, to tie or bind fast, and the preposition ob, which is prefixed to increase its meaning.[12] The best definition of this phrase is as follows: "The obligation of a contract," said the supreme court, in McCracken *v.* Hayward, 2 How. 608, 612, "consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party and the right acquired by the other."[13]

b. *Laws Affecting Validity, Construction, Discharge and Enforcement.*—And laws affecting the obligation of contracts embrace alike those which affect its validity, construction, discharge and enforcement.[14] Nothing could be more material to the obligation than the means of enforcement.[15]

11. Definition of obligation.—Edwards *v.* Kearzey, 96 U. S. 595, 600, 24 L. Ed. 793, citing Webster's Dict. See OBLIGATION.

12. Derivation of word "obligation."—Edwards *v.* Kearzey, 96 U. S. 595, 600, 24 L. Ed. 793.

13. Approved definition of "obligation of contracts."—Approved in Virginia Coupon Cases, 114 U. S. 269, 304, 29 L. Ed. 185; New York, etc., R. Co. *v.* Pennsylvania, 153 U. S. 628, 38 L. Ed. 846; Barnitz *v.* Beverly, 163 U. S. 118, 123, 41 L. Ed. 93.

All laws in existence when the contract is made are necessarily referred to in it and form a part of the measure of the obligation of the one party, and of the right acquired by the other. Cooley, Constitutional Limitations, 285. Rees. *v.* Watertown, 19 Wall. 107, 121, 22 L. Ed. 72.

Laws binding parties to perform.—"The obligation of a contract 'is the law which binds the parties to perform their agreement.'" Davidson *v.* Lanier, 4 Wall. 447, 452, 18 L. Ed. 377; Von Hoffman *v.* Quincy, 4 Wall. 535, 552, 18 L. Ed. 403, followed in Wolff *v.* New Orleans, 103 U. S. 358, 26 L. Ed. 395; Walker *v.* Whitehead, 16 Wall. 314, 318, 21 L. Ed. 357; Bedford *v.* Eastern Building, etc., Ass'n, 181 U. S. 227, 241, 45 L. Ed. 834.

The law which binds parties to perform their agreement constitutes the obligation of the contract. (Washington, J., approving the definition of obligation given by the Chief Justice in Sturges *v.* Crowninshield, 4 Wheat. 122, 4 L. Ed. 529.) Ogden *v.* Saunders, 12 Wheat. 213, 257, 6 L. Ed. 606.

"In the case of Sturges *v.* Crowninshield, 4 Wheat. 122, 4 L. Ed. 529, the court in explaining the meaning of the terms 'obligation of a contract,' say, 'a contract is an agreement in which a party undertakes to do, or not to do, a particular thing; the law binds him to perform his undertaking, and this is, of course, the obligation of his contract.' That is, as I understand it, the law of the contract forms its obligation, and if so, the contract is fulfilled, and its obligation discharged, by complying with whatever the existing law required in relation to such contract." Opinion of Thompson, J., in Ogden *v.* Saunders, 12 Wheat. 213, 301, 6 L. Ed. 606.

14. Laws affecting validity, construction, discharge, etc.—McCracken *v.* Hayward, 2 How. 608, 11 L. Ed. 397; Von Hoffman *v.* Quincy, 4 Wall. 535, 18 L. Ed. 403; Walker *v.* Whitehead, 16 Wall. 314, 317, 21 L. Ed. 357; Edwards *v.* Kearzey, 96 U. S. 595, 601, 24 L. Ed. 793; Brine *v.* Insurance Co., 96 U. S. 627, 637, 24 L. Ed. 858; Antoni *v.* Greenhow, 107 U. S. 769, 774, 27 L. Ed. 468.

15. Means of enforcement.—Curran *v.* Arkansas, 15 How. 304, 319, 14 L. Ed. 705; White *v.* Hart, 13 Wall. 646, 653, 20 L. Ed. 685; Walker *v.* Whitehead, 16 Wall. 314, 21 L. Ed. 357; Louisiana *v.* Police Jury, 111 U. S. 716, 720, 28 L. Ed. 574.

"The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced—by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation." If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent impaired. Louisiana *v.* New Orleans, 102 U. S. 203, 206, 26 L. Ed. 132, approved in Antoni *v.* Greenhow, 107 U. S. 769, 798, 27 L. Ed. 468; Seibert *v.* Lewis, 122 U. S. 284, 295, 30 L. Ed. 1161.

The obligation of a contract is impaired, in the sense of the constitution, when the means by which the contract at the time of its execution could be enforced, that is, by which the parties could be obliged to perform it, are rendered less efficacious by legislation operating directly upon those means. Wolff *v.* New Orleans, 103 U. S. 358, 26 L. Ed. 395.

The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of enforcement.

c. *Postponement of Payment.*—Hence any authorization of the postponement of payment, or of means by which such postponement may be effected, is in conflict with the constitutional inhibition.[16]

d. *Moral Obligations.*—But by the terms "obligation of contracts" the mere moral law could not have been intended, since the obligation which that imposes is altogether of the imperfect kind, which the parties to it are free to obey, or not, as they please.[17]

e. *Contingencies and Expectancies.*—So, also, the obligation of a contract within the meaning of the constitution is a valid subsisting obligation, not a contingent or speculative one.[18]

This is the breath of its vital existence. Without it, the contract, as such, in the view of the law, ceases to be, and falls into the class of those "imperfect obligations," as they are termed, which depend for their fulfillment upon the will and conscience of those upon whom they rest. The ideas of right and remedy are inseparable. "Want of right of remedy are the same thing." Edwards *v.* Kearzey, 96 U. S. 595, 600, 24 L. Ed. 793.

"The obligation of a contract consists in the power and efficacy of the law, which applies to, and enforces the performance of the contract, or the payment of an equivalent for nonperformance. The obligation does not inhere, and subsist in the contract itself proprio vigore, but in the law applicable to the contract. This is the sense, I think, in which the constitution uses the term obligation." Opinion of Trimble, J., in Ogden *v.* Saunders, 12 Wheat. 213, 318, 6 L. Ed. 606.

Distinguished from obligation in a state of nature.—"As in a state of nature, the natural obligation of a contract consists in the right and potential capacity of the individual to take, or enforce the delivery of the thing due to him by the contract, or its equivalent; so, in the social state, the obligation of a contract consists in the efficacy of the civil law, which attaches to the contract, and enforces its performance, or gives an equivalent in lieu of performance. From these principles, it seems to result, as a necessary corollary, that the obligation of a contract, made within a sovereign state, must be precisely that allowed by the law of the state, and none other." Opinion of Trimble, J., in Ogden *v.* Saunders, 12 Wheat. 213, 320, 6 L. Ed. 606.

So far as relates to private contract between individual and individual it is the civil obligation of contracts, that obligation which is recognized by and results from the law of the state in which the contract is made, which are within the meaning of the constitution. Opinion of Trimble, J., in Ogden *v.* Saunders, 12 Wheat. 213, 321, 6 L. Ed. 606.

All laws in existence when a contract in regard to real estate is made, including the contract of mortgage, enter into and become a part of such contract. Brine *v.* Insurance Co., 96 U. S. 627, 24 L. Ed. 858, approved in Barnitz *v.* Beverly, 163 U. S. 118, 126, 41 L. Ed. 93.

16. Laws postponing payment.—Louisiana *v.* New Orleans, 102 U. S. 203, 207, 26 L. Ed. 132.

Thus when a person executed his written promise to pay a sum of money on or before a certain day, the contract binds him to pay that money on that day: and this is its obligation. Any law which releases a part of this obligation must in the literal sense of the word impair it. Much more must a law impair it, which makes it totally invalid, and entirely discharges it. Sturges *v.* Crowninshield, 4 Wheat. 122, 197, 4 L. Ed. 529.

17. Moral obligation of contract not embraced in these terms.—Ogden *v.* Saunders, 12 Wheat. 213, 256, 6 L. Ed. 606.

"Right and obligation are considered by all ethical writers as correlative terms: Whatever I, by my contract, give another a right to require of me, I, by that act lay myself under an obligation to yield or bestow. The obligations of every contract will then consist of that right or power over my will or actions, which I, by my contract, confer on another. And that right and power will be found to be measured neither by moral law alone, nor universal law alone, nor by the laws of society alone, but by a combination of the three—an operation in which the moral law is explained and applied by the law of nature, and both modified and adapted to the exigencies of society by positive laws." Opinion of Johnson, J., in Ogden *v.* Saunders, 12 Wheat. 213, 282, 6 L. Ed. 606.

18. Contingencies and expectancies.—Ochiltree *v.* Railroad Co., 21 Wall. 249, 252, 22 L. Ed. 546. See Maryland *v.* Railroad Co., 22 Wall. 105, 112, 22 L. Ed. 713, citing Legal Tender Cases, 12 Wall. 457, 20 L. Ed. 287.

Increase of capital stock.—Thus, plaintiff being a creditor of a corporation whose stockholders were individually liable upon such indebtedness in an amount equal to the value of the stock held by them, the state authorized an increase of the capital stock, the new subscribers to be subject to individual liability the same as the old. Held, that, as to plaintiff, this was a mere contingency or expectancy, and that a change in the law, before any of the new stock was subscribed, exempting the persons subscribing to the new stock, from all personal

D. Enforcement of Laws Impairing Contracts.—The constitutional provision prohibiting a state from passing a law impairing the obligation of contracts, equally prohibits a state from enforcing as a law an enactment of that character from whatever source originating.[19]

E. Power of Court to Nullify State Law.—The supreme court of the United States has authority to declare a state law unconstitutional, upon the ground of its impairing the obligation of a contract between different states of the Union.[20]

F. Degree of Impairment Immaterial.—The objection to a law, as impairing the obligation of a contract, does not depend upon the extent of the change it affects; the laws in existence when a contract was made, including those which affect its validity, construction, discharge and enforcement, enter into and form a part of it, measuring the obligation to be performed by one party, and the rights acquired by the other; and one of the tests that a contract has been impaired is that its value has been diminished, when the constitution prohibits any impairment at all of its obligation.[21] The obligation of a contract cannot be substantially impaired in any way by a state law.[22] But while it is a settled rule that the constitutional inhibition prohibits any impairment, and that the degree of impairment is immaterial, yet it is to be understood that the en-

liability thereon, did not impair the obligation of his contract. Ochiltree *v.* Railroad Co., 21 Wall. 249, 22 L. Ed. 546.

19. Enforcement of such laws forbidden.—An enactment of the Confederate States, enforced as a law of one of the states composing that confederation, sequestrating a debt owing by one of its citizens to a citizen of a loyal state as an alien enemy, is void, because it impairs the obligation of the contract, and discriminates against citizens of another state. Williams *v.* Bruffy, 96 U. S. 176, 24 L. Ed. 716. See post, "Confederate Contracts," III, G, 1.

20. Power of court to nullify state law.—Green *v.* Biddle, 8 Wheat. 1, 5 L. Ed. 547.

21. Degree of impairment immaterial.—Green *v.* Biddle, 8 Wheat. 1, 5 L. Ed. 547; McCracken *v.* Hayward, 2 How. 608, 11 L. Ed. 397; Planters' Bank *v.* Sharp, 6 How. 301, 12 L. Ed. 447; Edwards *v.* Kearzey, 96 U. S. 595, 24 L. Ed. 793, distinguished in Connecticut, etc., Ins. Co. *v.* Cushman, 108 U. S. 51, 65, 27 L. Ed. 48.

"The amount of the impairment of the obligation is immaterial. If there be any, it is sufficient to bring into activity the constitutional provision and the judicial power of this court to redress the wrong. Von Hoffman *v.* Quincy, 4 Wall. 535, 18 L. Ed. 403." Farrington *v.* Tennessee, 95 U. S. 679, 683, 24 L. Ed. 558.

"The prohibition has no reference to the degree of impairment. The largest and least are alike forbidden." Von Hoffman *v.* Quincy, 4 Wall. 535, 552, 18 L. Ed. 403.

"Any impairment of the obligation of a contract—the degree of impairment is immaterial—is within the prohibition of the constitution." Walker *v.* Whitehead, 16 Wall. 314, 318, 21 L. Ed. 357.

The validity of a state law impairing the obligation of contracts, does not depend upon the extent of the change which the law effects in the contract. Any deviation from its terms, by postponement or accelerating the period of its performance imposing conditions not expressed in the contract, or dispensing with the performance of those which are expressed, however minute or apparently immaterial in their effect upon the contract, impairs its obligation. Green *v.* Biddle, 8 Wheat. 1, 5 L. Ed. 547, approved in Von Hoffman *v.* Quincy, 4 Wall. 535, 553, 18 L. Ed. 403; Barnitz *v.* Beverly, 163 U. S. 118, 123, 41 L. Ed. 93.

One of the best tests that a contract has been impaired is, that its value has been diminished by the legislature in question. It is not a question of degree or manner or cause, but of encroaching in any respect on its obligation, or dispensing with any part of its force. It is not, by the constitution, to be impaired at all. Planters' Bank *v.* Sharp, 6 How. 301, 327, 12 L. Ed. 447, approved in Edwards *v.* Kearzey, 96 U. S. 595, 601, 24 L. Ed. 793.

Laws changing intention of parties.—Any law, then, which enlarges, abridges, or in any manner changes the intention of the parties to a contract, when it is discovered, necessarily impairs the contract itself, which is but the evidence of that intention. The manner, or the degree, in which this change is effected, can in no respect influence this conclusion; for whether the law affect the validity, the construction, the duration, the mode of discharge, or the evidence of the agreement, it impairs the contract, though it may not do so to the same extent, in all the supposed cases. Ogden *v.* Saunders, 12 Wheat. 213, 256, 6 L. Ed. 606.

22. Obligation cannot be impaired in any way.—Edwards *v.* Kearzey, 96 U. S. 595, 603, 24 L. Ed. 793.

croachment thus denounced must be material. If it be not material, it will be regarded as of no account.[23]

G. The Rule That There Must Be a Valid Contract.—There can be no just complaint that a statute or constitutional provision impairs the obligation of a contract where there was in fact no valid contract.[24] As, for example, where the contracts alleged to be impaired were evidenced by railroad aid bonds issued in contravention of the state statute,[25] or where the alleged contract is wholly ultra vires and void.[26] In other words, it cannot be determined that there is an impairment of the obligation of a contract until it is determined what the contract is, and whether it is a valid contract.[27]

H. Effect of Such Invalid Laws.—Where a state statute or constitution is declared void on the ground that it impairs the obligation of a contract, the holders of the contract are entitled to enforce it in all respects as if such provision had not been passed.[28]

23. Held, that encroachment must be material.—Edwards *v.* Kearzey, 96 U. S. 595, 601, 24 L. Ed. 793, distinguished in Connecticut, etc., Ins. Co. *v.* Cushman, 108 U. S. 51, 65, 27 L. Ed. 648.

24. No impairment in absence of valid contract.—Railroad Co. *v.* Hamersley, 104 U. S. 1, 26 L. Ed. 629. See post, "Ultra Vires Contracts," III, J, 4.

25. Railroad aid bonds issued in contravention of the statute.—There can be no impairment of the obligation of contract as to bonds issued by a county in accordance with an Illinois act which has been declared void by the state courts. Such bonds, having been illegally issued, do not constitute contracts which are protected by the constitution. Zane *v.* Hamilton County, 189 U. S. 370, 47 L. Ed. 858.

Upon objection that a statute or constitutional amendment operates to impair the obligation of a contract, as, for example, a municipal donation in aid of a railroad, the existence of a contract must be clearly proved before the protection of the federal constitution can be invoked. Concord *v.* Portsmouth Sav. Bank, 92 U. S. 625, 630, 23 L. Ed. 628.

Under the Illinois statute enforced March 7, 1867, a town in that state could not make an appropriation or donation in aid of a railroad company until the road had been located and constructed through the town. On November 20, 1869, the town of Concord voted an appropriation, provided the company "would," run its road through the town. On the 20th of June, 1870, the company gave notice of its acceptance of the donation, and the bonds were issued on the 9th of October, 1871. In the meantime a new state constitution going into operation upon July 2, 1870, annulled the power of any city, town or township to make donations or loan its credit to a railroad company. Held, that as the town was not empowered to make a donation until the road was located through the town, its contract to give in consideration that the company would soon locate and construct its road, was without authority and void; therefore, an objection that the constitution of 1870 impaired the obligation of a contract was without merit, and there was no valid contract to be impaired. Concord *v.* Portsmouth Sav. Bank, 92 U. S. 625, 630, 23 L. Ed. 628.

26. Ultra vires contracts not protected by contract clause.—Goszler *v.* Georgetown, 6 Wheat. 593, 5 L. Ed. 339; Railroad Co. *v.* Falconer, 103 U. S. 821, 26 L. Ed. 471; Hoadley *v.* San Francisco, 124 U. S. 639, 31 L. Ed. 553; New Orleans *v.* New Orleans Waterworks Co., 142 U. S. 79, 35 L. Ed. 943.

A party to an alleged contract cannot justly complain that a subsequent statute or constitutional amendment operates as an impairment thereof when in fact there was no binding contract to be impaired; as, for example, where the alleged contract was wholly ultra vires and void. Railroad Co. *v.* Falconer, 103 U. S. 821, 26 L. Ed. 471.

Thus, where the contract of a municipal corporation to subscribe for stock in a railroad company was wholly ultra vires and void because, under the statute, the construction of the road was a condition precedent to its power to enter into such contract, a subsequent constitutional amendment adopted before the subscription was actually made, and forbidding municipal subscriptions in aid of railroads was not invalid as impairing the obligation of a contract. Railroad Co. *v.* Falconer, 103 U. S. 821, 26 L. Ed. 471, distinguishing County of Moultrie County *v.* Rockingham, etc., Bank, 92 U. S. 631, 23 L. Ed. 631.

Where, upon a just construction of the statutes defining their authority, the state railroad commissioners had authority to consent to the abandonment of railroad stations, but no authority to bind the state by contract that stations so bound should not be re-established, the statute re-establishing a station which had been abandoned with the consent of the commissioners was not obnoxious as impairing the obligation of the contract. Railroad Co. *v.* Hamersley, 104 U. S. 1, 26 L. Ed. 629.

27. Mercantile Trust, etc., Co. *v.* Columbus, 203 U. S. 311, 321, 51 L. Ed. 198.

28. Effect of such invalid laws.—Shreve-

II. What Laws Impair the Obligation of Contracts.

A. In General.—It is a municipal law of the state, whether that be written or unwritten, which forms part of the obligation of a contract, rather than the common law of nations.[29]

B. Laws Passed Prior to the Constitution.—The present constitution of the United States did not commence its operation, until the first Wednesday in March, 1789, and the provision in the constitution, that "no state shall make any law impairing the obligation of contracts," does not extend to a state law enacted before that day, and operating upon rights of property vested before that time.[30]

C. Laws Passed by the Confederate States.—At no time during the rebellion were the rebellious states out of the pale of the Union. Their constitutional duties and obligations remained unaffected by the rebellion. They could not then pass a law impairing the obligation of a contract more than before the rebellion, or now, since.[31] Hence, an enactment of the Confederate States, enforced as a law of one of the states composing that confederation, sequestrating a debt owing by one of its citizens to a citizen of a loyal state as an alien enemy, is void, because it impairs the obligation of the contract, and discriminates against citizens of another state.[32]

D. Laws of Congress—1. IN GENERAL.—This constitutional provision is only a restriction upon the states. No provision of the constitution prohibits congress from passing laws impairing the obligation of contracts.[33] Hence, congress may in the exercise of the powers conferred upon it, annul or impair the obligation of contracts; as, for example, in the exercise of its power to enact bankrupt laws, nonintercourse acts, etc.[34] And this may be done not only in

pott *v.* Cole, 129 U. S. 36, 32 L. Ed. 589.

29. **The "law" referred to is the municipal law.**—"Whilst I admit, then, that this common law of nations, which has been mentioned, may form in part of the obligation of a contract, I must unhesitatingly insist, that this law is to be taken in strict subordination to the municipal laws of the land where the contract is made, or is to be executed. The former can be satisfied by nothing short of performance; the latter may affect and control the validity, construction, evidence, remedy, performance and discharge of the contract. The former is the common law of all civilized nations, and of each of them; the latter is the peculiar law of each, and is paramount to the former, whenever they come in collision with each other. It is, then, the municipal law of the state, whether that be written or unwritten, which is emphatically the law of the contract made within the state, and must govern it throughout, wherever its performance is sought to be enforced. It forms, in my humble opinion, a part of the contract, and travels with it, wherever the parties to it may be found. It is so regarded by all the civilized nations of the world, and is enforced by the tribunals of those nations, according to its own forms, unless the parties to it have otherwise agreed, as where the contract is to be executed in, or refers to the laws of, some other country than that in which it is formed, or where it is of an immoral character, or contravenes the policy of the nation to whose tribunals the appeal is made; in which latter cases, the remedy which the comity of nations affords for enforcing the obligation of contracts wherever formed, is denied." Opinion of Washington, J., in Ogden *v.* Saunders, 12 Wheat. 213, 259, 6 L. Ed. 606.

30. **Laws passed prior to adoption of constitution.**—Owings *v.* Speed, 5 Wheat. 420, 5 L. Ed. 124. See, also, League *v.* DeYoung, 11 How. 185, 13 L. Ed. 657; Herman *v.* Phalen, 14 How. 79, 14 L. Ed. 334.

31. **Laws passed by Confederate States.**—White *v.* Hart, 13 Wall. 646, 20 L. Ed. 685.

32. **Confederate statute sequestrating debts owed to alien enemies.**—Williams *v.* Bruffy, 96 U. S. 176, 24 L. Ed. 716, approved in New Orleans Waterworks Co. *v.* Louisiana Sugar Ref. Co., 125 U. S. 18, 31, 31 L. Ed. 607.

33. **This provision only restricts the states.**—Satterlee *v.* Matthewson, 2 Pet. 380, 416, 7 L. Ed. 458.

34. **Congress may annul or impair contracts.**—Hepburn *v.* Griswold, 8 Wall. 603, 19 L. Ed. 513; Legal Tender Cases, 12 Wall. 457, 550, 20 L. Ed. 287.

It is no answer to the power of congress to enact statutes of limitation to say that it interferes with the validity of contracts, for no provision of the constitution prohibits congress from doing this, as it does the states; and where the question of the power of congress arises, as in the legal tender cases, and in bankruptcy cases, it does not depend upon the incidental

the exercise of its express powers but also in the exercise of its so-called implied or auxiliary powers; powers of the last description being as expressly given as the power to declare war or to establish uniform laws on the subject of bankruptcy, but not being catalogued or enumerative.[35]

2. LIMITATIONS OF GENERAL RULE.—But though congress is not prohibited from passing an act impairing the obligation of contracts, yet the spirit of this prohibition pervades the entire body of legislation. Hence, an act of congress which necessarily and in its direct operation impairs the obligation of contracts, is inconsistent with the spirit of the constitution.[36] Nor is congress competent to authorize any state to evade or infringe the constitutional provision forbidding the impairment of the obligation of contracts.[37]

3. VALIDITY OF LEGAL TENDER ACTS.—The acts of congress known as the

effect of its exercise on contracts, but on the existence of the power itself. Mitchell *v.* Clark, 110 U. S. 633, 643, 28 L. Ed. 279.

"Every contract for the payment of money, simply, is necessarily subject to the constitutional power of the government, over the currency, whatever that power may be, and the obligation of the parties is, therefore, assumed with reference to that power." Legal Tender Cases, 12 Wall. 457, 549, 20 L. Ed. 287; Legal Tender Cases, 110 U. S. 421, 449, 28 L. Ed. 204. See the title CONSTITUTIONAL LAW, vol. 4, p. 303.

35. Congress may exercise its implied powers to impair contracts.—Legal Tender Cases, 12 Wall. 457, 550, 20 L. Ed. 287.

36. Limitations upon power of congress to impair contracts.—"It is true that this prohibition is not applied in terms to the government of the United States. Congress has express power to enact bankrupt laws, and we do not say that a law made in the execution of any other express power, which, incidentally only, impairs the obligation of a contract, can be held to be unconstitutional for that reason. But we think it clear that those who framed and those who adopted the constitution, intended that the spirit of this prohibition should pervade the entire body of legislation, and that the justice which the constitution was ordained to establish was not thought by them to be compatible with legislation of an opposite tendency. In other words, we cannot doubt that a law not made in pursuance of an express power, which necessarily and in its direct operation impairs the obligation of contracts, is inconsistent with the spirit of the constitution." Hepburn *v.* Griswold, 8 Wall. 603, 623, 19 L. Ed. 513, followed in Broderick *v.* Magraw, 8 Wall. 639, 19 L. Ed. 531, but overruled in Legal Tender Cases, 12 Wall. 457, 20 L. Ed. 287. But see dissenting opinion of Miller, J.

The United States cannot any more than a state interfere with private rights, except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents states from passing laws impairing the obligation of contracts, but equally with the states they are prohibited from depriving persons or corporations of property without due process of law. Sinking-Fund Cases, 99 U. S. 700, 718, 25 L. Ed. 496.

The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a state or a municipality or a citizen. Sinking-Fund Cases, 99 U. S. 700, 719, 25 L. Ed. 496.

Congress cannot impair its own grants.—The United States cannot legislate back to themselves, without making compensation, the lands they have given to a corporation to aid in the construction of its railroad. Neither can they by legislation compel the corporation to discharge its obligations in respect to its subsidy bonds otherwise than according to the terms of the contract already made in that connection. Sinking-Fund Cases, 99 U. S. 700, 719, 25 L. Ed. 496.

37. Congress cannot authorize states to impair contracts.—Edwards *v.* Kearzey, 96 U. S. 595, 607, 24 L. Ed. 793.

Georgia statute forbidding enforcement of slave contracts.—The provision of the constitution of Georgia, adopted in 1868, that "no court or officer shall have nor shall the general assembly give jurisdiction to try, or give judgment on, or enforce any debt, the consideration of which was a slave, or the hire thereof," cannot be sustained upon the ground that said constitution was adopted under the coercion and dictation of congress, and that such provision was in effect an enactment of congress, upon which the constitutional inhibition against the impairment of the obligation of contracts had no effect. White *v.* Hart, 13 Wall. 646, 20 L. Ed. 685.

If congress had dictated and expressly approved such constitutional provision, such dictation and approval would have been without effect, since congress has no power to supersede the national constitution. White *v.* Hart, 13 Wall. 646, 649, 20 L. Ed. 685.

Though the constitution of Georgia adopted after the Civil War, and before its readmission to representation in congress, was sanctioned by congress the

legal tender acts are constitutional, when applied to contracts made before their passage.[38]

4. Act of Congress to Retire Porto Rican Money.—The act of congress passed 12th day of April, 1900, which provides for retiring Porto Rican coins and substituting American money therefor, does not impair the obligation of pre-existing contracts.[39]

E. State Constitutions and Amendments Thereto—1. State Constitutions.—The fact that the act of the state is a constitutional provision instead of a mere legislative act does not affect the case.[40] Because the constitution of a state is undoubtedly a law within the meaning of this prohibition. A state can no more do what is thus forbidden by one than by the other. There is the

provision therein relating to homestead exemption, and which impaired the obligation of existing contracts, can in no sense be considered as an act of congress. The sanction of congress was only permissive as a part of the process of rehabilitation, and involved nothing affirmative or negative beyond that event. Gunn *v.* Barry, 15 Wall. 610, 623, 21 L. Ed. 212.

38. Legal tender acts held valid.—Legal Tender Cases, 12 Wall. 457, 20 L. Ed. 287, overruling Hepburn *v.* Griswold, 8 Wall. 603, 19 L. Ed. 513, and reaffirmed in Dooley *v.* Smith, 13 Wall. 604, 20 L. Ed. 547; Bigler *v.* Waller, 14 Wall. 297, 308, 20 L. Ed. 891; Railroad Co. *v.* Johnson, 15 Wall. 195, 21 L. Ed. 178. See the titles CONSTITUTIONAL LAW, vol. 4, p. 303; PAYMENT.

"The power of making the notes of the United States a legal tender in payment of private debts, being included in the power to borrow money and to provide a national currency, is not defeated or restricted by the fact that its exercise may affect the value of private contracts. If, upon a just and fair interpretation of the whole constitution, a particular power or authority appears to be vested in congress, it is no constitutional objection to its existence, or to its exercise, that the property or the contracts of individuals may be incidentally affected." Legal Tender Case, 110 U. S. 421, 448, 28 L. Ed. 204.

The legal tender acts are not unconstitutional as impairing the obligation of contracts made before their enactment; since all contracts to pay money generally (otherwise as the contracts to pay some specifically defined species of money), are to be deemed to have been entered into with reference to the vicissitudes of national existence, and possible future changes in the currency laws and the medium of payment. In other words every contract for the payment of money generally, is subject to the constitutional power of the government over the currency, whatever that power may be, and the obligations of the parties are assumed with reference to that power. Legal Tender Cases, 12 Wall. 457, 549, 20 L. Ed. 287. As to a contract to pay in a specific kind of money or in specie, see Bronson *v.* Rodes, 7 Wall. 229, 19 L. Ed. 141; Trebilcock *v.* Wilson, 12 Wall. 687, 20 L. Ed. 460.

Overruled cases.—An act compelling acceptance in satisfaction of any other than the stipulated medium of payment, alters arbitrarily the terms of the contract and impairs its obligation; the extent of the impairment is in the proportion of the unequality of the payment accepted under the constraint of the law to the payment due under the contract. Hepburn *v.* Griswold, 8 Wall. 603, 609, 19 L. Ed. 513, followed in Broderick *v.* Magraw, 8 Wall. 639, 19 L. Ed. 531.

In the case of Hepburn *v.* Griswold, 8 Wall. 603, 623, 19 L. Ed. 513, it was stated that while the constitutional prohibition against the impairment of the obligation of contracts does not in terms apply to congress, yet it is clear that the framers of the constitution intended that the spirit of this prohibition should pervade the entire body of our legislation, and that a law not made in pursuance of an express power, which necessarily and in its direct operation impairs the obligation of contracts, is inconsistent with the spirit of the constitution. Therefore, the "legal tender acts," which were not enacted under any express power, were unconstitutional so far as they apply to existing obligations. Hepburn *v.* Griswold, 8 Wall. 603, 623, 19 L. Ed. 513, followed in Broderick *v.* Magraw, 8 Wall. 639, 19 L. Ed. 531.

39. Act of congress providing for the retiring of Porto Rican money.—The act of congress, April 12, 1900, § 11, providing that United States money shall be accepted in exchange at the rate of sixty cents for one peso of Porto Rican money, does not impair the obligation of a contract, where the seller of a plantation in Porto Rico sought to make the purchaser pay him at the rate of $1.00 for each peso of the debt and the agreement at the time of the purchase in 1894 was that the debt should be satisfied by money current in the province at the rate of 100 centavos for each peso of the debt. Serralles' Succession *v.* Esbri, 200 U. S. 103, 50 L. Ed. 391.

40. Shreveport *v.* Cole, 129 U. S. 36, 32 L. Ed. 589, citing Railroad Co. *v.* McClure, 10 Wall. 511, 19 L. Ed. 997.

same impediment in the way of both.[41] And the fact that the new constitution was sanctioned by congress does not affect the question.[42]

2. Constitutional Amendments.—If a contract was valid when made, a state can no more impair its obligation by a constitutional amendment than it can by an ordinary act of legislation.[43]

F. Judicial Decisions—1. In General.—The prohibition upon the passage of state laws impairing the obligation of contracts has reference only to the laws, that is, to the constitutional provisions or to the legislative enactments of a state, and not to judicial decisions or the acts of state tribunals or officers under statutes in force at the time of the making of the contract, the obligation of which is alleged to have been impaired.[44] Hence, there is no impairment of the obliga-

41. State constitutions are within the inhibition.—Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 583e, 9 L. Ed. 773; Dodge *v.* Woolsey, 18 How. 331, 15 L. Ed. 401; Railroad Co. *v.* McClure, 10 Wall. 511, 515, 19 L. Ed. 997; White *v.* Hart, 13 Wall. 646, 652, 20 L. Ed. 685; Delmas *v.* Insurance Co., 14 Wall. 661, 20 L. Ed. 757; Gunn *v.* Barry, 15 Wall. 610, 623, 21 L. Ed. 212; Boyce *v.* Tabb, 18 Wall. 546, 21 L. Ed. 757; Concord *v.* Portsmouth Sav. Bank, 92 U. S. 625, 630, 23 L. Ed. 628; Moultrie County *v.* Rockingham, etc., Bank, 92 U. S. 631, 23 L. Ed. 631; Clay County *v.* Society for Savings, 104 U. S. 579, 26 L. Ed. 856; Louisiana *v.* Jumel, 107 U. S. 711, 721, 27 L. Ed. 448; New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650, 672, 29 L. Ed. 516; New Orleans Waterworks Co. *v.* Rivers, 115 U. S. 674, 29 L. Ed. 525; Fisk *v.* Jefferson Police Jury, 116 U. S. 131, 135, 29 L. Ed. 587; Bier *v.* McGehee, 148 U. S. 137, 140, 37 L. Ed. 397.

Constitutional enactment cannot affect contracts which, when entered into, were within the power of the state to make, and which, consequently, were protected against impairment, in respect of their obligation, by the constitution of the United States. A state can no more impair the obligation of a contract by her organic law than by legislative enactment; for her constitution is a law within the meaning of the contract clause of the national constitution. Ohio Life Ins., etc., Co. *v.* Debolt, 16 How. 416, 429, 14 L. Ed. 997; Railroad Co. *v.* McClure, 10 Wall. 511, 19 L. Ed. 997; New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650, 672, 29 L. Ed. 516.

Right to grant special franchises to corporations.—Where at the time a contract is entered into between a municipality and a water works company, it was established by the decisions of the highest court of the state that the constitution of the state permitted a grant of special franchises to persons and corporations, and permitted the latter to receive assignments of them from such persons, or grants of them directly from the legislature, it was held that such contract could not be affected by a new constitution adopted by the state. New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650, 29 L. Ed. 516; Fisk *v.* Jefferson Police Jury, 116 U. S. 131, 29 L. Ed. 587; St. Tammany Waterworks *v.* New Orleans Waterworks, 120 U. S. 64, 30 L. Ed. 563; Los Angeles *v.* Los Angeles City Water Co., 177 U. S. 558, 44 L. Ed. 886.

42. Effect where state constitution was sanctioned by congress.—Gunn *v.* Barry, 15 Wall. 610, 21 L. Ed. 212.

43. Pre-existing contracts must not be impaired by constitutional amendments.—Delmas *v.* Insurance Co., 14 Wall. 661, 20 L. Ed. 757.

Contracts represented by charters.—The state can no more impair the obligations of its contracts embodied in chartered corporations, by constitutional adoption or amendments, than it can by ordinary acts of legislation. Dodge *v.* Woolsey, 18 How. 331, 15 L. Ed. 401; Mechanics', etc., Bank *v.* Debolt, 18 How. 380, 15 L. Ed. 458; Mechanics', etc., Bank *v.* Thomas, 18 How. 384, 15 L. Ed. 460.

An ordinance of a municipality of the state of Louisiana imposed a tax upon the property of the city to defray expenses of drainage. After the assessments were made and reduced to judgments, a constitutional amendment went into effect, in 1874, limiting the power of the city to contract debts. In order to complete the work, the city purchased a drainage plant and franchise, in 1876, and issued bonds for the payment thereof, advising property holders, by an ordinance without the knowledge of the person from whom the purchase was made, not to pay the assessments. Held, the constitutional amendment was not designed to impair the validity of a debt already legally incurred, and if it had attempted that, it would have been hostile to the provision of the Federal constitution against impairing the obligation of a contract. New Orleans *v.* Warner, 175 U. S. 120, 144, 44 L. Ed. 96.

44. No impairment by judicial decisions.—Railroad Co. *v.* Rock, 4 Wall. 177, 18 L. Ed. 381; Knox *v.* Exchange Bank, 12 Wall. 379, 383, 20 L. Ed. 414; Lehigh Water Co. *v.* Easton, 121 U. S. 388, 30 L. Ed. 1059; New Orleans Waterworks Co. *v.* Louisiana Sugar Ref. Co., 125 U. S. 18, 30, 31 L. Ed. 607; Brown *v.* Smart, 145 U. S. 454, 36 L. Ed. 773; Wood *v.* Brady, 150 U. S. 13, 37 L. Ed. 981; Central Land Co. *v.* Laidley, 159 U. S.

tion of contract where a state court merely changes a prior decision; and it is settled that such impairment can come only from a subsequent statute, and after it is upheld or effect given to it by the state court.[45]

Limitations of General Rule.[46]—But the rule is well settled that judicial decisions construing the constitution or laws of the state are a part thereof, and a change of decision may have all the practical effect of the adoption of a new constitutional provision, statute, or ordinance; and if the last construction has the effect of impairing the obligation of a contract entered into while the prior decision was regarded as having established a law, the last decision must be disregarded in adjudicating the rights of the parties.[47] And this

103, 109, 40 L. Ed. 91, distinguished in Loeb *v.* Columbia Tp. Trustees, 179 U. S. 472, 493, 45 L. Ed. 280; Hanford *v.* Davies, 163 U. S. 273, 278, 41 L. Ed. 157; Weber *v.* Rogan, 188 U. S. 10, 14, 47 L. Ed. 363. See post, "Right to Take Away Remedy by Judicial Decisions." VII, C.

As stated by Mr. Justice Gray, speaking for the court, in New Orleans Waterworks Co. *v.* Louisiana Sugar Ref. Co., 125 U. S. 18, 30, 31 L. Ed. 607: "In order to come within the provision of the constitution of the United States which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by a law of the state. The prohibition is aimed at the legislative power of the state, and not at the decisions of its courts, or the acts of administrative or executive boards or officers, or the doings of corporations or individuals." And the language of Mr. Justice Miller, in exposition of the rule, is quoted from two opinions of the court delivered by him: "It must be the constitution, or some law of the state, which impairs the obligation of the contract, or which is otherwise in conflict with the constitution of the United States; and the decision of the state court must sustain the law or constitution of the state in the matter in which the conflict is supposed to exist; or the case for this court does not arise." Railroad Co. *v.* Rock, 4 Wall. 177, 181, 18 L. Ed. 381; St. Paul, etc., R. Co. *v.* Todd County, 142 U. S. 282, 286, 35 L. Ed. 1014.

45. Mere change in prior decisions.—National Mut., etc., Ass'n *v.* Brahan, 193 U. S. 635, 48 L. Ed. 823.

Conflicting decisions upon validity of lottery.—Upon an indictment under an Alabama statute for conducting a lottery the defendant justified under an act of incorporation which he alleged amounted to a contract between himself and the state and which the state could not repeal or impair. The only question before the court was whether or not the act constituted a contract, and the court held that it did, the question of the constitutionality of the statutes was not considered. Upon a subsequent indictment against the same defendant for a similar offense the question of the constitutionality of the statute was expressly raised and the courts decided that it was unconstitutional and constituted no defense to the charge against the defendant. Held, that the previous adjudication did not estop the state from denying the constitutionality of the statute, and that the second did not therefore impair the obligation of a contract; and it is immaterial that the question of the constitutionality of the statute might have been raised upon the trial of the first instrument. Boyd *v.* Alabama, 94 U. S. 645, 24 L. Ed. 3.

46. See the title COURTS, vol. 4, p. 1049.

47. When decisions construing constitutions and statutes are immutable.—Ohio Life Ins., etc., Co. *v.* Debolt, 16 How. 416, 432, 14 L. Ed. 997; Gelpcke *v.* Dubuque, 1 Wall. 175, 206, 17 L. Ed. 520; Havemeyer *v.* Iowa County, 3 Wall. 294, 18 L. Ed. 38; Thomson *v.* Lee County, 3 Wall. 327, 18 L. Ed. 177; Butz *v.* Muscatine, 8 Wall. 575, 579, 19 L. Ed. 490; Olcott *v.* Supervisors, 16 Wall. 678, 21 L. Ed. 382; Pine Grove Tp. *v.* Talcott, 19 Wall. 666, 22 L. Ed. 227; Commissioners *v.* Thayer, 94 U. S. 631, 642, 24 L. Ed. 133; Douglass *v.* Pike County, 101 U. S. 677, 25 L. Ed. 968; Taylor *v.* Ypsilanti, 105 U. S. 60, 71, 26 L. Ed. 1008; New Buffalo *v.* Iron Co., 105 U. S. 73, 26 L. Ed. 1024; Louisiana *v.* Pilsbury, 105 U. S. 278, 294, 26 L. Ed. 1090.

"The same principle applies where there is a change of judicial decision as to the constitutional power of the legislature to enact the law. To this rule, thus enlarged, we adhere. It is the law of this court. It rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal." Gelpcke *v.* Dubuque, 1 Wall. 175, 206, 17 L. Ed. 520.

Where a state constitution has received a uniform and undisputed construction by every department of the government, supported by judicial decision for nearly fifty years, a contract with the state authorities may have been made upon the faith of such construction. The courts, upon a question involving the validity of such contracts, are bound to adopt the construction they received from the state authorities at the time the contract was made. Opinion of Taney, C. J., in Ohio Life Ins., etc., Co. *v.* Debolt, 16 How. 416,

is true although the first judicial construction of the statute upon which the contract, or the remedy for its enforcement, is based, was not made until after the contract had been entered into.[48] This doctrine applies as well to the construction of a provision of the organic law, as to the construction of a statute. The construction, so far as contract obligations incurred under it are concerned, constitutes a part of the law as much as if embodied in it.[49] And so far does it extend, that when a statute of two states, expressed in the same terms, is construed differently by the highest courts, they are treated as different laws, each embodying the particular construction of its own state, and

431, 14 L. Ed. 997; Rowan *v.* Runnels, 5 How. 134, 12 L. Ed. 85.

After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of a legislative enactment. Gelpcke *v.* Dubuque, 1 Wall. 175, 17 L. Ed. 520; Havemeyer *v.* Iowa County, 3 Wall. 294, 18 L. Ed. 38; Thomson *v.* Lee County, 3 Wall. 327, 18 L. Ed. 177; Lee County *v.* Rogers, 7 Wall. 181, 19 L. Ed. 160; Chicago *v.* Sheldon, 9 Wall. 50, 19 L. Ed. 594; Olcott *v.* Supervisors, 16 Wall. 678, 21 L. Ed. 382; Fairfield *v.* County of Gallatin, 100 U. S. 47, 25 L. Ed. 544; Louisiana *v.* Pilsbury, 105 U. S. 278, 295, 26 L. Ed. 1090.

Where a contract was valid at the time of its execution under the state law as it was then judicially construed by the state courts, such construction becomes a part of the contract, and the federal courts will follow it in disregard of any subsequent change in the attitude of the state courts with reference to the question. Ohio Life Ins., etc., Co. *v.* Debolt, 16 How. 416, 432, 14 L. Ed. 997; Olcott *v.* Supervisors, 16 Wall. 678, 21 L. Ed. 382; Douglass *v.* Pike County, 101 U. S. 677, 25 L. Ed. 968; Taylor *v.* Ypsilanti, 105 U. S. 60, 72, 26 L. Ed. 1008; New Buffalo *v.* Iron Co., 105 U. S. 73, 26 L. Ed. 1024.

Oscillating decisions not followed.—But although it is the practice of the federal supreme court to follow the latest settled adjudications of the state courts giving constructions to the laws and constitutions of their own states, it will not necessarily follow decisions which may prove but oscillations in the course of such judicial settlement. Nor will it follow any adjudication to such an extent as to make a sacrifice of truth, justice and law. Gelpcke *v.* Dubuque, 1 Wall. 175, 17 L. Ed. 520.

Change of judicial construction given a prospective effect.—"The true rule is to give a change of judicial construction in respect to a statute the same operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself; and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment." Ohio Life Ins., etc., Co. *v.* Debolt, 16 How. 416, 432, 14 L. Ed. 997; Olcott *v.* Supervisors, 16 Wall. 678, 21 L. Ed. 382; Douglass *v.* Pike County, 101 U. S. 677, 25 L. Ed. 968; Taylor *v.* Ypsilanti, 105 U. S. 60, 72, 26 L. Ed. 1008; New Buffalo *v.* Iron Co., 105 U. S. 73, 26 L. Ed. 1024; Louisiana *v.* Pilsbury, 105 U. S. 278, 294, 26 L. Ed. 1090.

Construction of saving clause in a statute.—The construction given to a statute of a state by the highest judicial tribunal of such state is regarded as a part of the statute, and is as binding upon the courts of the United States as the text. Hence a ruling of the court of appeals of New York, that a saving clause, in a statute regarding impairing obligation of contract is not applicable in judgments like the plaintiffs, is binding on the supreme court of United States. Morley *v.* Lake Shore, etc., R. Co., 146 U. S. 162, 36 L. Ed. 925.

Right to grant special franchises to corporations.—Where at the time a contract is entered into between a municipality and a waterworks company, it was established by the decisions of the highest court of the state that the constitution of the state permitted a grant of special franchises to persons and corporations, and permitted the latter to receive assignments of them from such persons, or grants of them directly from the legislature, this judicial construction is a part of the contract, and cannot be affected by subsequent decisions. Rowan *v.* Runnels, 5 How. 134, 12 L. Ed. 85; Ohio Life Ins., etc., Co. *v.* Debolt, 16 How. 416, 14 L. Ed. 997; Havemeyer *v.* Iowa County, 3 Wall. 294, 18 L. Ed. 38; Chicago *v.* Sheldon, 9 Wall. 50, 19 L. Ed. 594; Olcott *v.* Supervisors, 16 Wall. 678, 21 L. Ed. 382; McCullough *v.* Virginia, 172 U. S. 102, 43 L. Ed. 382; Los Angeles *v.* Los Angeles City Water Co., 177 U. S. 558, 44 L. Ed. 886.

48. **Subsequent decisions within the rule.**—Butz *v.* Muscatine, 8 Wall. 575, 19 L. Ed. 490, followed in United States *v.* Burlington, 154 U. S., appx., 568, 19 L. Ed. 495.

49. **Judicial construction of constitu-**

enforced in accordance with it in all cases arising under it.[50] And it seems that it is immaterial that the state decision by which it is claimed that the contract is impaired is one of first impression in the state construing the law under which the contract was entered into.[51] Moreover, although the decision of the state court is arrived at without any reference made to the act claimed to impair the contract obligation, yet if the necessary consequence of the judgment is that effect is thereby given to that act, and in a manner in which the complainant claims to be unwarranted and illegal, such decision will be held to infringe the contract clause of the federal constitution.[52]

2. New York Elevated Railroad Cases.—It was held in the New York Elevated Railway Cases that when the court of appeals of that state has once interpreted the contract existing between the landowner and the city, that interpretation becomes a part of the contract, upon which one acquiring land may rely, and any subsequent change of it to his injury impairs the obligation of the contract.[53]

3. Decisions upon the Validity of Municipal Securities.—Where bonds issued to bona fide holders for value, as, for example, bonds to aid the construction of a railroad,[54] are valid by the judicial decisions of a state when is-

tion within the rule.—Louisiana *v.* Pilsbury, 105 U. S. 278, 294, 26 L. Ed. 1090.

50. Different construction of same statute.—Shelby *v.* Guy, 11 Wheat. 361, 6 L. Ed. 495; Christy *v.* Pridgeon, 4 Wall. 196, 18 L. Ed. 322; Louisiana *v.* Pilsbury, 105 U. S. 278, 294, 26 L. Ed. 1090.

51. Decisions on questions of novel impression.—Pine Grove Tp. *v.* Talcott, 19 Wall. 666, 22 L. Ed. 227.

Thus where the state constitution provides that the credit of the state should never be granted in aid of any person, association or corporation, and that the state should not be a party to nor interested in any work of internal improvement, a decision of the highest court of the state, being the first decision construing that provision, and holding that it extends to prohibit township aid to railroads, was held to impair the obligation of the contract between the township and the holders of the bonds issued in aid of a railroad enterprise; the federal supreme court saying that the question was one of general commercial and constitutional law, the right to decide which it reserved to itself. Pine Grove Tp. *v.* Talcott, 19 Wall. 666, 22 L. Ed. 227.

52. Effect of failure of court to refer to statute.—A construction by a state court of a state statute, whereby a cause of action under the statute for default of payments is enforced on the ground that payments previously made and accepted by the state are void, operates to impair the obligation of the implied contract arising out of the acceptance of the payments, and therefore violates the federal constitution, although the state court does not mention the statute. Houston, etc., R. Co. *v.* Texas, 177 U. S. 66, 44 L. Ed. 673.

53. New York elevated railroad cases.—Muhlker *v.* New York, etc., R. Co., 197 U. S. 544, 49 L. Ed. 872, distinguished in Sauer *v.* New York City, 206 U. S. 536, 51 L. Ed. 1176, Mr. Justice McKenno dissenting.

Abutting owners on New York elevated railroad.—The city of New York, owning the fee of a street, solely for public travel and to give passage across the city over an otherwise impassable bluff, constructed a viaduct which interfered with an abutter's access to his land and with the free admission to it of light and air. This construction was authorized by the state, and no compensation was made to abutting owners. Held, that there is a well-defined distinction between a structure erected for the exclusive use of a railroad and one erected for the general use of the public; and that the decision in the elevated railroad cases did not give abutting owners a contract right to light, air and access as against the use of a street for purely public purposes, which would be impaired within the constitutional provision by such use subsequently. Sauer *v.* New York City, 206 U. S. 536, 51 L. Ed. 1176, distinguishing Muhlker *v.* New York, etc., R. Co., 197 U. S. 544, 49 L. Ed. 872.

Where a railroad builds an elevated structure in a city street, in place of a prior depressed roadbed, and by command of a New York statute; and where the state courts have held that an abutting owner has a right to the easement of light, air and access, held, that an abutting owner, deriving his title from the original grantor, has a contract right to light and air entirely distinct from that of access; and that such statute impairs the obligation of contract in so far as it allows an infringement of the right without compensation to the abutting owner. Muhlker *v.* New York, etc., R. Co., 197 U. S. 544, 49 L. Ed. 872, distinguished in Sauer *v.* New York City, 206 U. S. 536, 51 L. Ed. 1176.

54. Municipal aid bonds.—Commissioners *v.* Thayer, 94 U. S. 631, 642, 24 L. Ed.

sued, subsequent decisions in the same state cannot destroy their validity in such hands.[55]

4. Decisions upon Property Rights.—The general rule is especially appli-

133, citing Gelpcke *v.* Dubuque, 1 Wall. 175, 17 L. Ed. 520; Butz *v.* Muscatine, 8 Wall. 575, 19 L. Ed. 490; Olcott *v.* Supervisors, 16 Wall. 678, 21 L. Ed. 382; German Sav. Bank *v.* Franklin County, 128 U. S. 526, 32 L. Ed. 519. See the title MUNICIPAL, COUNTY, STATE AND FEDERAL AID. See post, "Contracts of Municipalities," III, J.

Rule where appeal is from state to federal court.—"It has been held that where a state court has decided in a series of decisions that its legislature had the power to permit municipalities to issue bonds to pay their subscriptions to railroad companies, and such bonds had been issued accordingly, if in such event suit were brought on the bonds in a United States court, that court would not follow the decision of the state court rendered after the issuing of the bonds and holding that the legislature had no power to permit a municipality to issue them, and that they were therefore void. Such are the cases of Gelpcke *v.* Dubuque, 1 Wall. 175, 17 L. Ed. 520, and Douglass *v.* Pike County, 101 U. S. 677, 25 L. Ed. 968. In cases of that nature there is room for the principle laid down that the construction of a statute and admission as to its validity made by the highest court of a state prior to the issuing of any obligations based upon the statute, enters into and forms a part of the contract and will be given effect to by this court as against a subsequent changing of decision by the state court by which such legislation might be held to be invalid. But effect is given to it by this court only on appeal from a judgment of a United States court and not from that of a state court." Bacon *v.* Texas, 163 U. S. 207, 220, 41 L. Ed. 132. See Turner *v.* Wilkes County Comm'rs, 173 U. S. 461, 43 L. Ed. 768.

55. Decisions upholding municipal securities.—Gelpcke *v.* Dubuque, 1 Wall. 175, 17 L. Ed. 520; Mitchell *v.* Burlington, 4 Wall. 270, 18 L. Ed. 350; Lee County *v.* Rogers, 7 Wall. 181, 19 L. Ed. 160; The City *v.* Lamson, 9 Wall. 477, 19 L. Ed. 725, followed in Kenosha *v.* Lamson, 154 U. S., appx., 573, 19 L. Ed. 725; Olcott *v.* Supervisors, 16 Wall. 678, 21 L. Ed. 382; Loeb *v.* Columbia Tp. Trustees, 179 U. S. 472, 492, 45 L. Ed. 280. See the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.

Where under the constitution of a state, as construed by the highest court in the state at the time municipal bonds were issued, such bonds were valid as having been issued for a corporate purpose, the federal supreme court will not consider itself bound by a subsequent decision of the state court construing the state constitution so as to render the bonds invalid. Livingston County *v.* Darlington, 101 U. S. 407, 415, 25 L. Ed. 1015; Douglass *v.* Pike County, 101 U. S. 677, 25 L. Ed. 968.

Where municipal bonds have been put upon the market as commercial paper, the rights of the parties thereto are to be determined according to the statutes of the state as they were then construed by her highest court; and in a case involving those rights the federal supreme court will not be governed by any subsequent decision in conflict with that under which they accrued. Douglass *v.* Pike County, 101 U. S. 677, 25 L. Ed. 968.

Where municipal bonds, under the state constitution as it was construed by the highest court of the state at the time of their issuance, were valid as having been issued for a corporate purpose, such construction becomes a part of the contract between the municipality and the bondholders, and they cannot be invalidated by a change in the judicial interpretation of the state constitution. Livingston County *v.* Darlington, 101 U. S. 407, 415, 25 L. Ed. 1015; Douglass *v.* Pike County, 101 U. S. 677, 25 L. Ed. 968.

But while it is true as a general proposition that it is for the state court to construe its own constitution and laws, yet where bonds and securities were valid under the state constitution as construed by the highest state court where issued, the federal courts will not follow a subsequent decision construing the state constitution so as to invalidate the bonds. Livingston County *v.* Darlington, 101 U. S. 407, 415, 25 L. Ed. 1015; Douglass *v.* Pike County, 101 U. S. 677, 25 L. Ed. 968.

As to the assignees or indorsees, with or without notice, of municipal bonds, valid under the law as judicially construed at the time they were issued, their rights are as much within the protection of the constitutional provision against impairment of the obligation, as were the rights of the original holders. So far as they are concerned it is wholly immaterial that prior to the indorsement or assignment of the bonds there had been a change in the decisions of the state court declaring the statute under which they were issued to be invalid. New Buffalo *v.* Iron Co., 105 U. S. 73, 26 L. Ed. 1024.

Cases distinguished.—But in one case, which is difficult to reconcile, it was held that where the state and federal courts have placed conflicting constructions upon a statute or constitutional provision of the state, with regard to the validity of county bonds, that the federal supreme court on appeal from an inferior federal court would follow later decisions by the state court upholding their validity. Wade *v.* Travis County, 174 U. S. 499, 43 L. Ed. 1060, following Green *v.* Neal, 6 Pet. 291.

cable to decisions upon property rights.[56]

5. Estoppel.—But simply because a contract made by a municipality with a waterworks company has received a judicial interpretation by the highest state court, does not affect the power of the state to change the same by subsequent legislation, because courts have no power to make new contracts or to impose new terms upon parties to contracts without their consent.[57]

G. By-Laws and Ordinances.—So a by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the legislature to the corporation as a political subdivision of the state having all the force of law within the limits of the municipality, that it may properly be considered as a law, within the meaning of this article of the constitution of the United States.[58] But a municipal ordinance, not passed under supposed legis-

8 L. Ed. 402; Morgan *v.* Curtenius, 20 How. 1, 15 L. Ed. 823, and distinguishing other cases as follows: "An exception has been admitted to this rule, where, upon the faith of state decisions affirming the validity of contracts made or bonds issued under a certain statute, other contracts have been made or bonds issued under the same statute before the prior cases were overruled. Such contracts and bonds have been held to be valid, upon the principle that the holders upon purchasing such bonds and the parties to such contracts were entitled to rely upon the prior decisions as settling the law of the state. To have held otherwise would enable the state to set a trap for its creditors by inducing them to subscribe to bonds and then withdrawing their own security. Gelpcke *v.* Dubuque, 1 Wall. 175, 17 L. Ed. 520; Havemeyer *v.* Iowa County, 3 Wall. 294, 18 L. Ed. 38; Mitchell *v.* Burlington, 4 Wall. 270, 18 L. Ed. 350; Riggs *v.* Johnson County, 6 Wall. 166, 18 L. Ed. 768; Lee County *v.* Rogers, 7 Wall. 181, 19 L. Ed. 160; Chicago *v.* Sheldon, 9 Wall. 50, 19 L. Ed. 594; Olcott *v.* Supervisors, 16 Wall. 678, 21 L. Ed. 382; Douglass *v.* Pike County, 101 U. S. 677, 25 L. Ed. 968; Burgess *v.* Seligman, 107 U. S. 20, 27 L. Ed. 359."

56. Decisions upon property rights.—"The construction of the general law which had been thus given by the courts upon the question of what was a sufficient survey, it is claimed, had become a rule of property which parties were entitled to rely upon, and which no court could overturn, and if it did so, a contract was impaired, and the judgment was reviewable by this court. The proposition cannot be maintained as a basis for giving this court jurisdiction upon writ of error to the state court. It ignores the limits to our jurisdiction in this regard, which, as has been seen, is confined to legislation which impairs the obligation of a contract." New Orleans Waterworks Co. *v.* Louisiana Sugar Ref. Co., 125 U. S. 18, 31 L. Ed. 607; Central Land Co. *v* Laidley, 159 U. S. 103, 109, 40 L. Ed. 91; Bacon *v.* Texas, 163 U. S. 207, 220, 41 L. Ed. 132.

57. Estoppel.—New Orleans *v.* New Orleans Waterworks Co., 142 U. S. 79, 35 L. Ed. 943. See the title ESTOPPEL, vol. 5, p. 913.

58. By-laws and ordinances.—United States *v.* New Orleans, 98 U. S. 381, 25 L. Ed. 225; New Orleans Waterworks Co *v.* Louisiana Sugar Ref. Co., 125 U. S. 18, 31, 31 L. Ed. 607; Hamilton Gas Light, etc., Co. *v.* Hamilton City, 146 U. S. 258, 36 L. Ed. 963; Bacon *v.* Texas, 163 U. S. 207, 41 L. Ed. 132; Walla Walla City *v.* Walla Walla Water Co., 172 U. S. 1, 43 L. Ed. 341; St. Paul Gas Light Co. *v.* St. Paul, 181 U. S. 142, 148, 45 L. Ed. 788; Davis, etc., Mfg. Co. *v.* Los Angeles, 189 U. S. 207, 216, 47 L. Ed. 782; Mercantile Trust, etc., Co. *v.* Columbus, 203 U. S. 311, 320, 51 L. Ed. 198. See the title ORDINANCES.

Taxation by municipalities.—For instance, the power of determining what persons and property shall be taxed belongs exclusively to the legislative branch of the government, and, whether exercised by the legislature itself, or delegated by it to a municipal corporation, is strictly a legislative power. United States *v.* New Orleans, 98 U. S. 381, 392, 25 L. Ed. 225; Meriwether *v.* Garrett, 102 U. S. 472, 26 L. Ed. 197; New Orleans Waterworks Co. *v.* Louisiana Sugar Ref. Co., 125 U. S. 18, 31 L. Ed. 607.

Accordingly, where the city council of Charleston, upon which the legislature of South Carolina, by the city charter, had conferred the power of taxing persons and property within the city, passed ordinances assessing a tax upon bonds of the city, and thus diminishing the amount of interest which it had agreed to pay, the federal supreme court held such ordinances to be laws impairing the obligation of contracts, for the reason that the city charter gave limited legislative power to the city council, and, when the ordinances were passed under the supposed authority of the legislative act, their provisions became the law of the state. Murray *v.* Charleston, 96 U. S. 432, 440, 24 L. Ed. 760. See, also, Home Ins. Co. *v.* City Council, 93 U. S. 116, 23 L. Ed. 825; New Orleans Waterworks Co. *v.* Louisiana Sugar Ref. Co., 125 U. S. 18, 31 L. Ed. 607.

Ordinance infringing exclusive privileges.—The legislature of Louisiana

lative authority, cannot be regarded as a law of the state within the meaning of the constitutional prohibition against state laws impairing the obligation of contracts.[59]

H. Laws Passed by States before Their Admission.—The constitution of the United States was made by, and for the protection of, the people of the United States. The restraints imposed by that instrument upon the legislative power of the several states, could affect them only after they became states of the Union, under the provisions of the constitution, and had consented to be bound by it. Therefore it does not affect laws passed and taking complete effect in a state before that state was admitted as one of the states of this Union.[60]

I. Laws Passed by Territorial Legislatures.—It seems never to have been decided whether acts passed by territorial legislatures are embraced by this provision,[61] though, reasoning from the construction given these terms in the judiciary act providing for the review of decisions of state courts by the federal supreme court, it would seem that they are not within the contract clause of the constitution.[62]

J. Pre-Existing Statutes Unobjectionable.—The contract clause of the constitution of the United States has reference only to a statute of a state enacted after the making of the contract whose obligation is alleged to have been impaired;[63] it does not apply to laws enacted prior to the execution of the contract, the obligation of which is asserted to be impaired.[64] This rule has been

granted plaintiff company the exclusive privilege of supplying the inhabitants of the city of New Orleans with water, by a charter which provided that nothing therein should be "so construed as to prevent the city council from granting to any person, contiguous to the river, the privilege of laying pipes to the river, exclusively for his own use." Held, that the power conferred upon the city council was not legislative but administrative, and an ordinance of the city, permitting one to lay pipes for his own use, is but a license, the validity of which is in no way dependent upon the constitution or laws of the United States. New Orleans Waterworks Co. *v.* Louisiana Sugar Ref. Co., 125 U. S. 18, 31 L. Ed. 607.

59. Ordinances not passed under legislative authority.—Williams *v.* Bruffy, 96 U. S. 176, 183, 24 L. Ed. 716; Murray *v.* Charleston, 96 U. S. 432, 440, 24 L. Ed. 760; Lehigh Water Co. *v.* Easton, 121 U. S. 388, 392, 30 L. Ed. 1059; New Orleans Waterworks Co. *v.* Louisiana Sugar Ref. Co., 125 U. S. 18, 38, 31 L. Ed. 607; Hamilton Gas Light, etc., Co. *v.* Hamilton City, 146 U. S. 258, 266, 36 L. Ed. 963.

60. Laws passed by states before their admission.—If the congress of Texas had abolished all certificates whether fraudulent or genuine; or if the people of Texas had done the same thing by their constitution adopted before their admission as a state of the Union, their right to do so could not be questioned by the federal supreme court; restraints contained in the federal constitution not extending to the state of Texas until after it had been admitted into the Union and consented to be bound thereby. League *v.* De Young, 11 How. 185, 203, 13 L. Ed. 657; Herman *v.* Phalen, 14 How. 79, 14 L. Ed. 334. See the title STATES.

61. Laws enacted by territorial legislatures.—"Assuming that the prohibition of the federal constitution against the impairment of contracts by state legislation applies equally as would seem to be the opinion of the supreme court of the territory, to legislation by territorial legislatures, we are clear that marriage is not a contract within the meaning of the prohibition." Maynard *v.* Hill, 125 U. S. 190, 210, 31 L. Ed. 654. See the title TERRITORIES.

62. See the title APPEAL AND ERROR, vol. 1, p. 555.

63. Laws operating prospectively unobjectionable.—Lehigh Water Co. *v.* Easton, 121 U. S. 388, 391, 30 L. Ed. 1059; Brown *v.* Smart, 145 U. S. 454, 36 L. Ed. 773; Barnitz *v.* Beverly, 163 U. S. 118, 122, 41 L. Ed. 93; Bacon *v.* Texas, 163 U. S. 207, 41 L. Ed. 132; Pinney *v.* Nelson, 183 U. S. 144, 147, 46 L. Ed. 125; New Orleans Waterworks Co. *v.* Louisiana, 185 U. S. 336, 351, 46 L. Ed. 936; Oshkosh Waterworks Co. *v.* Oshkosh, 187 U. S. 437, 446, 47 L. Ed. 249; Bradley *v.* Lightcap, 195 U. S. 1, 19, 49 L. Ed. 95.

"It is thus most apparent that, whichever way we turn, whether to laws affecting the validity, construction, or discharge of contracts, or the evidence or remedy to be employed in enforcing them, we are met by this overruling and admitted distinction between those which operate retrospectively and those which operate prospectively. In all of them, the law is pronounced to be void, in the first class of cases, and not so in the second." Opinion of Washington, J., in Ogden *v.* Saunders, 12 Wheat. 213, 262, 6 L. Ed. 606.

64. Laws enacted prior to contract cannot be impeached.—Ogden *v.* Saunders, 12 Wheat. 213, 360, 6 L. Ed. 606; Briscoe *v.* Bank, 11 Pet. 257, 328o, 9 L. Ed. 709; Rail-

applied to statutes authorizing assignments for the benefit of creditors,[65] to statutes imposing taxes upon the transfer of property,[66] to statutes affecting the remedy,[67] to constitutional provisions declaring null and void bonds purchased

road Co. *v.* McClure, 10 Wall. 511, 19 L. Ed. 997; United States *v.* Memphis, 97 U. S. 284, 24 L. Ed. 937; Lehigh Water Co. *v.* Easton, 121 U. S. 388, 391, 30 L. Ed. 1059; Hanford *v.* Davies, 163 U. S. 273, 278, 41 L. Ed. 157; Pinney *v.* Nelson, 183 U. S. 144, 147, 46 L. Ed. 125; Diamond Glue Co. *v.* United States Glue Co., 187 U. S. 611, 615, 47 L. Ed. 328; Knights of Pythias *v.* Meyer, 198 U. S. 508, 49 L. Ed. 1146.

"The principle is well stated in the case of Edwards *v.* Kearzey, 96 U. S. 595, 603, 24 L. Ed. 793, in the following language: 'The inhibition of the constitution is wholly prospective. The states may legislate as to the contracts thereafter made, as they may see fit. It is only those in existence when the hostile law is passed that are protected from its effect.' See, also, Railroad Co. *v.* Rock, 4 Wall. 177, 18 L. Ed. 381; University *v.* People, 99 U. S. 309, 25 L. Ed. 387; Knox *v.* Exchange Bank, 12 Wall. 379, 20 L. Ed. 414." Denny *v.* Bennett, 128 U. S. 489, 495, 32 L. Ed. 491.

"The law must have a present effect upon some contract in existence, to bring it within the plain meaning of the language employed. There would be no propriety in saying, that a law impaired, or in any manner whatever modified or altered what did not exist. The most obvious and natural application of the words themselves, is to laws having a retrospective operation upon existing contracts; and this construction is fortified by the associate prohibitions, 'no state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts.' The first two are confessedly restricted to retrospective laws, concerning crimes and penalties affecting the personal security of individuals. And no good reason is perceived why the last should (not) be restricted to restrospective law relating to private rights growing out of the contract of parties." Opinion of Thompson, J.; Ogden *v.* Saunders, 12 Wheat. 213, 303, 6 L. Ed. 606.

The inhibition of the constitution is wholly prospective. The states may legislate as to contracts thereafter made, as they may see fit. It is only those in existence when the hostile law is passed that are protected from its effect. Edwards *v.* Kearzey, 96 U. S. 595, 603, 24 L. Ed. 793.

Distinction as to prospective and retrospective laws.—"The great principle intended to be established by the constitution, was the inviolability of the obligation of contracts, as the obligation existed, and was recognized by the laws in force at the time the contracts were made. It furnished to the legislatures of the states a simple and obvious rule of justice, which, however theretofore violated, should, by no means, be thereafter violated; and whilst it leaves them at full liberty to legislate upon the subject of all future contracts, and assign to them either no obligation, or such qualified obligation as, in their opinion, may consist with sound policy, and the good of the people; it prohibits them from retrospecting upon existing obligations, upon any pretext whatever." Opinion of Trimble, J., Ogden *v.* Saunders, 12 Wheat. 213, 327, 6 L. Ed. 606.

65. Statutes authorizing assignments for creditors.—In so far as it applies to debts subsequently incurred, the Minnesota Act of March 7, 1881, providing that "whenever the property of a debtor is seized by an attachment or execution against him, he may make an assignment of all his property and estate not exempt by law, for the equal benefit of all his creditors who shall file releases of their debts and claims, and his property shall be equitably distributed among such creditors," does not impair the obligation of contract. Denny *v.* Bennett, 128 U. S. 489, 32 L. Ed. 491. See the title ASSIGNMENTS FOR BENEFIT OF CREDITORS, vol. 2, p. 599.

66. Inheritance tax laws.—Where a New York law imposed a tax upon all transfers of property within the state, and was in force before a certain deposit was placed with a New York trust company, it does not impair the obligation of contract that such deposit is thereby taxed on the death of depositor, if a tax otherwise lawful ever could have that effect. Blackstone *v.* Miller, 188 U. S. 189, 47 L. Ed. 439, citing Pinney *v.* Nelson, 183 U. S. 144, 46 L. Ed. 125. See the title SUCCESSION TAXES.

67. Laws relating to the remedy.—If the law, whatever it may be, relating to the remedy, has a prospective operation only, no objection can arise to it under this clause in the constitution. It is a question that must rest in the sound discretion of the state legislature. Opinion of Thompson, J., in Ogden *v.* Saunders, 12 Wheat. 213, 301, 6 L. Ed. 606; Rees *v.* Watertown, 19 Wall. 107, 22 L. Ed. 72; Oshkosh Waterworks Co. *v.* Oshkosh, 187 U. S. 437, 47 L. Ed. 249. See post, "Remedies," VII.

The contract between a municipal corporation and a waterworks company made and entered into August 31, 1891, cannot be impaired by a change in the corporate charter which went into operation March 23, 1891, changing the manner in which claims or demands against a city should be presented to the common council. Oshkosh Waterworks Co. *v.* Oshkosh, 187 U. S. 437, 47 L. Ed. 249.

Personal liability of stockholders.—Where a corporation is formed in one

after the constitution took effect,[68] to statutes claimed to impair the obligation of county warrants,[69] and to statutes granting exclusive privileges to corporations.[70] Moreover, the rule is operative as to contracts made after its enactment but before it goes into effect.[71] But in presenting this inquiry it is immaterial whether the law purports to apply to pass as well as future contracts, or is wholly prospective in its provisions. It is not the terms of the law but its effect, that is inhibited by the constitution.[72] On the other hand, a statute does not necessarily impair the obligation of a contract because it may affect it retrospectively.[73]

K. Repealing Laws.—It is competent for a legislature to repeal an act which, when it was passed, was a mere gratuity, if while it was in existence no vested rights were acquired under it or in virtue of it.[74] But when a law is

state to do business in another, and it is claimed that the constitutional and statutory provision of the latter state imposing personal liability upon stockholders impairs the obligation of contracts in that by the laws of the state incorporating the company there was no such liability, if it appears that such constitutional and statutory provisions were enacted before the incorporation of the company then § 10, of art. 1 has no application. Pinney *v.* Nelson, 183 U. S. 144, 46 L. Ed. 125, citing Lehigh Water Co. *v.* Easton, 121 U. S. 388, 30 L. Ed. 1059; Central Land Co. *v.* Laidley, 159 U. S. 103, 40 L. Ed. 91; McCullough *v.* Virginia, 172 U. S. 102, 43 L. Ed. 382. See the title STOCK AND STOCKHOLDERS.

68. Statutes affecting state securities.—Article 233 of the constitution of the state of Louisiana declares that the consolidated bonds of the state, held for a certain agricultural college, were null and void. Payment having been refused by the state to an innocent holder of one of the bonds, which he had bought for value, he brought suit against the state, alleging that it is beyond the power of the state to annul or cancel bonds outstanding and presumably in the hands of bona fide purchasers. The court held that if the plaintiff had been a holder for value of this bond, "when the constitution was adopted, it would evidently be beyond the power of the state, by act of the legislature, or by an amendment to its constitution, to nullify such bond in his hands. But if, when the constitutional amendment was adopted, the bond was still in the possession of the state, there was then no contract with Bier upon which such amendment could operate and hence no contract subject to impairment. New Orleans *v.* New Orleans Waterworks Co., 142 U. S. 79, 35 L. Ed. 943. There was no objection to the state declaring bonds still in its possession to be null and void." Bier *v.* McGehee, 148 U. S. 137, 140, 37 L. Ed. 397.

69. Prospective statutes affecting county warrants valid.—Ouachita County *v.* Wolcott, 103 U. S. 559, 26 L. Ed. 505. See the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.

70. Statutes granting exclusive privileges.—Thus a water company claiming exclusive contract privileges under a statute enacted in 1874 cannot claim that such contract is impaired by a statute enacted in 1867 authorizing one of the municipalities which it now claims, the exclusive right to supply, to erect and maintain its own waterworks. The real question in such case is, of course, whether the earlier statute was repealed by the latter, either expressly or by implication, and this, generally, is a question for the state court. In other words it is a question of construction of the statute under which it claims the exclusive right or privilege. As to whether such statute, properly interpreted, conferred an exclusive right upon the water company is a question for the state court to decide. Lehigh Water Co. *v.* Easton, 121 U. S. 388, 30 L. Ed. 1059. See the title CORPORATIONS, vol. 4, p. 681.

71. Computation of time.—A Wisconsin act, taking effect September 1st, 1898, forbade foreign corporations to transact business in the state until they should have filed a copy of their charter with the secretary of state, and had paid a fee of twenty-five dollars for such filing. Held, that such act does not impair the obligation of a contract by which a foreign corporation is to do business in the state after September 1st, 1898, where contract is made after its enactment but before it goes into effect. Diamond Glue Co. *v.* United States Glue Co., 187 U. S. 611, 47 L. Ed. 328.

72. "It is not the terms of the law but its effect, that is inhibited by the constitution. A law may be in part constitutional and in part unconstitutional. It may, when applied to a given case, produce an effect which is prohibited by the constitution; but it may not, when applied to a case differently circumstanced, produce such prohibited effect. Whether the law under consideration, in its effects and operation upon the contract sued on in this case, be a law impairing the obligation of this contract, is the only necessary inquiry." Opinion of Trimble, J., in Ogden *v.* Saunders, 12 Wheat. 213, 316, 6 L. Ed. 606.

73. Retrospective laws not necessarily void.—Curtis *v.* Whitney, 13 Wall. 68, 20 L. Ed. 513.

74. Impairment by repealing statutes.—

in its nature a contract, and absolute rights have vested under that contract, a repeal of the law cannot divest those rights.[75]

L. Laws of Dominion of Canada.—There is no constitutional prohibition in Canada against the passage of laws impairing the obligation of contracts.[76]

III. Contracts within Purview of Prohibition.

A. In General.—It has been stated broadly that the constitutional prohibition against the impairment of the obligation of contracts embraces all contracts, executed or executory, between private individuals, or a state and individuals, or corporations, or between the states themselves.[77] But the provision "has never been understood to embrace other contracts than those which respect property, or some object of value, and confer rights which may be asserted in a court of justice."[78] Or as the rule has otherwise been stated, the contracts

Memphis *v.* United States, 97 U. S. 293, 297, 24 L. Ed. 920.

It is, however, true that vested rights may be acquired by the creditor under it and by virtue of it; and when such rights have been acquired, they are beyond the reach of the legislature, and the repeal of the law will not affect them. As to them the law continues in force, notwithstanding its repeal. Memphis *v.* United States, 97 U. S. 293, 295, 24 L. Ed. 920.

75. **Repealing law cannot divest vested rights.**—Fletcher *v.* Peck, 6 Cranch 87, 3 L. Ed. 162.

That a legislature is competent to repeal any act which a former legislature was competent to pass and that one legislature cannot abridge the power of a succeeding legislature, is true as respects general legislation. But when a law is in its nature a contract, or when individuals have acquired absolute or vested rights under a statute, a subsequent repeal cannot impair the obligation of the contract, or divest rights which have become vested rights under the statute. Fletcher *v.* Peck, 6 Cranch 87, 135, 3 L. Ed. 162, approved in State Bank *v.* Knoop, 16 How. 369, 384, 14 L. Ed. 977.

Repeal of statute granting public lands.—Thus where a statute is enacted conveying public lands to certain individuals, bona fide purchasers for value and without notice of a fraud or wrongdoing, from the original grantees, acquiring vested rights in the lands purchased by them, which rights cannot be impaired or divested by a subsequent statute repealing the original granting act, even though the enactment of such original act was procured by fraud and bribery on the part of the original grantees. Fletcher *v.* Peck, 6 Cranch 87, 135, 3 L. Ed. 162, distinguished in United States *v.* Stockslager, 129 U. S. 470, 477, 32 L. Ed. 785, approved in Planters' Bank *v.* Sharp, 6 How. 301, 331, 12 L. Ed. 447; Von Hoffman *v.* Quincy, 4 Wall. 535, 549, 18 L. Ed. 403.

76. **Impairment of contracts in Canada.**—Canada Southern R. Co. *v.* Gebhard, 109 U. S. 527, 532, 27 L. Ed. 1020.

77. **The constitution protects practically all contracts.**—Green *v.* Biddle, 8 Wheat. 1, 5 L. Ed. 547.

The words of the constitutional provisions prohibiting the impairment of the obligation of contracts are general, and are applicable to contracts of every description. Fletcher *v.* Peck, 6 Cranch 87, 137, 3 L. Ed. 162.

The terms of the constitutional prohibition are broad enough to comprehend all contracts, and violence would be done the plain meaning of the language, by making any exception by construction. Opinion of Baldwin, J., in Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 583c, 9 L. Ed. 773.

78. **Only contracts with respect to property or objects of value are protected.**—Dartmouth College *v.* Woodward, 4 Wheat. 518, 629, 4 L. Ed. 629; Briscoe *v.* Bank, 11 Pet. 257, 9 L. Ed. 709; Newton *v.* Commissioners, 100 U. S. 548, 25 L. Ed. 710; Maynard *v.* Hill, 125 U. S. 190, 210, 31 L. Ed. 654; Hunt *v.* Hunt, 131 U. S., appx. clxv, 24 L. Ed. 1109.

"'It was intended to correct the mischiefs of state laws, which had weakened the confidence between man and man, and embarrassed all transactions between individuals, by dispensing with a faithful performance of engagements; to guard against a power which had been extensively abused, and to restrain the legislature in future from violating the rights of property. It protected contracts respecting property, under which some person could claim a right to something beneficial to himself; and since the clause must in construction receive some limitation, it ought to be confined to the mischiefs it was intended to remedy. Not to authorize a vexatious interference with the internal concerns or civil institutions of a state; to embarrass its legislation in the regulation of internal government, or to render immutable those institutions, for these purposes, which ought to vary with varying circumstances. The term contract must be understood in a more limited sense, so as not to embrace other contracts than those which respect property, or some object of value, and confer rights which may be asserted in a court of justice.' Dartmouth College *v.* Woodward, 4 Wheat. 518, 4 L. Ed. 629." Opinion of Baldwin, J., in Briscoe *v.* Bank, 11 Pet. 257, 328o, 9 L. Ed. 709.

In the Dartmouth College Case, Mr.

designed to be protected by the tenth section of the first article of that instrument are contracts by which perfect rights, certain, definite, fixed private rights of property are vested.[79]

B. Executory and Executed Contracts.—Since the constitution uses the general term contract without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former,[80] because a contract executed, as well as one which is executory, contains obligations binding on the party.[81] An executory contract is one in which a party binds himself to do or not to do a particular thing.[82] A contract executed is one in which the object of the contract is performed.[83]

C. Rights and Obligations Arising Ex Delicto.—The term contract is used in the constitution in its ordinary sense, as signifying the agreement of two or more minds, for considerations proceeding from one to the other, to do, or not to do, certain acts. Mutual assent to its terms is of its very essence. Rights and obligations arising ex delicto are not within the protection of the constitutional prohibition.[84] And it is altogether immaterial that the rights or obligations arising from such a case have been merged into a judgment. It is only those judgments based upon contract or agreement that are within the protection of the constitutional provision.[85]

Chief Justice Marshall said: "Anterior to the formation of the constitution, a course of legislation had prevailed in many, if not in all, of the states, which weakened the confidence of man in man, and embarrassed all transactions between individuals, by dispensing with a faithful performance of engagements. To correct this mischief by restraining the power which produced it, the state legislatures were forbidden 'to pass any law impairing the obligation of contracts;' that is, of contracts respecting property, under which some individual could claim a right to something beneficial to himself; and that since the clause in the constitution must, in construction, receive some limitation, it may be confined, and ought to be confined, to cases of this description—to cases within the mischief it was intended to remedy." Dartmouth College *v.* Woodward, 4 Wheat. 518, 4 L. Ed. 629; Newton *v.* Commissioners, 100 U. S. 548, 557, 25 L. Ed. 710.

79. Butler *v.* Pennsylvania, 10 How. 402, 416, 13 L. Ed. 472; Maynard *v.* Hill, 125 U. S. 190, 210, 31 L. Ed. 654.

The contract designed to be protected by the 10th section of the first article of the constitution are contracts by which perfect rights, certain definite fixed private rights of property, are vested. These are clearly distinguishable from measures or engagements adopted or undertaken by the body politic or state government —for the benefit of all, and from the necessity of the case, and according to universal understanding to be varied or discontinued as the public good shall require. Butler *v.* Pennsylvania, 10 How. 402, 416, 13 L. Ed. 472.

80. **The constitution protects both executory and executed contracts.**—Fletcher *v.* Peck, 6 Cranch 87, 3 L. Ed. 162; Von Hoffman *v.* Quincy, 4 Wall. 535, 18 L. Ed. 403; Osborn *v.* Nicholson, 13 Wall. 654, 656, 20 L. Ed. 689; Davis *v.* Gray, 16 Wall. 203, 232, 21 L. Ed. 447; Walker *v.* Whitehead, 16 Wall. 314, 318, 21 L. Ed. 357; Farrington *v.* Tennessee, 95 U. S. 679, 683, 24 L. Ed. 558; Fiske *v.* Jefferson Police Jury, 116 U. S. 131, 135, 29 L. Ed. 587; Shreveport *v.* Cole, 129 U. S. 36, 42, 32 L. Ed. 589; McGahey *v.* Virginia, 135 U. S. 662, 694, 34 L. Ed. 304.

A contract is either executory or executed, but whether executed or executory it contains an obligation binding on the parties, and, whether the one or the other, it is equally within the provisions of the federal constitution which forbids the state governments to pass laws impairing the obligation of contracts. Opinion of Washington, J., in Dartmouth College *v.* Woodward, 4 Wheat. 518, 657, 4 L. Ed. 629; Fletcher *v.* Peck, 6 Cranch 87, 3 L. Ed. 162.

81. Fletcher *v.* Peck, 6 Cranch 87, 137, 3 L. Ed. 162.

82. **Executory contract defined.**—Fletcher *v.* Peck, 6 Cranch 87, 136, 3 L. Ed. 162.

83. **Executed contract defined.**—Fletcher *v.* Peck, 6 Cranch 87, 136, 3 L. Ed. 162.

84. **Rights and obligations arising ex delicto not protected.**—Louisiana *v.* New Orleans, 109 U. S. 285, 288, 27 L. Ed. 936. See post, "Judgments," III, M; "Statutes Barring Actions Ex Delicto," VII, F, 6.

"The prohibition of the federal constitution was intended to secure the observance of good faith in the stipulation of parties against any state action. Where a transaction is not based upon any assent of parties, it cannot be said that any faith is pledged with respect to it; and no case arises for the operation of the prohibition. Garrison *v.* New York, 21 Wall. 196, 203, 22 L. Ed. 612; Louisiana *v.* New Orleans, 109 U. S. 285, 288, 27 L. Ed. 936.

85. **Effect where obligation is merged into a judgment.**—Garrison *v.* New York, 21 Wall. 196, 22 L. Ed. 612; Louisiana *v.*

D. Contracts of States—1. In General.—A sovereign state, and one of the states of the Union, if the latter were not restrained by constitutional prohibitions, might, in virtue of sovereignty, act upon the contracts of its citizens, wherever made, and discharge them, by denying a right of action upon them in its courts.[86] But undoubtedly there are cases in which a state may, as it were, lay aside its sovereignty and contract like an individual, and be bound accordingly.[87] And it has long been settled that contracts between a state and an individual are as fully protected by the constitution as contracts between two individuals.[88] In other words, the prohibition of the constitution against the passage of laws impairing the obligation of contracts, applies to the contracts of a state, and to those of its agents acting under its authority, as well as to contracts between individuals.[89] But a contract binding the state is only created by clear language, and is not to be extended by implication beyond the terms of the statute.[90]

2. Violation of Contracts by the State.—There is a vast difference between the impairment of the obligation of a contract by a state and the violation of the contract. Accordingly where a state conveys land and agrees to erect certain buildings on the premises conveyed, its failure so to do presents no case under the contract clause of the federal constitution.[91]

New Orleans, 109 U. S. 285, 288, 27 L. Ed. 936; Freeland *v.* Williams, 131 U. S. 405, 414, 33 L. Ed. 193. See post, "Judgments," III, M.

86. Right of states to destroy contract obligations.—Wayne, J., delivering the opinion in Suydam *v.* Broadnax, 14 Pet. 67, 74, 10 L. Ed. 357. See, generally, the title STATES.

87. Right of state to enter into contracts.—Curran *v.* Arkansas, 15 How. 304, 14 L. Ed. 705; Davis *v.* Gray, 16 Wall. 203, 21 L. Ed. 447; Newton *v.* Commissioners, 100 U. S. 548, 556, 25 L. Ed. 710.

"When a state descends from the plane of its sovereignty, and contracts with private persons, it is regarded pro hac vice as a private person itself, and is bound accordingly. Davis *v.* Gray, 16 Wall. 203, 21 L. Ed. 447." Hall *v.* Wisconsin, 103 U. S. 5, 11, 26 L. Ed. 302.

There is no constitutional objection to the exercise of the power of the state to enter into a contract binding upon itself. This power necessarily exists in its sovereignty. An act which creates a valid contract is binding upon succeeding legislation. State Bank *v.* Knoop, 16 How. 369, 389, 14 L. Ed. 977.

88. Contracts between states and its citizens are protected.—Fletcher *v.* Peck, 6 Cranch 87, 3 L. Ed. 162; New Jersey *v.* Wilson, 7 Cranch 164, 166, 3 L. Ed. 303, following Fletcher *v.* Peck, 6 Cranch 87, 3 L. Ed. 162; Dartmouth College *v.* Woodward, 4 Wheat. 518, 519, 4 L. Ed. 629; Green *v.* Biddle, 8 Wheat. 1, 92, 5 L. Ed. 547; Providence Bank *v.* Billings, 4 Pet. 514, 7 L. Ed. 939; Woodruff *v.* Trapnall, 10 How. 190, 13 L. Ed. 383; Jefferson Branch Bank *v.* Skelly, 1 Black 436, 446, 17 L. Ed. 173; Von Hoffman *v.* Quincy, 4 Wall. 535, 550, 18 L. Ed. 403; Wolff *v.* New Orleans, 103 U. S. 358, 367, 26 L. Ed. 395; Virginia Coupon Cases, 114 U. S. 269, 286, 29 L. Ed. 185; Marye *v.* Parsons, 114 U. S. 325, 336, 29 L. Ed. 205; New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650, 673, 29 L. Ed. 516; Pennoyer *v.* McConnaughy, 140 U. S. 1, 35 L. Ed. 363.

"Neither argument nor authority is necessary to prove that a state legislature cannot pass a valid law impairing the obligations of a contract, as that general proposition is universally admitted." Mount Pleasant *v.* Beckwith, 100 U. S. 514, 529, 25 L. Ed. 699.

The constitutional provisions of prohibiting the impairment of the obligation of contract contains no exception in favor of contracts to which a state is a party; on the other hand the words of the provisions are general and are applicable to contracts of every description. Fletcher *v.* Peck, 6 Cranch 87, 137, 3 L. Ed. 162, approved in States Bank *v.* Knoop, 16 How. 369, 385, 14 L. Ed. 977.

A state can no more impair by legislation the obligation of its own contract, than it can impair the obligation of a contract of individuals. Woodruff *v.* Trapnall, 10 How. 190, 207, 13 L. Ed. 383; Antoni *v.* Greenhow, 107 U. S. 769, 803, 27 L. Ed. 468.

When a state becomes a party of a contract, the same rules of law are applied to her as to private persons under like circumstances. When she or her representatives are properly brought into the forum of litigation, neither she nor they can assert any right or immunity as incident to her political sovereignty. Davis *v.* Gray, 16 Wall. 203, 232, 21 L. Ed. 447; Curran *v.* Arkansas, 15 How. 304, 14 L. Ed. 705.

89. Contracts made through agents.—Wolff *v.* New Orleans, 103 U. S. 358, 26 L. Ed. 395.

90. Contract only created by clear language.—Williams *v.* Wingo, 177 U. S. 601, 603, 44 L. Ed. 905.

91. Violation and impairment distin-

3. The Contract Contained in State Securities—a. *Funding State Debts*—(1) *In General.*—Where a state adopts a plan for funding its floating debt, this constitutes, when accepted by the holders of the security, a new contract with each individual creditor, which cannot be altered by any subsequent modification or repeal of the statute.[92] But it is well settled that the funding act does not create a contract between the holders of state securities and the state, until they have accepted or acted upon its provisions.[93]

guished.—Brown *v.* Colorado, 106 U. S. 95, 27 L. Ed. 132.

92. Funding state debts.—Murray *v.* Charleston, 96 U. S. 432, 24 L. Ed. 760; Board of Liquidation *v.* McComb, 92 U. S. 531, 23 L. Ed. 623; Louisiana *v.* Pilsbury, 105 U. S. 278, 26 L. Ed. 1090; Louisiana *v.* Jumel, 107 U. S. 711, 27 L. Ed. 448; Amy *v.* Shelby County Taxing Dist., 114 U. S. 387, 29 L. Ed. 172. See the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.

Levee debt of Louisiana could not be funded in consolidated bonds.—On the 24th of January, 1874, the legislature of Louisiana passed "The Funding Act," which created a board of liquidation, consisting of the governor and other state officers. Its principal stipulations, aside from that which provided that, prior to the year 1914, the entire state debt should never be increased beyond the sum of fifteen million dollars, are: First, that the "consolidated bonds," the issue of which is thereby authorized, shall not exceed in amount fifteen million dollars, or so much thereof as may be necessary for the purpose of consolidating and reducing the floating and bonded debt of the state, amounting to twenty-five million dollars, and consisting of valid outstanding bonds, and valid warrants of the auditor theretofore issued; secondly, that they shall only be used for exchange for said debt at the rate of sixty cents in consolidated bonds for one dollar in such bonds and warrants; thirdly, that a tax of five and a half mills on the dollar of the assessed value of all the real and personal property of the state shall be annually levied and collected for paying the interest and principal of the bonds, and is set apart and appropriated for that purpose, and no other, any surplus beyond paying interest to be used for the purchase and retirement of the bonds; fourthly, that the power of the judiciary, by means of mandamus, injunction, and criminal procedure, shall be exerted to carry out the provisions of the act. An amendment of the constitution was subsequently adopted, which declared that the issue of the consolidated bonds should create a valid contract between each holder thereof and the state, which the latter should not impair; and directed that the tax should be levied and collected without further legislation. Thereafter, on the 2d of March, 1875, the legislature passed an act authorizing the board of liquidation to issue a portion of such consolidated bonds to the Louisiana Levee Company, in liquidation of a debt claimed to be due it under a contract made in 1871. This debt was not one of those to fund which the consolidated bonds had been issued; but the act, under which that contract was made, provided and set apart certain taxes, to be levied and collected throughout the state, to meet the payments which would accrue to the company. The circuit court, upon a bill filed for that purpose by a citizen of Delaware, who had surrendered his old bonds, and taken sixty per cent of the amount in consolidated bonds, two millions of which had then been issued, granted an injunction restraining the board from using the consolidated bonds, and from issuing any other state bonds in payment of said pretended debt. Held, that as the proposed funding of the levee debt at par in the consolidated bonds destroys all benefits anticipated from the funding, on which benefits those who accepted its terms had a right to rely, and makes an unjust discrimination between one class of creditors and another, the injunction, so far as it restrained the funding of said debt in consolidated bonds issued, or to be issued, under the act of Jan. 24, 1874, was properly granted. Board of Liquidation *v.* McComb, 92 U. S. 531, 23 L. Ed. 623.

Right of federal court to decide for itself whether or not state constitution or law impairs the obligation of contract.—By an amendment of the constitution of the state of Louisiana, adopted in 1870, it was provided that no debt should be thereafter created which, added to the debt of the state then existing, would increase the total indebtedness of the state beyond $25,000,000. Upon a suit by the attorney general of the state to enjoin the payment of certain railroad bonds issued by the state, as having been issued in violation of this amendment, it was held that the federal supreme court would determine for itself whether or not the bonds were issued in violation of this amendment, or whether as contended they were issued in exchange for obligations existing previous to the amendment, and whether the amendment itself as applied to the bonds in question by the state court operated to impair the contract of the state with the bondholders. Williams *v.* Louisiana, 103 U. S. 637, 26 L. Ed. 595; Durkee *v.* Board of Liquidation, 103 U. S. 646, 26 L. Ed. 598. See the title APPEAL AND ERROR, vol. 1, p. 703.

93. Funding act must be accepted.—A funding act creating a board of liquidation

(2) *Virginia Coupon Cases*—aa. *In General.*—The Virginia act of March 30th, 1871, known as the "Funding Act," and providing that the coupons of the bonds issued thereunder should be receivable at and after maturity for all taxes, debts, dues and demands due the state, constituted a contract between the coupon holder and the state, the obligation of which the state is forbidden by the constitution of the United States to impair.[94] Moreover, the holders of the coupons of those bonds, whether still attached thereto or separated therefrom, are entitled, by a solemn engagement of the state, to use them in payment of state taxes and public dues.[95] Nor can the Virginia statute repealing the receivability feature of the funding act of March 30, 1871, be upheld on the ground that such acts merely change the general law in regard to offsetting one claim against another. The right of a coupon holder under the funding act to pay his taxes in coupons was of the essence of his contract and cannot be taken away under the authority to regulate the law of offsets.[96]

and authorizing such board to fund the outstanding obligation of the state, does not as to the holders of securities which were outstanding at the time of its enactment, create a contract between them and the state until they have accepted or acted upon its provisions. Consequently its repeal before the holders of such outstanding obligations have accepted and acted upon its provision does not impair the obligation of any contract as to them. Durkee *v.* Board of Liquidation, 103 U. S. 646, 26 L. Ed. 598.

94. Virginia coupon cases.—Hartman *v.* Greenhow, 102 U. S. 672, 26 L. Ed. 271; Antoni *v.* Greenhow, 107 U. S. 769, 771, 27 L. Ed. 468; Virginia Coupon Cases, 114 U. S. 269, 29 L. Ed. 185; Royall *v.* Virginia, 116 U. S. 572, 578, 29 L. Ed. 735; Royall *v.* Virginia, 121 U. S. 102, 30 L. Ed. 883; McGahey *v.* Virginia, 135 U. S. 662, 668, 34 L. Ed. 304.

The Virginia funding act of March 30, 1871, which stipulated that the coupons should be receivable for all taxes and dues to the state; that is, for taxes and dues owing by the holders of the coupons, and for their full amount, and upon which pledge the holders of the bonds of the state surrendered them, and took new bonds for two-thirds of their amount, constituted a contract between the state and the holders of the bonds and coupons issued thereunder which it was beyond the power of the state to impair. Hartman *v.* Greenhow, 102 U. S. 672, 685, 26 L. Ed. 271.

"Any lawful holder of the tax-receivable coupons of the state issued under the act of 1871 or the subsequent act of 1879, who tenders such coupons in payment of taxes, debts, dues and demands due from him to the state, and continues to hold himself ready to tender the same in payment thereof, is entitled to be free from molestation in person or goods on account of such taxes, debts, dues or demands, and may vindicate such right in all lawful modes of redress—by suit to recover his property, by suit against the officer to recover damages for taking it, by injunction to prevent such taking where it would be attended with irremediable injury, or by a defense to a suit brought against him for his taxes or the other claims standing against him." McGahey *v.* Virginia, 135 U. S. 662, 684, 34 L. Ed. 304.

The statement of the court in the Virginia Coupon Cases, 114 U. S. 269, 270, 29 L. Ed. 185, that a tender of the Virginia tax-receivable coupons in payment of the taxes was equivalent to the payment of the taxes, is not to be construed as extinguishing all claim to them on the part of the state, or as prohibiting the state from instituting an action, in disregard of such tender, so long as the taxpayer was permitted to plead and prove such tender, and the genuineness of the coupons tendered in defense to the action. The act of May 12, 1887, authorizing such suits to be brought in disregard of such tenders, but reserving to the taxpayer the right to plead and prove such tender, cannot, therefore, be considered as impairing any contract right of the holders of such coupons. In re Ayers, 123 U. S. 443, 496, 31 L. Ed. 216.

95. Detaching coupons from bonds did not deprive the holder of protection.—McGahey *v.* Virginia, 135 U. S. 662, 34 L. Ed. 304, citing Hartman *v.* Greenhow, 102 U. S. 672, 26 L. Ed. 271; Virginia Coupon Cases, 114 U. S. 269, 29 L. Ed. 185.

96. Cannot be justified as a set-off law.—Virginia Coupon Cases, 114 U. S. 269, 29 L. Ed. 185. See post, "Set-Offs," VII, E, 2.

Deprivation of right to plead tender of coupons in defense to proceeding to enforce taxes.—Under the Virginia Funding Act of March 30th, 1871, the right of holders of coupons to have the same received in payment of taxes was of the essence of the contract. When the taxpayer had tendered such coupon he had, in legal contemplation, performed his part of the contract and paid the debt which he owed to the state for taxes, beyond that every step taken for enforcing the payment of the tax in disregard of the tender was wholly without authority of law, and the owner of the coupons was entitled to plead such tender as a perfect defense to any further proceeding for enforcing the tax. A subsequent statute taking away this right

bb. *Payment of School Tax.*—**The law requiring the school tax to be paid in lawful money** of the United States was a valid law, notwithstanding the provisions of the act of 1871; it was sustained by the sections of the state constitution relating to the literary fund, which antedate the law of 1871 and override any provisions therein which are repugnant thereto.[97]

cc. *Occupation and Business Taxes.*—But the charges, or, as they are called in the statutes, assessments made by law as conditions precedent to obtaining licenses for pursuing a business or profession, are included within the meaning of the words, "taxes, debts, dues and demands due the state," as used in the act of March 30, 1871, and an act requiring such fees, charges or assessments to be paid in money is a violation of the state's contract with the bondholders.[98] But the rule is otherwise as to licenses for the sale of intoxicating liquors.[99]

dd. *License Fees as Condition to Sale of Coupons.*—The statute requiring a prohibitive license fee as a condition to offering these tax-receivable coupons for sale, so far interfered with their negotiability that it was held void under the contract clause.[1]

ee. *Manner of Establishing Genuineness of Coupons*—aaa. *Necessity for Production of Bond.*—The act of the general assembly of Virginia which required the production of the bonds, from which the coupons tendered were cut, in order to establish the genuineness of the coupons at the time of offering the same in evidence in court, was an unreasonable condition, and violated the

impaired the obligation of his contract and was unconstitutional and void. The question is not of the reasonableness of a remedy for a breach of the contract to receive the tendered coupons in payment of the tax; but whether the right to have them so received, and the use of that right as a defense against all further efforts to exact and compel payment of the tax, in denial and defiance of that right, can be taken away without impairing the obligation of his contract. Virginia Coupon Cases, 114 U. S. 269, 301, 29 L. Ed. 185.

97. Medium of payment of school tax.—McGahey *v.* Virginia, 135 U. S. 662, 713, 34 L. Ed. 304.

98. Medium of payment of license tax.—Royall *v.* Virginia, 116 U. S. 572, 579, 29 L. Ed. 735; Sands *v.* Edmunds, 116 U. S. 585, 29 L. Ed. 739; Royall *v.* Virginia, 121 U. S. 102, 30 L. Ed. 883. See post, "Licenses," III, U. See, generally, the title LICENSES.

Lawyer's license.—"The right of the plaintiff in error to pay his license tax as a lawyer in coupons, receivable for taxes, as described in his petition, is affirmed by the opinion and judgment in the case of Royall *v.* The State of Virginia, just decided, ante, 572. His remedy to have them received for verification and to recover back the money paid for his license, is secured to him by the terms of the act of January 14, 1882, which, for such purposes, was upheld by this court as a valid enactment in Antoni *v.* Greenhow, 107 U. S. 769, 27 L. Ed. 468." Sands *v.* Edmunds, 116 U. S. 585, 587, 29 L. Ed. 739.

99. License to sell liquor.—"The requirement that the license fee shall be paid in lawful money of the United States does not, as contended, impair the obligation of the contract made by the state with the holders of the coupons referred to. Licenses for the sale of intoxicating liquors are not only imposed for the purpose of raising revenue, but also for the purpose of regulating the traffic and consumption of these articles, and hence the state may impose such conditions for conducting said traffic as it may deem most for the public good." McGahey *v.* Virginia, 135 U. S. 662, 709, 34 L. Ed. 304.

1. License fee as condition precedent to sale of coupons.—"The license required by the 65th section of the tax act of March 15, 1884, as amended by the act of May 23, 1887, was a very material interference with such negotiability. * * * The enormous license fee of one thousand dollars in towns of more than ten thousand inhabitants and of five hundred dollars in other counties and towns, with the exception of twenty per cent of the face value on every coupon sold, was absolutely prohibitory in its effect. A material quality of the coupons—their negotiability—was thereby destroyed." And the act was therefore unconstitutional as impairing the obligation of the contract. McGahey *v.* Virginia, 135 U. S. 662, 698, 34 L. Ed. 304.

"It is manifest from the terms of the act of 1871, as well as that of 1879, under which tax-receivable coupons were authorized to be and were issued, that said coupons were intended to circulate from hand to hand, being expressly made payable to bearer, and being made receivable for taxes, debts, dues and demands due to the state. Any undue restraint upon the free negotiability of these instruments, therefore, would be a violation of the clear understanding and agreement of the parties." McGahey *v.* Virginia, 135 U. S. 662, 698, 34 L. Ed. 304.

contract clause of the federal constitution.[2]

bbb. *Forbidding Introduction of Expert Testimony.*—And the prohibition of expert testimony in establishing the genuineness of coupons was in like manner unconstitutional. To prohibit it is to take from the holder of such instruments the only feasible means he has in his power to establish their validity.[3]

ff. *Denial of Right of Action against Taxing Officer.*—It was held that the auxiliary part of this act, which prohibits any action against the taxing officer for attempting to collect the taxes in disregard of a lawful tender of coupons, was also void.[4]

gg. *When Right May Be Asserted.*—But the refusal of the state of Virginia to accept tax receivable coupons in payment of taxes, and its action in instituting proceedings in disregard of such tenders against the taxpayers making the same as delinquent taxpayers, affords no ground of complaint to the holders of such coupons unless they have taxes to pay. The refusal of the state to receive coupons tendered by a taxpayer is no breach of its contract with a coupon holder who has no taxes to pay; and the depreciation of his coupons by reason of the state's refusal to receive coupons tendered by taxpayers is damnum absque injuria.[5] Nor is it material that the holder of such coupons has trans-

2. Statute requiring production of bond from which coupon was clipped, held to be unconstitutional.—"We have no hesitation in saying that the duty imposed upon the taxpayer of producing the bond from which the coupons tendered by him were cut, at the time of offering the same in evidence in court, was an unreasonable condition, in many cases impossible to be performed. If enforced it would have the effect of rendering valueless all coupons which have been separated from the bonds to which they were attached, and have been sold in the open market. It would deprive them of their negotiable character. It would make them fixed appendages to the bond itself. It would be directly contrary to the meaning and intent of the act of 1871 and the corresponding act of 1879. It would be so onerous and impracticable as not only to affect, but virtually destroy, the value of the instruments in the hands of the holder who had purchased them. We think that the requirement was unconstitutional." McGahey *v.* Virginia, 135 U. S. 662, 694, 34 L. Ed. 304.

3. Statute excluding expert testimony unconstitutional.—McGahey *v.* Virginia, 135 U. S. 662, 34 L. Ed. 304. See, generally, the title EXPERT AND OPINION EVIDENCE, ante, p. 200.

The Virginia statute of May 12, 1887, requires the commonwealth attorneys in the various counties of that state to institute actions in the name of the state of Virginia in disregard of tenders of tax-receivable coupons made by taxpayers in payment of taxes, against all such taxpayers as delinquent. On the trial of such actions it was required that the defendant should not only prove the fact of tender but the genuineness of the coupons tendered; that as part of that proof he was required to produce the bond from which such coupons was said to have been cut; and the defendant was not permitted to introduce expert testimony to prove the genuineness of the coupon tendered. Held, that this act did impair the obligation of the state's contract under the act of 1871 to receive the state's coupons in payment of taxes due the state. In re Ayers, 123 U. S. 443, 493, 31 L. Ed. 216.

4. Denial of right of action against taxing officer.—The Virginia act of January 14th, 1882, as amended by the act of March 13th, 1884, is altogether unconstitutional and void. Neither the substantive part of the act forbidding the receipt of the coupons in payment of taxes, and which constitutes its money design, nor the auxiliary part, which prohibits any action against the taxing officer for attempting to collect the taxes in disregard of a lawful tender of coupons, can be separated the one from the other. The money design of the act being unconstitutional, that which is merely auxiliary and incidental, cannot stand. Virginia Coupon Cases, 114 U. S. 269, 304, 29 L. Ed. 185.

5. When right may be asserted.—In re Ayers, 123 U. S. 443, 496, 31 L. Ed. 216. Accord: Virginia Coupon Cases, 114 U. S. 269, 29 L. Ed. 185.

State scrip which expresses upon its face that it is receivable in payment of taxes due the state, is a contract between the state and the person who has taxes to pay; and it cannot be said that the contract has been broken until it has been tendered for taxes due from a holder and been refused, for then the right of the holder is threatened by the refusal of the state to receive the same in payment of taxes unless he is in a situation to make a present tender for that purpose. The holder has no legal right to have his scrip received for taxes, unless he owes taxes for which it is received: and in order that it may be used for the payment of the taxes of another he must transfer it to the new holder, and that would divest him of all right to enforce the contract,

ferred them with a warranty that the state shall receive them in payment of taxes; the state is no party to such a contract between a holder of the coupons and his assignee.[6]

(3) *Right to Annex Conditions and Restrictions.*—The state has a right to say, when it proposes a scheme for the compromise of its debts, what creditors shall be included.[7] And a provision in the funding act that no bond of questionable or doubtful obligation upon the state should be funded under the provisions of the former act, until such bond should be declared a legal and valid obligation against the state by some designated tribunal, is not unconstitutional as creating additional defenses against bona fide holders of bonds.[8]

b. *Provisions Regarding Payment of Interest*—(1) *Conflicting Rights of Bond Holders.*—Although the state, in authorizing an issuance of bonds, directs the levy and appropriation of a tax to meet the interest on the bonds and provide a sinking fund therefor, when such tax had already been set apart for the same purpose in the case of a prior issuance of bonds by the state, yet this does not impair the obligation of the contract between the state and such prior bond holders.[9]

(2) *Reduction of Interest Rate by Subsequent Statute.*—But where a state statute is passed providing for the funding of the state debt, in which it is agreed, in consideration of the exchange of the old bonds for new coupon ones

since he would then be no longer a party, or would have no legal interest therein. Hagood *v.* Southern, 117 U. S. 52, 64, 29 L. Ed. 805; Williams *v.* Hagood, 98 U. S. 72, 25 L. Ed. 51; Virginia Coupon Cases, 114 U. S. 269, 325, 29 L. Ed. 185.

But the mere discredit cast upon such scrip by the refusal of the tax collectors to receive the same, and the depreciation in value occasioned thereby are not sufficient to sustain the cause of action under the contract clause. Hagood *v.* Southern, 117 U. S. 52, 64, 29 L. Ed. 805; Virginia Coupon Cases, 114 U. S. 269, 325, 29 L. Ed. 185.

6. In re Ayers, 123 U. S. 443, 496, 31 L. Ed. 216.

7. State may exclude some creditors from funding act.—Guaranty Co. *v.* Board of Liquidation, 105 U. S. 622, 26 L. Ed. 1106.

8. Louisiana statute construed not to be unconstitutional as creating new defense against bona fide purchaser of state bonds.—Act number 3 of 1874 of the legislature of Louisiana provided for funding the obligations of the state by an issue, if necessary, of $15,000,000 of consolidated bonds of the state of Louisiana. By act number 11 of 1875 it was provided that no bonds of questionable and doubtful obligation upon the state should be funded under the provisions of the former act until said bonds should first by final decree of the supreme court have been declared legal and valid obligations against the state of Louisiana, and that the same were issued in strict conformity to law, and not in violation of the constitution of this state or of the United States, and for a valid consideration. In this act certain canal bonds were specially designated as questioned and of doubtful validity. Plaintiff, claiming to be a bona fide holder of a portion of canal bonds and being desirous of funding its bonds under the provisions of the funding act, filed a petition in the state court, praying that the bonds held by it, "be decreed to have been issued in strict conformity to law, and not in violation of the constitution of this state or of the United States, and that they be declared legal and valid obligations against the state of Louisiana, and issued for a valid consideration." No other judgment was asked than such an one as was necessary under act number 11, of 1875, to secure the benefit of act number 3 of 1874—the funding act. It was held that the proceeding was not for the purpose of recovery upon the bonds, but merely to determine whether under the provisions of act number 11 of 1875 the plaintiff was entitled to have its bonds funded as provided by act number 3 of 1874; that any right of action upon the bonds remain just as it was, and subject only to such defenses as it would have been subject to prior to the enactment of act number 11, 1875; therefore said act was not unconstitutional as creating additional defenses against bona fide holder of bonds. Guaranty Co. *v.* Board of Liquidation, 105 U. S. 622, 26 L. Ed. 1106.

9. Conflicting rights of bond holders to interest.—The constitution of Louisiana, 1898, art. 317, ordered the sale of city bonds to pay the debts of a school board of one of its municipal corporations. The bonds were to be paid out of the proceeds of a 1 per cent ad valorem tax. Held, the rights of the takers of the new bonds were subject to the rights of prior bond holders and creditors where both were to be paid out of the same funds, and therefore the provision in the Louisiana constitution for the sale of the new bonds did not impair the obligation of a contract between the city and the holders of the old bonds. Board of Liquidation *v.* Louis-

executed in pursuance of the act, that the state will levy and collect a tax to a certain amount, this act amounts to a formal contract with each and every holder of the bonds, which is impaired by a subsequent constitutional provision reducing the rate of interest.[10]

c. *Writing State Bonds Off Its Books.*—A state statute which requires a state treasurer to write certain state bonds off the books in his office and no longer carry them on the books as a debt of the state, does not impair the obligation of the state to pay the bonds therein mentioned, or the remedy to recover upon them. The obligation and the remedy remain precisely the same after the enactment of the law as before. Neither the one nor the other is in the slightest degree diminished or affected, for the law merely directs the change of entries on the books of the state treasury, and can by no possibility, in any respect whatever, deny, obstruct, impair or affect the rights of the complainant.[11]

d. *Redemption and Repudiation of Its Void Securities.*—Where a state issues treasury warrants, and discovering they are void, redeems them at their face value and cancels them, a subsequent statute of the state which repudiates or permits the repudiation of the payments impairs the obligation of the contract which the law raises from the transaction itself.[12] On the other hand, although it is entirely beyond the power of the state by an act of the legislature, or by an amendment to its constitution, to nullify bonds in the hands of a holder for value at the time when the statute or constitution was adopted; yet if when the constitutional amendment or statute was adopted, such bonds were still in the possession of the state, there is no objection to the state declaring them

iana, 179 U. S. 622, 638, 639, 45 L. Ed. 347.

10. Reduction of rate of interest.—The legislature of Louisiana, at its session of 1874, by an act known as act number 3 of 1874, provided for an issue of bonds, to be designated as consolidated bonds of the state, for the purpose of consolidating and reducing the floating and bonded debt. By § 7 of this act a tax of five and a half miles on the dollar was thereby annually levied for the purpose of paying the interest and priciple of the consolidated bonds, the proceeds of said tax being thereby set apart and appropriated to that purpose and no other. It was further provided that this interest tax should be a continuing annual tax until the said consolidated bonds, principal and interest should be paid or redeemed, and that the interest appropriation should be a continuing annual appropriation during the same period, and that said levy and appropriation should authorize and make it the duty of certain officers named to collect said tax annually and pay said interest and redeem said bonds until the same should be fully discharged. By the constitution of the state adopted during that same year, this act was in all respects confirmed and declared to constitute a valid and binding contract between the state and persons holding the consolidated bonds issued thereunder. The constitution also further declared that the tax provided by the act should be annually collected and applied to the payment of the bonds principal and interest, without further legislation or appropriation in that behalf. On the first day of January, 1880, a new constitution of Louisiana went into effect containing a "Debt Ordinance," whereby it was provided that the interest upon the consolidated bonds should be reduced from seven per cent. to a scale ranging from two to four per cent., and reducing the tax levy to pay the same to a tax not exceeding three mills, as compared with the five and one-half mills provided by the act of 1874. It was held that the provisions of the act of 1874 and of the constitution of that year confirming and ratifying the same, constituting a contract between the state and the holders of the consolidated bonds which was impaired by the provisions of the debt ordinance of the constitution which went into effect on the first day of January, 1880, but that in as much as the state had made no provision for suit against itself in its own courts, and in as much as it cannot be sued in the courts of the United States by a citizen of another state, the bond holders were without remedy; that a suit against the officers charged with the collection and disbursement or appropriation of the special tax to the payment of the bonds was in substance a suit against the state itself; that the money collected under the special tax and already in the state treasury was the money of the state and a part of its general funds and that the court had no jurisdiction to coerce or control the state officers in the administration of the financial affairs of the state. Louisiana *v.* Jumel, 107 U. S. 711, 27 L. Ed. 448.

11. Writing state bonds off its books.—Smith *v.* Jennings, 206 U. S. 276, 51 L. Ed. 1061.

12. Redemption of void securities.—Houston, etc., R. Co. *v.* Texas, 177 U. S. 66, 91, 98, 99, 44 L. Ed. 673.

null and void.[13]

4. Auditing Claims against the State.—Since the power given the courts of a state to examine and recommend claims against it to the legislature is not a contract, the repeal of the right to have the claims examined and recommended, does not impair the obligation of a contract in the sense conveyed by those words as used in the constitution of the United States.[14] Nor is the decision by the court of last resort in the state that the right had been taken away an impairment of the contract, for the reason that the question whether or not such right has been repealed becomes purely a question of state law to be determined by the courts of the state.[15]

5. Release by State.—A statute of a state releasing "whatever interest" in certain real estate may "rightfully" belong to it, is not a law impairing the obligation of a contract in a case where an agent of the state, having by contract with it acquired an interest in half the lot, undertakes to sell and conveys the whole of it. In such case, and on an assumption that the agent does own one-half, the statute will be held to apply to the remaining half alone.[16]

6. Contracts of Loan.—States and cities, when they borrow money and contract to repay it with interest, are not acting as sovereignties. They come down to the level of ordinary individuals. Their contracts have the same meaning as that of similar contracts between private persons. Hence, instead of there being in the undertaking of a state or city to pay, a reservation of a sovereign right to withhold payment, the contract should be regarded as an assurance that such a right will not be exercised. A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity.[17]

7. Land Grants[18]—a. *In General.*—A grant from the state is a contract executed, and the state has no right to impair the same or to divest rights acquired thereunder.[19] Therefore, where lands have been granted by a state for

13. When state may nullify its bonds.—Bier *v.* McGehee, 148 U. S. 137, 37 L. Ed. 397, following New Orleans *v.* New Orleans Waterworks Co., 142 U. S. 79, 35 L. Ed. 943.

Article 233 of the constitution of the state of Louisiana, which declares that the consolidated bonds of the state, held for the Agricultural and Mechanical College and the Louisiana Seminary fund are null and void is not repugnant to § 10, art. 1, of the constitution of the United States, prohibiting states from passing laws impairing the obligation of contracts. Bier *v.* McGehee, 148 U. S. 137, 37 L. Ed. 397.

14. Auditing claims against state.—Baltzer *v.* North Carolina, No. 1, 161 U. S. 240, 40 L. Ed. 684.

15. Baltzer *v.* North Carolina, No. 1, 161 U. S. 240, 40 L. Ed. 684.

16. Release executed by state held valid.—Thus where an attorney at law, employed under a valid contract to recover escheated property for the benefit of the state, received, under his contract of employment, a one-half interest in the property, and afterwards undertook to sell and convey the whole, it was held that a subsequent statute, releasing to the persons from whom the property was recovered, whatever interest the state had therein, did not operate to impair the obligation of the contract under which the attorney acquired a half interest therein, but would be construed as applying only to the remaining half belonging to the state. Mulligan *v.* Corbins, 7 Wall. 487, 19 L. Ed. 278. See the title RELEASE.

17. Contracts of loan by state.—Murray *v.* Charleston, 96 U. S. 432, 445, 24 L. Ed. 760. See the title LOANS.

18. See the title PUBLIC LANDS.

19. Grants of land by the state are contracts.—Fletcher *v.* Peck, 6 Cranch 87, 3 L. Ed. 162; Dartmouth College *v.* Woodward, 4 Wheat. 518, 656, 4 L. Ed. 629.

A grant whether by the state or by an individual, amounts to an extinguishment of the right of the grantor and implies a contract not to reassert that right. A party is also estopped by his own grant. Opinion of Story, J., in Dartmouth College *v.* Woodward, 4 Wheat. 518, 682, 683, 4 L. Ed. 629.

A grant of land is a contract, the option of which is that the profits issuing from it shall enure to the benefit of the grantee. Marshall, C. J., delivering the opinion in Providence Bank *v.* Billings, 4 Pet. 514, 562, 7 L. Ed. 939.

Grants by the crown to colonial churches.—Even before the Dartmouth College case was decided, it was held by the supreme court that grants of land made by the crown to colonial churches were irrevocable, and that property purchased by, or devised to them, prior to the adoption of the constitution, could not be diverted to other purposes by the states which succeeded to the sovereign power of the colonies. Terrett *v.* Taylor, 9 Cranch 43, 3 L. Ed. 650; Pawlett *v.* Clark,

one purpose and an attempt is made by law to appropriate them to another, or to revoke the grant, this impairs the obligation of contracts.[20]

b. *Statutes Prescribing the Mode or Form of Settling Titles.*—But where a state grants lands, and makes no stipulation not to legislate further upon the subject, a statute which proceeds to prescribe a mode or form of settling titles, does not impair the force of the grant or take away any right under it.[21]

c. *Statutes Annulling Grants.*—A party to a contract cannot pronounce its own deed invalid, although such party be a sovereign state;[22] hence, a statute annulling conveyances is unconstitutional, because it is a law impairing the obligation of contracts, within the meaning of the constitution of the United States.[23] But a state may annul its prior grant and convey the same property to another, if such prior grant was void.[24]

d. *Statutes Requiring Proof of Genuineness of Grants.*—Judgments as well as grants obtained by fraud or collusion are void, and confer no vested title; and a state may justly require those who claim that their grants are not of this character to make proof of their genuineness in some proper tribunal before they can be entitled to a survey or patent under them, and may limit the time within which suits may be instituted.[25]

9 Cranch 292, 3 L. Ed. 735; Society for the Propagation of the Gospel *v.* New Haven, 8 Wheat. 464, 5 L. Ed. 662; Pearsall *v.* Great Northern R. Co., 161 U. S. 646, 661, 40 L. Ed. 838.

20. Appropriation of lands to other purposes in derogation of grant.—Planters' Bank *v.* Sharp, 6 How. 301, 12 L. Ed. 447, citing Terrett *v.* Taylor, 9 Cranch 43, 3 L. Ed. 650; Pawlett *v.* Clark, 9 Cranch 292, 3 L. Ed. 735.

21. Statutes prescribing mode of settling titles.—Jackson *v.* Lamphire, 3 Pet. 280, 7 L. Ed. 679, approved in Planters' Bank *v.* Sharp, 6 How. 301, 331, 12 L. Ed. 447.

The plaintiff in error claimed to recover the land in controversy, having derived his title under a patent granted by the state of New York to John Cornelius; he insisted that the patent created a contract between the state and the patentee, and his heirs and assigns, that they should enjoy the land, free from any legislative regulations to be made, in violence of the constitution of the state, and that an act passed by the legislature of New York, subsequent to the patent, did violate that contract; under that act, commissioners were appointed to investigate the contending titles to all the lands held under such patents, as that granted to John Cornelius, and by their proceeding, without the aid of a jury, the title of the defendants in error was established against and defeating the title under a deed made by John Cornelius, the patentee, and which deed was executed under the patent. Held, that this is not a case within the clause of the constitution of the United States, which prohibits a state from passing laws which shall impair the obligation of contracts; the only contract made by the state, is a grant to John Cornelius, his heirs and assigns, of the land; the patent contains no covenant to do, or not to do, any further act, in relation to the land; and the court are not inclined to create a contract by implication; the act of the legislature of New York does not attempt to take the land from the patentee, the grant remains in full effect; and the proceedings of the commissioners under the law, operated upon titles derived under, and not adversely to the patent. Jackson *v.* Lamphire, 3 Pet. 280, 7 L. Ed. 679, approved in Vance *v.* Vance, 108 U. S. 514, 520, 27 L. Ed. 808.

22. Statutes annulling grants are void.—Fletcher *v.* Peck, 6 Cranch 87, 3 L. Ed. 162.

23. Fletcher *v.* Peck, 6 Cranch 87, 3 L. Ed. 162, cited in Von Hoffman *v.* Quincy, 4 Wall. 535, 549, 18 L. Ed. 403.

24. State may annul prior void conveyances.—Where a land entry is, under the statute of the state and the judicial construction thereof by the courts of the state, voidable, but not void, because of the nonpayment of the purchase money at the time of the entry; a subsequent grantee or patentee of the same land, takes no contract or vested right as against a subsequent statute validating and confirming the title to the person making the original entry upon payment of the purchase money and the proof thereof. Williams *v.* Norris, 12 Wheat. 117, 126, 6 L. Ed. 571, citing Fletcher *v.* Peck, 6 Cranch 87, 3 L. Ed. 162.

But had the entry stated in the foregoing paragraph been absolutely void, the title of the subsequent patentee would have constituted a valid contract as between the state and such patentee, and a statute validating the original void entry would have been understood as impairing the obligation thereof. Williams *v.* Norris, 12 Wheat. 117, 126, 6 L. Ed. 571.

25. Statutes requiring proof of genuineness of grants are valid.—League *v.* De Young, 11 How. 185, 203, 13 L. Ed. 657; Herman *v.* Phalen, 14 How. 79, 14 L. Ed. 334.

e. *Conflicting Grants.*—Where the state makes a valid grant of land to one person, and afterwards issues a junior patent for the same land to other persons, no contract can be imputed to the state, nor can any vested rights, or, for that matter, contingent rights be acquired under such junior patent. Such junior patent is not vested with the attribute of hanging over a valid and indefeasible grant of the soil, waiting to vest upon the occurrence of the casualty of an escheat, or an indefinite failure of heirs; and a failure of heirs actually occurring after the lapse of one life does not aid the title of the junior patentee in any way.[26]

f. *Particular Grants Considered*—(1) *Grants to Aid Railroad Construction.*—A provision in the constitution of a state repealing grants of land to aid in the construction of railroads, impairs the obligation of contracts entered into between the state and the company prior to the adoption of the constitution.[27] But such a provision is valid of course as applied to statutes attempting to grant land and enacted after its adoption, or as applied to those companies which do not begin operations until after its adoption.[28]

(2) *Grants of Rights in Navigable Waters.*—A grant by the state to a corporation of rights and privileges in the navigable waters of the state is revocable, and such revocation impairs the obligation of no contract between the state and the grantee.[29]

26. Conflicting grants of land.—Governeur *v.* Robertson, 11 Wheat. 332, 360, 6 L. Ed. 488.

The state of Virginia having issued a land patent to an alien, afterwards issues a junior patent for same land. The original patent to the alien having been held valid, it was held that the junior patent for the same land conferred no rights upon the patentees. Therefore, the original patentee having died without heirs capable of taking the land, but the land having been conveyed by persons claiming it by descent from such original alien patentee, it was held that statutes confirming and validating the title acquired by the purchasers under such conveyance, impair no contract or vested rights of the persons claiming under the junior patent. Governeur *v.* Robertson, 11 Wheat. 332, 358, 360, 6 L. Ed. 488.

The land mentioned in the preceding paragraph being in that section of Virginia which was afterwards erected into the state of Kentucky, the Kentucky statute confirming and validating the title to the purchasers thereof were valid under the compact of 1789, between the states of Virginia and Kentucky. Governeur *v.* Robertson, 11 Wheat. 332, 360, 6 L. Ed. 488.

27. Repealing grants to railroads.—Houston, etc., R. Co. *v.* Texas, 170 U. S. 243, 42 L. Ed. 1023, distinguishing Galveston, etc., R. Co. *v.* Texas, 170 U. S. 226, 42 L. Ed. 1017.

A grant of lands from the state to a railroad company, embodied in the charter of the company upon conditions that the company should do certain things, is a contract within the protection of the federal constitution and a state law or constitutional amendment revoking the grant and disposing of the land of other persons is an impairment of the obligation of the contract. Davis *v.* Gray, 16 Wall. 203, 232, 21 L. Ed. 447.

Where a state law provides that any railroad company constructing its line within the state shall be entitled to so many sections of the public domain upon the completion of the agreed number of miles of track, those companies acting upon the faith of the statute and constructing the requisite number of miles of track acquire a contract or vested right to the land; and a constitutional provision adopted after they have so constructed their tracks and acquired such right to the land and which undertakes to revoke or repeal the statute granting the land, is, as to them, unconstitutional both as impairing the obligation of their contract and as depriving them of their property without due process of law. Houston, etc., R. Co. *v.* Texas, 170 U. S. 243, 42 L. Ed. 1023, holding § 6 of article 10 of the constitution of Texas of 1869 to be invalid in so far as it attempted to deprive those companies, which had already complied with the statute, of the lands to which they were entitled thereunder.

28. Galveston, etc., R. Co. *v.* Texas, 170 U. S. 226, 42 L. Ed. 1017.

29. Grants of privileges in navigable waters may be revoked.—The state holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the state holds title to soils under tidewater, by the common law, and that title necessarily carries with it control over the waters above them whenever the lands are subjected to use. But it is a title different in character from that which the state holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to pre-emption and sale. It is a title held in trust for the people of

(3) *Swamp and Overflowed Land Acts.*—There is no doubt that grants of swamp and overflowed lands by the United States to a state upon conditions constitutes, upon its acceptance by the state, a contract binding upon the state, which it cannot violate by legislation without infringement of the constitution. It has all the elements of a contract, namely, competent parties, proper subject matter, sufficient consideration, and consent of minds.[30] Thus an application to purchase swamp and overflowed lands in acceptance of an offer contained in a statute becomes a binding contract upon both parties as soon as it is accepted by the state and the terms and conditions mentioned in the act are performed by the other party. Accordingly a statute authorizing the cancellation of the certificates of sale violates the constitutional inhibition against impairing the obligation of contracts.[31] But the appropriation of the proceeds of the swamp and overflowed lands granted to the state by the act of congress commonly known as the Arkansas swamp act, which grant was made on condition that the proceeds of the lands should be applied, as far as necessary, in reclaiming the land by means of levees and drains, rests solely in the good faith of the state. The discretion in disposing of them is not controlled by that condition, as neither a contract nor a trust following the lands was thereby created.[32]

the state that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace. Hence any grant of this kind is necessarily revocable, and such revocation is not infringing upon the contract clause of the United States constitution. Illinois Cent. R. Co. *v.* Illinois, 146 U. S. 387, 452, 453, 36 L. Ed. 1018.

The soil under the public navigable waters of East New Jersey belongs to the state and not to the proprietors. The supreme court of the United States so decided in the case of Martin *v.* Waddell, 16 Pet. 367, 10 L. Ed. 997, and the principle covers the case where land has been reclaimed from the water under an act of the legislature. Therefore, a legislative grant of such lands is not an impairment of the obligation of the contract of one claiming title thereof under the proprietors. Den *v.* Jersey Co., 15 How. 426, 14 L. Ed. 757. See post, "Laws Concerning Civil Institutions or Governmental Subjects." IV. See the title NAVIGABLE WATERS.

30. **Grants of swamp lands constitute contracts.**—McGee *v.* Mathis, 4 Wall. 143, 18 L. Ed. 314.

31. **Contracts to purchase swamp and overflowed lands.**—By an act of the legislature of the state of Oregon of October 26, 1870, provision was made for the sale of swamp and overflowed lands belonging to the state to persons making application to purchase any tract or tracts thereof, such applicant being required to pay twenty per cent. of the purchase price within ninety days after the publication of the notice of the completion, approval and filing of maps and description provided for in § 2 of said act, and it being further provided that no patent should issue therefor until after proof of reclamation and payment of the balance of the purchase money. Held, that this constituted an offer of sale upon the part of the state, the acceptance of which by the filing of an application to purchase certain described tracts and the payment of twenty per cent. of the days after the publication of the notice above mentioned, completed a contract between the state and the applicant which could not be impaired by the acts of January 17, 1879, and February 16, 1886, providing for the cancellation of the certificates of sale and the resale of all lands upon which twenty per cent. of the purchase price had not been paid prior to January 17, 1879; that it was immaterial that the twenty per cent. of the purchase price was not paid until after January 17, 1879, provided it was paid within ninety days after the publication of notice as required by the act of October 26, 1870, that as to an applicant who had made such payment within such time, said acts were unconstitutional as impairing the obligation of his contract. Pennoyer *v.* McConnaughy, 140 U. S. 1, 25, 35 L. Ed. 363.

32. **Construction of Arkansas swamp act.**—Hagar *v.* Reclamation Dist. No. 108, 111 U. S. 701, 28 L. Ed. 569, following Mills County *v.* Railroad Companies, 107 U. S. 557, 27 L. Ed. 578, approved in United States *v.* Louisiana, 127 U. S. 182, 190, 32 L. Ed. 66.

The states may make binding irrepealable contracts exempting these lands from taxation.[33]

g. *Construction of Grants.*—"No grant can be raised by mere inference or presumption, and the right granted must be clearly defined."[34]

h. *Escheat Statutes.*—A statute providing for escheat proceedings is not a statute impairing the obligation of any contract involved in the grant by which the land was held.[35]

8. Grant of State Funds in Form of Endowments.—"The government has no power to revoke a grant, even of its own funds, when given to a private person, or a corporation, for special uses. It cannot recall its own endowments, granted to any hospital or college, or city or town, for the use of such corporations. The only authority remaining to the government is judicial, to ascertain the validity of the grant, to enforce its proper uses, to suppress frauds, and, if the uses are charitable, to secure their regular administration, through the

33. Exemptions of swamp lands from taxation.—Where a state, in order to promote the drainage and sale of certain swamp lands belonging to it and which it was desirous of reclaiming, has passed by way of encouraging purchasers, a law that such lands "shall be exempt from taxation for the term of ten years," and issued transferable scrip receivable for them, a repeal of the exemption act, so far as it concerns lands paid for either before or after the repeal, with scrip issued before the repeal, impairs a contract of the state with the holders of such scrip. McGee *v.* Mathis, 4 Wall. 143, 18 L. Ed. 314. See, generally, the title TAXATION.

34. Grant cannot be raised by inference.—Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 9 L. Ed. 773; Fertilizing Co. *v.* Hyde Park, 97 U. S. 659, 24 L. Ed. 1036; Newton *v.* Commissioners, 100 U. S. 548, 561, 25 L. Ed. 710. See the title CORPORATIONS, vol. 4, p. 677.

Grants from the public are strictly construed in favor of the public, and grants of a privilege are not ordinarily to be taken as grants of an exclusive privilege. Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 9 L. Ed. 773; Turnpike Co. *v.* State, 3 Wall. 210, 18 L. Ed. 180; Stein *v.* Bienville Water Supply Co., 141 U. S. 67, 35 L. Ed. 622; Hamilton Gas Light, etc., Co. *v.* Hamilton City, 146 U. S. 258, 36 L. Ed. 963; Long Island Water Supply Co. *v.* Brooklyn, 166 U. S. 685, 696, 41 L. Ed. 1165.

"The contract must be shown to exist. There is no presumption in its favor. Every reasonable doubt should be resolved against it. Where it exists, it is to be rigidly scrutinized, and never permitted to extend either in scope or duration beyond what the terms of the concession clearly require." There must have been a deliberate intention clearly manifested on the part of the state to grant what is claimed. Such a purpose cannot be inferred from equivocal language. Province Bank *v.* Billings, 4 Pet. 514, 7 L. Ed. 939; Gilman *v.* Sheboygan, 2 Black 510, 17 L. Ed. 305; Tucker *v.* Ferguson, 22 Wall. 527, 22 L. Ed. 805; Newton *v.* Commissioners, 100 U. S. 548, 561, 25 L. Ed. 710.

No legislative grant can be held void, on account of its alleged violation of a former grant, which is not definite in its object, the thing granted, and its extent. If it is so imperfectly described as to leave it doubtful whether the subject matter of both grants is the same, the doubt operates conclusively in favor of the power of the legislature to make the second grant. This consideration alone leads to the rule for construing public grants of property or franchise even more strictly than in England; the reason exists in the provisions of the constitution which prohibits any legislative violation of the obligation of a contract; whereas in England, parliament can revoke or annul a grant of property or power. Opinion of Baldwin, J., in Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 583m, 9 L. Ed. 773.

35. Escheat statutes held to be valid.—When a man dies, the legislature is under no constitutional obligation to leave the title to his property, real or personal, in abeyance for an indefinite period; but it may provide for promptly ascertaining, by appropriate judicial proceedings, who has succeeded to his estate. If such proceedings are had, after actual notice by service of summons to all known claimants, and constructive notice by publication to all possible claimants who are unknown, the final determination of the right of succession, either among private persons, as in the ordinary administration of estates, or between all persons and the state, as by inquest of office or similar process to determine whether the estate has escheated to the public, is due process of law; and a statute providing for such proceedings and determination does not impair the obligation of any contract contained in the grant under which the former owner held, whether that grant was from the state or from a private person. Hamilton *v.* Brown, 161 U. S. 256, 275, 40 L. Ed. 691. See the title ESCHEAT, vol. 5, p. 897.

means of equitable tribunals, in cases where there would otherwise be a failure of justice."[36]

9. Right of State to Convey Its Rights.—Where a state, by an act of its legislature, has reserved to itself an "absolute" right to certain property of a corporation existing under a charter of the state, the state may grant its rights to third parties without impairing any of the rights of the corporation.[37]

10. Repeal of Statute Making Certain Securities Receivable for Debts—a. *In General.*—A state statute which repeals a prior statute under which certain funds and securities had theretofore been receivable in payment of debts, impairs the obligation of pre-existing contracts.[38] For example, where the charter of a state bank makes its paper receivable for all debts due the state, this provision cannot be repealed as to bills in circulation at the time.[39] Nor

36. Recall of endowments made by a state.—Dartmouth College *v.* Woodward, 4 Wheat. 518, 698, 4 L. Ed. 629.

37. Right of state to convey its "absolute" rights.—An act of the general assembly of South Carolina authorized the board of directors of the South Carolina penitentiary, which had acquired the ownership of a canal under a previous act, to transfer the property to the board of trustees of the Columbia Canal, and required the completion of the canal and a reservation to the state, free of charge, on the line of the canal, of 500 horse power of water power, with a further proviso that the right of the state to the free use of the said 500 horse power should be absolute, and any mortgage, assignment, or other transfer of the said canal by the said board of trustees, or their assignees, should always be subject to this right. In § 21 this reservation is described as a provision for the state, with 500 horse power of water power "at" the penitentiary. Held, that, in providing the right of the state should be absolute, it was intended to permit the board of directors to do exactly what was done in this case, i. e., to lease such portion of the 500 horse power as was not required for the individual use of the penitentiary, and that such action did not impair the obligation of any contract as between the state and a waterworks company to which it conveyed the canal. Columbia Water Power Co. *v.* Columbia Electric St. R., etc., Co., 172 U. S. 475, 43 L. Ed. 521.

38. Repeal of statute making certain securities receivable for debts.—Hawthorne *v.* Calef, 2 Wall. 10, 17 L. Ed. 776.

39. Repeal of statute making bank paper receivable for debts.—Woodruff *v.* Trapnall, 10 How. 190, 13 L. Ed. 383; Curran *v.* Arkansas, 15 How. 304, 14 L. Ed. 705; Tennessee *v.* Sneed, 96 U. S. 69, 24 L. Ed. 610; Keith *v.* Clark, 97 U. S. 454, 24 L. Ed. 1071; South Carolina *v.* Gaillard, 101 U. S. 433, 25 L. Ed. 937; Pearsall *v.* Great Northern R. Co., 161 U. S. 646, 663, 40 L. Ed. 838.

Contract to receive notes issued by state bank.—In 1836, the legislature of Arkansas chartered a bank, the whole of the capital of which belonged to the state, and the president and directors of which were appointed by the general assembly. The 28th section of the charter provided, "that the bills and notes of said institution shall be received in all payments of debts due to the state of Arkansas." Held, that the undertaking of the state to receive the notes of the bank constituted a contract between the state and the holders of the notes, which the state was not at liberty to break, and that the act of 1845 repealing the said 28th section was as to the notes issued before the repeal, unconstitutional as impairing the obligation of the contract. (Four justices dissenting.) Woodruff *v.* Trapnall, 10 How. 190, 13 L. Ed. 383, reaffirmed in Hawthorne *v.* Calef, 2 Wall. 10, 21, 17 L. Ed. 776; Paup *v.* Drew, 10 How. 218, 13 L. Ed. 394; Trigg *v.* Drew, 10 How. 224, 13 L. Ed. 397, approved in McGahey *v.* Virginia, 135 U. S. 662, 719, 34 L. Ed. 304.

The provision in § 12 of the charter of 1838, of the bank of Tennessee, "that the bills or notes of said corporation, originally made payable or which shall have become payable on demand, in gold or silver coin, shall be receivable at the treasury of the state, or by all tax collectors and other public officers, in all payments for taxes or other moneys due to the state," made a contract on the part of the state with all persons that the state would receive for all payments for taxes or other moneys due to it, all bills of the bank lawfully issued, where the section remained in force. Furman *v.* Nichol, 8 Wall. 44, 19 L. Ed. 370, following Woodruff *v.* Trapnall, 10 How. 190, 13 L. Ed. 383. See Knox *v.* Exchange Bank, 12 Wall. 379, 383, 20 L. Ed. 414, distinguishing Furman *v.* Nichol, 8 Wall. 44, 19 L. Ed. 370.

A general statutory provision that the state will receive for public use the paper of banks generally, unconnected with the state is not analogous to the case of a special charter provision that the notes issued by a bank, the capital stock of which is owned wholly by the state, shall be received in payment of all debts due the state. In the first case it is a question of public policy, influenced by considerations of general conveyances, which may be changed at the discretion of the

could such notes of the bank be refused because issued by it during the war between the states,[40] unless it was under the control of the secession government.[41] This guaranty is not a personal one, existing only for the benefit of the first holder, but attaches to the notes so issued, as much as if written on the back thereof. It goes with the notes everywhere as long as the guaranty lasts.[42] But notes issued by the bank after the repeal are not within the contract and may be refused by the state.[43]

b. *Where There Is an Agreement as to Medium of Payment.*—And although the pledge of the state to receive the notes of the bank in payment of all debts due to it in its own right is a contract which it could not violate, yet, where the state sold lands which were held by it in trust for the benefit of a seminary, and the terms of the sale were, that the debtor should pay in specie or its equivalent, such debtor was not at liberty to tender the notes of the bank in payment.[44] And this was true, although the money to be received from the debtor was intended by the legislature to be put into the bank, and to constitute a part of its capital. The fund belonged to the state only as a trustee, and therefore was not, within the meaning of the charter, a debt due to the state.[45] By the terms of sale, also, to pay "in specie or its equivalent," the notes of the bank were executed.[46]

11. Grants of Exclusive Privileges.—See post, "Contracts of Municipalities," III, J.

a. *In General.*—Where there is nothing in the constitution and laws of a state which prohibits the granting of exclusive franchises, such grant will constitute a contract inviolable under the contract clause of the federal constitution.[47] And

legislature. In the other it is the case of a contract incorporated into the charter imposing an obligation on the state to receive in payment of all debts due to it, the paper of the bank owned by the state, and whose notes are circulated for its benefit. In the latter case the contract is between the state and the holders of the notes who have received the same upon faith of the promise of the state to accept them in payment of all obligations to the state. Woodruff *v.* Trapnall, 10 How. 190, 207, 13 L. Ed. 383.

40. Bank notes issued during Civil War.—The state of Tennessee having, in 1838, organized the Bank of Tennessee, agreed, by a clause in the charter, to receive all its issues of circulating notes in payment of taxes; but, by a constitutional amendment adopted in 1865, it declared the issues of the bank during the insurrectionary period void, and forbade their receipt for taxes. Held, that the amendment was in conflict with the provision of the constitution of the United States against impairing the obligation of contracts. Keith *v.* Clark, 97 U. S. 454, 24 L. Ed. 1071.

The twelfth section of the charter of the Bank of Tennessee constituted a contract between every holder of the circulating notes of the bank and the state of Tennessee, that the state would receive the notes in payment of taxes at their par value. Keith *v.* Clark, 97 U. S. 454, 24 L. Ed. 1071; Furman *v.* Nichol, 8 Wall. 44, 19 L. Ed. 370.

41. Furman *v.* Nichol, 8 Wall. 44, 45, 19 L. Ed. 370.

42. Privilege not a personal one.—Furman *v.* Nichol, 8 Wall. 44, 19 L. Ed. 370.

Therefore a tender made in 1847, of notes issued by the bank prior to the repealing law of 1845, was good to satisfy a judgment obtained against the debtor by the state; and it makes no difference whether or not the debtor had the notes in his possession at the time when the repealing act was passed, since the contract or guaranty of the state was to receive them from the person in whosoever hands they might be. Woodruff *v.* Trapnall, 10 How. 190, 13 L. Ed. 383; Paup *v.* Drew, 10 How. 218, 13 L. Ed. 394; Trigg *v.* Drew, 10 How. 224, 13 L. Ed. 397.

43. Retrospective operation of statute.—Woodruff *v.* Trapnall, 10 How. 190, 13 L. Ed. 383; Paup *v.* Drew, 10 How. 218, 13 L. Ed. 394; Trigg *v.* Drew, 10 How. 224, 13 L. Ed. 397.

44. Where there is an agreement as to medium of payment.—Paup *v.* Drew, 10 How. 218, 13 L. Ed. 394; Trigg *v.* Drew, 10 How. 224, 13 L. Ed. 397.

45. Paup *v.* Drew, 10 How. 218, 13 L. Ed. 394; Trigg *v.* Drew, 10 How. 224, 13 L. Ed. 397.

46. Paup *v.* Drew, 10 How. 218, 13 L. Ed. 394; Trigg *v.* Drew, 10 How. 224, 13 L. Ed. 397.

47. When grants of exclusive privileges are inviolable.—New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650, 29 L. Ed. 516; New Orleans Waterworks Co. *v.* Rivers, 115 U. S. 674, 29 L. Ed. 525; Louisville Gas Co. *v.* Citizens' Gas Co., 115 U. S. 683, 685, 29 L. Ed. 510; St. Tammany Waterworks *v.* New Orleans Waterworks, 120 U. S. 64, 30 L. Ed. 563. See

the mere reservation of a right by the state to alter, amend or repeal all charters and grants of and to incorporations, unless the contrary intent be therein expressed, will not confer upon the state the right to impair the obligation of a contract subsequently made and entered into between the state and a private corporation, where the act granting its charter is not a clear expression of the legislative intent that the company's charter should not be amended or repealed, but that the company should enjoy and exercise an exclusive privilege.[48] But if a state grant no exclusive privileges to one company which it has incorporated, it impairs no contract by incorporating a second one which itself largely manages and profits by, to the injury of the first.[49] Moreover, grants of special privileges are to be most strongly construed in favor of the public and where the privilege claimed is doubtful nothing is to be taken by mere implication as against public rights.[50] Thus, when an act of the legislature is fairly susceptible of being construed as a grant of certain franchises and rights in perpetuity or for a term of years, and the obligation of the contract will be impaired by one construction and not by the other, the construction most favorable to the state must be adopted, as grants of property franchises or privileges by the state are strictly construed in favor of the public, and whatever is not unequivocally granted is withheld.[51]

the title CORPORATIONS, vol. 4, p. 681.

"If the state can, by contract, restrict the exercise of her power to construct and maintain highways, bridges, and ferries, by granting to a particular corporation the exclusive right to construct and operate a railroad within certain lines and between given points, or to maintain a bridge or operate a ferry over one of her navigable streams within designated limits; if she may restrict the exercise of the power of taxation, by granting exemption from taxation to particular individuals and corporations; it is difficult to perceive upon what ground we can deny her authority—when not forbidden by her own organic law—in consideration of money to be expended and important services to be rendered for the promotion of the public comfort, the public health, or the public safety, to grant a franchise, to be exercised exclusively by those who thus do for the public what the state might undertake to perform either herself or by subordinate municipal agencies." New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650, 665, 29 L. Ed. 516.

Exclusive privileges—Construction—Presumption against surrender of supervisory control by government.—The object and end of all government is to promote the happiness and prosperity of the community by which it is established; and it can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created; the state is never to be presumed to have surrendered this power; because like the taxing power, the whole community has an interest in preserving it undiminished. This presumption is not confined to the taxing power but whenever any power of the state is said to be surrendered or diminished the rule of construction must be the same Thus, that a state has surrendered for seventy years its power of improvement and public accommodation, in a great and important line of travel, along which a vast number of its citizens must daily pass is not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear. Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 9 L. Ed. 773

48. Effect of reservation to annul and alter charters.—Louisville Gas Co. *v.* Citizens' Gas Co., 115 U. S. 683, 29 L. Ed. 510. See, generally, the title CORPORATIONS, vol. 4, p. 677.

49. Grants of rights to competing companies do not impair in absence of exclusive privilege.—Turnpike Co. *v.* State, 3 Wall. 210, 18 L. Ed. 180, followed in Hamilton Gas Light, etc., Co. *v.* Hamilton City, 146 U. S. 258, 269, 36 L. Ed. 963, Lehigh Water Co. *v.* Easton, 121 U. S. 388, 391, 30 L. Ed. 1059.

50. Construction of grant of exclusive privileges.—"In considering this contract we are to remember the well-established rule in this court which requires grants of franchises and special privileges to be most strongly construed in favor of the public, and that where the privilege claimed is doubtful nothing is to be taken by mere implication as against public rights. This rule has been applied to a series of contracts in waterworks and lighting cases, and we have no disposition to detract from its force and effect. And unless the city has excluded itself in plain and explicit terms from competition with the waterworks company during the period of this contract it cannot be held to have done so by mere implication. The rule, as applied to waterworks contracts, was last announced in this court in Knoxville Water Co. *v.* Knoxville, 200 U. S. 22, 50 L. Ed. 353, decided at this term. Citing previous cases." Vicksburg *v.* Vicksburg Waterworks Co., 202 U. S. 453, 469, 50 L. Ed. 1102.

51. Construction to uphold not to de-

b. *Bridges*—(1) *In General.*—When no clause exists in a charter for a bridge against authorizing other bridges near at suitable places, it is no violation of the terms or obligations of the contract to authorize another.[52] But this does not mean that a state legislature, by the use of appropriate language, may not grant exclusive privileges to a bridge company. In numerous cases it has been held by the federal supreme court that the grant by a state to a bridge company of the exclusive rights to build and maintain bridges across rivers is a contract

stroy.—Coosaw Min. Co. *v.* South Carolina, 144 U. S. 550, 36 L. Ed. 537.

The legislature gave a mining company a right to mine phosphate in a certain river for twenty-one years. Later the legislature proposed modifications of this contract which were accepted by the mining company. The act provided when these modifications were accepted the mining company should have the exclusive privilege of mining phosphate "so long as and no longer" than it complied with these conditions. At the expiration of the twenty-one years the legislature took these phosphate lands and placed them in the control of a board of phosphate commissioners with power to lease them to others. The latter statute giving the mining company the right to mine phosphate was construed with the former statute and was declared to be a grant for twenty-one years and not in perpetuity so that the act of the legislature taking the phosphate lands from the mining company did not impair the obligation of the contract. Coosaw Min. Co. *v.* South Carolina, 144 U. S. 550, 36 L. Ed. 537. See the title MINES AND MINERALS.

52. Grant of exclusive privileges to bridge companies.—Planters' Bank *v.* Sharp, 6 How. 301, 331, 12 L. Ed. 447, citing Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 9 L. Ed. 773. See the titles BRIDGES, vol. 3, p. 516; CORPORATIONS, vol. 4, p. 682.

An act incorporating a bridge company, in the usual form, and with privileges such as are commonly given corporations of that kind, for the purpose of building a bridge, and establishing certain rates of toll which the company is authorized to take, does not confer any exclusive privilege or franchise upon such company, and is not a contract that the legislature will not authorize the construction of another toll bridge alongside of the former, nor even that the legislature will not authorize the construction of a free bridge and thereby destroy the value of toll privileges of the former. Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 9 L. Ed. 773.

Charles River Bridge case.—Thus in 1650, the legislature of Massachusetts granted to Harvard College the liberty and power to dispose of a ferry by lease or otherwise, from Charlestown to Boston, passing over Charles River; the right to set up a ferry between these places had been given by government, under the authority of the court of assistance, by an order dated November 9, 1636, to a particular individual; and was afterwards leased successively to others, they having the privilege of taking tolls regulated in the grant; and when, in 1650, the franchise of this ferry was granted to the college, the rights of the lessees in the same had expired; under the grant, the college continued to hold the ferry by its lessees and received the profits therefrom until 1785, when the legislature of Massachusetts incorporated a company to build a bridge over Charles River, where the ferry stood, granting them tolls; the company to pay to Harvard College £200 a year, during the charter, for forty years, which was afterwards extended to seventy years; after which the bridge was to become the property of the commonwealth. The bridge was built under this charter and the corporation received tolls allowed by the law; always keeping the bridge in order and performing all that was enjoined on them to do. In 1828, the legislature of Massachusetts incorporated another company for the erection of another bridge, the Warren Bridge over Charles River from Charlestown to Boston, allowing the company to take tolls; commencing in Charlestown, near where Charles River Bridge commenced, and terminating in Boston, about 800 feet from the termination of the Charles River Bridge; the bridge was to become free after a few years, and had actually become free. Travelers, who formerly passed over the Charles River Bridge from Charlestown Square, then passed over the Warren Bridge and thus the Charles River Bridge Company were deprived of the tolls, they would have otherwise received; the value of the franchise granted by the act of 1785, was thus entirely destroyed. The proprietors of the Charles River Bridge filed a bill, in the supreme judicial court of Massachusetts, against the proprietors of the Warren Bridge, first for an injunction to prevent the erection of the bridge and afterwards for general relief; stating that the act of the legislature of Massachusetts authorizing the building of the Warren Bridge, was an act impairing the obligation of a contract, and therefore repugnant to the constitution of the United States; the supreme court of Massachusetts dismissed the bill of the complainants; and the case was brought by writ of error to the supreme court of the United States, under the provisions of the 25th section of the judiciary act of 1789. It was held that

within the meaning of the federal constitution.[53] A railway viaduct, however, is not a bridge; and so a legislative authorization to a railroad to build a viaduct does not impair the obligation of a pre-existing exclusive privilege granted to a bridge company.[54]

(2) *Tolls and Charges.*—Where the legislature in prescribing the tolls that may be charged by bridge companies, agrees not to reduce them so as to bring the net profits of the corporation below a certain amount, this amounts to a contract within the meaning of the federal constitution.[55]

c. *Ferries.*—A general act forbidding county courts to license additional fer-

while the act incorporating the proprietors of the Charles River Bridge constituted a contract between the states and the persons incorporated, and their successors, such contract was to be strictly construed in favor of the public; that such contract did not confer upon the Charles River Bridge Company any exclusive rights of taking tolls in perpetuity, or for any less period, nor prohibit the state from authorizing the construction of another bridge, either free or toll bridge along side the former. Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 9 L. Ed. 773.

Toll bridges.—Where, under the laws of the state, the power to grant franchises to establish toll bridges upon public highways where they cross rivers is vested in the courts of law, but without power to grant exclusive franchises, such courts cannot bind the public with respect to future necessities of that character and it is competent for the legislature to authorize the erection and maintenance of another bridge within the limits of the original grant. Wright *v.* Nagle, 101 U. S. 791, 25 L. Ed. 921.

53. When privileges exclusive.—Bridge Proprietors *v.* Hoboken Co., 1 Wall. 116, 17 L. Ed. 571; The Binghampton Bridge, 3 Wall. 51, 18 L. Ed. 137.

The statute of the legislature of New Jersey, passed A. D. 1790, by which that state gave power to certain commissioners to contract with any persons for the building of a bridge over the Hackensack River; and by the same statute enacted that the "said contract should be valid on the parties contracting as well as on the state of New Jersey;" and that it should not be "lawful" for any person or persons whatsoever to erect "any other bridge over or across the said river for ninety-nine years," is a contract, whose obligation the state can pass no law to impair. Bridge Proprietors *v.* Hoboken Co., 1 Wall. 116, 17 L. Ed. 571.

54. Railway viaduct not a bridge.—A railway viaduct, if nothing but a structure made so as to lay iron rails thereon, upon which engines and cars may be moved and propelled by steam, not to be connected with the shore on either side of said river, except by a piece of timber under each rail, and in such a manner, as near as may be, so as to make it impossible for man or beast to cross said river upon said structure, except in railway cars (the only roadway between said shores and said structure being two or more iron rails, two and a quarter inches wide, four and a half inches high, laid and fastened upon said timber four feet ten inches asunder), is not a "bridge" within the meaning of the act of New Jersey, passed A. D. 1790, and just mentioned; Catron, J., dissenting. And the act of assembly of that same state, passed A. D. 1860, authorizing a company to build a railway, with the necessary viaduct, over the Hackensack, does not impair the obligation of the contract made by the aforesaid act of 1790. Bridge Proprietors *v.* Hoboken Co., 1 Wall. 116, 17 L. Ed. 571, cited in New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650, 662, 29 L. Ed. 516.

55. Tolls to be charged by bridge companies.—By an act approved February 17, 1846, the Covington and Cincinnati Bridge Company was made a body corporate and politic in the state of Kentucky with authority to its president and directors to fix the rate of toll for passing over the bridge proposed to be erected across the Ohio River between the cities of Covington, Kentucky, and Cincinnati, Ohio, subject to the condition that the said president and directors should, from time to time reduce the rates of tolls so that the net profits of the said bridge should not exceed fifteen per cent per annum after making deductions for repairs and certain other charges. By an act of the legislature of Ohio enacted March 9, 1849, the same company was made a body corporate and politic of that state, with the same franchises, rights and privileges, and subject to the same duties and liabilities, as under the original act of incorporation in the state of Kentucky. The company having constructed its bridge pursuant to these statutes, it was held that the Kentucky statute of March 31, 1890, prescribing a maximum rate of toll insufficient to create a net profit of fifteen per cent per annum, was unconstitutional as impairing the original agreement between the bridge company and the two states. Per the minority opinion of Justices Fuller, Field, Gray, and White concurring specially with the judgment in Covington, etc., Bridge Co. *v.* Kentucky, 154 U. S. 204, 223, 38 L. Ed. 962, and with Covington, etc., Bridge Co. *v.* Kentucky, 154 U. S. 224, 38 L. Ed. 970. See the title TURNPIKES AND TOLLROADS.

ries is not infringed by a subsequent act giving special right to a single county court to establish a particular ferry. No promise made by the legislature by the first act is broken by the second.[56]

d. *Grants to Gas and Electric Light Companies*—(1) *In General.*—Where a state legislature grants to a gas company the right to supply a city or town with such quantities of gas as may be needed, but the right to revoke, alter or repeal corporate franchises is reserved, a subsequent statute authorizing cities and villages to erect gas works or otherwise supply themselves with gas, cannot be regarded as impairing the obligation of the contract, whatever may be the motive of the legislature, or however harshly such legislation may operate in the particular case, upon the corporation or parties affected by it.[57]

(2) *When Grant Exclusive.*—But in several cases grants by the state of exclusive privileges to private corporations to supply gas to municipalities, have been held to be contracts protected by the federal constitution against state legislation to impair them, after performance by the grantee.[58] And a clause in

56. Ferry franchises.—Williams *v.* Wingo, 177 U. S. 601, 604, 44 L. Ed. 905. See the title FERRIES, ante, p. 274.

The legislature of Virginia of March 5, 1840, enacted that "it shall not be lawful for the court of any county to grant leave to establish a ferry over any watercourse within one-half mile, in a direct line, of any other ferry legally established over the same watercourse." Held, this act was one of general legislation, and subject to repeal by the general assembly; therefore, it did not tie the hands of the legislature, or prevent it from authorizing another ferry within a half mile whenever in its judgment it saw fit. Williams *v.* Wingo, 177 U. S. 601, 602, 603, 44 L. Ed. 905, following Fanning *v.* Gregoire, 16 How. 524, 14 L. Ed. 1043, and distinguishing The Binghamton Bridge, 3 Wall. 51, 18 L. Ed. 137.

Where a ferry was licensed, the license conferring no exclusive privilege, a subsequent general law prohibiting the courts of the different counties from licensing a ferry within half a mile in a direct line from an established ferry, was a gratuitous proceeding on the part of the legislature, which had in it nothing of the nature of a contract. Such general law was repealable at the pleasure of the legislature without such repeal being obnoxious to the prohibition contained in the contract clause of the constitution. Wheeling Bridge Co. *v.* Wheeling Bridge Co., 138 U. S. 287, 292, 34 L. Ed. 967.

57. Grants to gas and electric light companies.—Hamilton Gas Light, etc., Co. *v.* Hamilton City, 146 U. S. 258, 36 L. Ed. 963; Walla Walla City *v.* Walla Walla Water Co., 172 U. S. 1, 43 L. Ed. 341. See the titles CORPORATIONS, vol. 4, p. 679; GAS, ante, p. 545.

Where there is no contract right to maintain an exclusive gas plant, either by charter or express contract, or by virtue of a law providing for municipal construction in case of conditions broken and forfeiture therefrom; and where, moreover, the state constitution retains in the legislature the right to amend or repeal; held, there can be no impairment of contract obligation by a subsequent law authorizing municipalities to build whenever it be deemed expedient. Hamilton Gas Light, etc., Co. *v.* Hamilton City, 146 U. S. 258, 266, 36 L. Ed. 963.

A municipality under authority of § 2486 of the Revised Statutes of Ohio is given the power to purchase, or erect its own gas and power plant. And the fact that an existing plant is now supplying the town with gas and power, under provisions of acts of May 1, 1852, and March 11, 1853, does not make the above statute (§ 2486) an infringement of the contract clause of the constitution of the United States. Hamilton Gas Light, etc., Co. *v.* Hamilton City, 146 U. S. 258, 36 L. Ed. 963.

If the statute under which the plaintiff became incorporated be construed as giving it the exclusive privilege, so long as it met the requirements of law, of supplying gas light to the city of Hamilton and its inhabitants by means of pipes laid in the public ways, there is no escape from the conclusion that such a grant, as respects, at least, its exclusive character, was subject to the power of the legislature, reserved by the state constitution, of altering or revoking it. Hamilton Gas Light, etc., Co. *v.* Hamilton City, 146 U. S. 258, 270, 36 L. Ed. 963.

58. Grants to gas and electric light companies held exclusive.—New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650, 29 L. Ed. 516; Louisville Gas Co. *v.* Citizens' Gas Co., 115 U. S. 683, 29 L. Ed. 510.

"The grant of a right to supply gas or water to a municipality and its inhabitants through pipes and mains laid in the streets, upon condition of the performance of its service by the grantee, is the grant of a franchise vested in the state in consideration of the performance of a public service, and after performance by the grantee, is a contract protected by the constitution of the United States against state legislation to impair it. New Orleans Gas Co. *v.* Louisiana Light Co.,

a state constitution which declares that "all freemen when they form a social compact are equal, and that no man or set of men are entitled to exclusive, separate public emoluments or privileges from the community, but in consideration of public services," does not prohibit the state from granting to a private corporation the exclusive privileges of manufacturing and distributing gas for public and private use, by means of pipes and mains laid under the streets and other public ways of a municipality, because the services which the gas company undertakes to perform in consideration of the exclusive privileges granted to it, are public services, within the meaning of such provision.[59] But where a corporation is by its charter authorized to engage in a business affecting the public interest, and given exclusive privileges which tend to establish a monopoly, such grant of exclusive privileges does not become a contract or vested right, so as to be protected from impairment by the state or federal constitution, until the grantee has, to say the least, begun preparations or made some expenditures to perform the service to the public which constitutes the consideration for the grant of the privilege.[60]

e. *Turnpike Companies.*—Where no exclusive privileges have been conferred upon a turnpike company, either in express terms or by necessary implication, the legislature may constitutionally grant a competing privilege or right to another.[61]

115 U. S. 650, 660, 29 L. Ed. 516; New Orleans Waterworks Co. *v.* Rivers, 115 U. S. 674, 29 L. Ed. 525; St. Tammany Waterworks *v.* New Orleans Waterworks, 120 U. S. 64, 30 L. Ed. 563; Crescent City Gas Light Co. *v.* New Orleans Gas Light Co., 27 La. Ann. 138, 147." Walla Walla City *v.* Walla Walla Water Co., 172 U. S. 1, 9, 43 L. Ed. 341.

The grant to a gas company, under Kentucky act of Jan. 22, 1869, of the exclusive privilege of erecting and establishing gas works in the city of Louisville during the continuance of the city charter, and of vending coal gas lights, and supplying that municipality and its people with gas by means of pipes, mains and conduits placed in and under its streets and public ways, constitutes a contract between the state and that company, the obligation of which was impaired by a subsequent grant of the same privilege to another company. Louisville Gas Co. *v.* Citizens' Gas Co., 115 U. S. 683, 29 L. Ed. 510.

59. Construction of the Kentucky bill of rights.—Louisville Gas Co. *v.* Citizens' Gas Co., 115 U. S. 683, 29 L. Ed. 510, following New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650, 29 L. Ed. 516; New Orleans *v.* Clark, 95 U. S. 644, 24 L. Ed. 521.

60. Rule in case of nonuser of corporate franchises.—The Tallahassee Gas & Electric Light Company was incorporated pursuant to the laws of Florida Dec. 20, 1887, for the purpose of constructing, maintaining and operating gas works and electric light works in the city of Tallahassee, and with the apparently exclusive privilege of supplying these products within the city. Held, that aside from the question of whether such exclusive privilege was authorized, there is no impairment of the obligation of contract when the company has failed to use its privilege as to the electric light supply during six years, and there is no other consideration for that portion of the contract, if the city meantime begins the construction of its own plant. Capital City Light, etc., Co. *v.* Tallahassee, 186 U. S. 401, 46 L. Ed. 1219.

61. Turnpike companies.—In Turnpike Co. *v.* State, 3 Wall. 210, 213, 18 L. Ed. 180, the state of Maryland incorporated a company with power to construct a turnpike between Baltimore and Washington; and subsequently incorporated a railroad company, with authority to construct a railroad between the same cities, the line of which ran near to and parallel with the turnpike. One of the questions in the case was, whether the last act impaired the obligation of the contract with the turnpike company, it appearing that the construction of the railroad had rendered it impracticable for the company, out of its diminished income, to maintain the turnpike in proper order. This court said: "The difficulty of the argument in behalf of the turnpike company, and which lies at the foundation of the defense, is, that there is no contract in the charter of the turnpike company that prohibited the legislature from authorizing the construction of the rival railroad. No exclusive privileges had been conferred upon it, either in express terms, or by necessary implication; and hence whatever may have been the general injurious effects and consequences to the company, from the construction and operation of the rival road, they are simply misfortunes which may excite our sympathies, but are not the subject of legal redress." Approved in Hamilton Gas Light, etc., Co. *v.* Hamilton City, 146 U. S. 258, 269, 36 L. Ed. 963. Pearsall *v.* Great Northern R. Co., 161 U. S. 646, 664, 40 L. Ed. 838. See the title CORPORATIONS, vol. 4, p. 682.

By an act of the legislature of Illinois, approved Feb. 13, 1847, a turnpike com-

f. *Grants of Privileges to Water Companies*—(1) *In General.*—A grant of an exclusive privilege to a water company to supply water to a municipality and its inhabitants, when accepted and acted upon by the water company, is likewise a contract protected by the contract clause of the federal constitution.[62] And this rule applies as well where the franchises are bestowed upon corporations by the municipal authorities as where it is granted directly by the state legislature. An ordinance, alleged to impair a prior contract with the gas or water company, creates a case under the constitution and laws of the United States.[63] But where the charter of a water company granted by the state legislature is not exclusive, and is subject to repeal, alteration or amendment at the will of the legislature, it is no impairment of the obligation of the contract for the legislature to authorize the city to erect its own waterworks, and this power the legislature could exercise without compelling the city to purchase the plant of the company then supplying it with water.[64] But there is a limitation, even to the power of amendment when reserved in the constitution or the statutes of a state; the alteration must be reasonably made, in good faith and consistent with the scope and object of the act of incorporation; a sheer oppression alone cannot be inflicted under the guise of amendment or alteration.[65]

(2) *Construction of Particular Contracts.*—A grant, under legislative authority, of an exclusive privilege, for a term of years, of supplying a municipal corporation and its people with water drawn by means of a system of waterworks from a particular stream or river, does not prevent the state from granting to other persons the privilege of supplying, during the same period, the same corporation and people with water drawn in like manner from a different stream or river.[66] Nor is a contract to supply water for hydrants impaired by the city furnishing itself with water for other purposes.[67]

pany was created a body corporate, to continue as such for twenty-five years from that date, with power to construct and maintain a certain turnpike, erect toll gates, and collect tolls. The state reserved the right to purchase the road at the expiration of the charter, by paying to the corporation the original cost of construction; but the road, with all its appendages, was to remain in the possession of the corporation, to be used and controlled, subject to the rights and restrictions contained in the charter, until such time as the state should refund said cost. By a supplement passed in 1861, the company was authorized to extend its road; and, in consideration of keeping in repair a certain bridge and dyke, to use them as a part of the road, erect a toll gate thereon, and collect tolls. It was held, that, at the expiration of that term, the state, by resuming the control of the bridge and dyke without compensation to the company, did not impair the obligation of her contract with the company. Turnpike Co. *v.* Illinois, 96 U. S. 63, 24 L. Ed. 651.

62. Grants of privileges to water companies.—New Orleans Waterworks Co. *v.* Rivers, 115 U. S. 674, 29 L. Ed. 525, following New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650, 29 L. Ed. 516. See the titles CORPORATIONS, vol. 4, p. 682; WATER COMPANIES AND WATERWORKS.

"The grant of a right to supply gas or water to a municipality and its inhabitants through pipes and mains laid in the streets, upon condition of the performance of its service by the grantee, is the grant of a franchise vested in the state, in consideration of the performance of a public service, and after performance by the grantee, is a contract protected by the constitution of the United States against state legislation to impair it. New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650, 660, 29 L. Ed. 516; New Orleans Waterworks Co. *v.* Rivers, 115 U. S. 674, 29 L. Ed. 525." St. Tammany Waterworks *v.* New Orleans Waterworks, 120 U. S. 64, 30 L. Ed. 563; Walla Walla City *v.* Walla Walla Water Co., 172 U. S. 1, 9, 43 L. Ed. 341.

63. Distinction between charters granted by cities and by the state.—Walla Walla City *v.* Walla Walla Water Co., 172 U. S. 1, 43 L. Ed. 341.

64. When privilege not exclusive.—Newburyport Water Co. *v.* Newburyport, 193 U. S. 561, 48 L. Ed. 799.

65. Power of state to alter and amend not unlimited.—Stanislaus County *v.* San Joaquin, etc., Co., 192 U. S. 201, 48 L. Ed. 406.

66. Construction of particular contracts.—Stein *v.* Bienville Water Supply Co., 141 U. S. 67, 81, 35 L. Ed. 622, distinguishing New Orleans Waterworks Co. *v.* Rivers, 115 U. S. 674, 29 L. Ed. 525; St. Tammany Waterworks *v.* New Orleans Waterworks, 120 U. S. 64, 30 L. Ed. 563.

67. Contracts to supply water for hydrants.—In Bienville Water Supply Co.

(3) *Regulation of Rates.*—In order to make a contract between the state and a corporation not to regulate the rates of a water company chartered by it, the language must be plain and susceptible of no other reasonable construction. As a general rule the language of such statutes does not and is not intended to form a contract, but simply amounts to the then pleasure of the legislature, to so remain until subsequently altered by it.[68] A mere reduction of rates, while still leaving reasonable, fair or just compensation for the use of the property, is not prohibited.[69]

12. Power of States to Impair Contracts Through Its Taxing Power —a. *In General.*—The constitutional prohibition against legislation impairing the obligation of contracts, is also a limitation upon the taxing power of the states.[70] But neither a lawful tax on a new subject, nor an increased tax on

v. Mobile, 175 U. S. 109, 44 L. Ed. 92, a water company which had been organized under the state laws contracted with the city to supply it with water for certain hydrants at an agreed sum. In this contract there was no provision for furnishing the inhabitants with water, and there was no express stipulation that the company would do so. The city had power to make this contract and was also authorized by the legislature to build or otherwise acquire waterworks of its own to supply water to itself and its inhabitants for the extinguishment of fires, and for sanitary and domestic purposes, and in its contract with the Bienville Company the city did not agree not to do so. It was held that the city might construct its own waterworks, and in doing so it did not impair its contract with the water company.

68. Regulation of rates.—Stanislaus County *v.* San Joaquin, etc., Co., 192 U. S. 201, 48 L. Ed. 406, citing Freeport Water Co. *v.* Freeport City, 180 U. S. 587, 45 L. Ed. 679; Railroad Commission Cases, 116 U. S. 307, 29 L. Ed. 636. See the title CORPORATIONS, vol. 4, p. 634, and references given.

To regulate or establish rates for which water will be supplied is in its nature the execution of one of the powers of the state, and the right of the state so to do should not be regarded as parted with any sooner than the right of taxation should be so regarded, and the language of the alleged contract should in both cases be equally plain. Owensboro *v.* Owensboro Waterworks Co., 191 U. S. 358, 48 L. Ed. 217; Stanislaus County *v.* San Joaquin, etc., Co., 192 U. S. 201, 210, 48 L. Ed. 406.

An act of the California legislature which provided that every water company should have power to establish, collect and receive rates, water rents or tolls which shall be subject to regulation by the board of supervisors of the county or counties in which the work is situated, but which shall not be reduced so low as to yield less than one and one-half per cent per month upon the capital actually invested, does not amount to a contract that the rates for the use of water should never be lowered below the amount provided for in that act, especially where the constitution of the state contains a reservation that all general and special laws may be altered or repealed. Stanislaus County *v.* San Joaquin, etc., Co., 192 U. S. 201, 48 L. Ed. 406.

69. Stanislaus County *v.* San Joaquin, etc., Co., 192 U. S. 201, 48 L. Ed. 406.

70. States cannot impair contracts through their taxing power.—Franklin Branch Bank *v.* Ohio, 1 Black 474, 17 L. Ed. 180; Murray *v.* Charleston, 96 U. S. 432, 24 L. Ed. 760; Hartman *v.* Greenhow, 102 U. S. 672, 26 L. Ed. 271.

As to exemptions from taxation, and validity of statutes repealing such exemptions, see the title TAXATION.

The provision in the constitution that no state shall pass a law impairing the obligation of contracts, is a limitation upon the taxing power of a state as well as upon all its legislation, whatever form it may assume. Therefore, a law changing the stipulations of a contract, or relieving a debtor from a strict and literal compliance with its requirements, enacted by a state in the exercise of that power, is unconstitutional and void. Murray *v.* Charleston, 96 U. S. 432, 24 L. Ed. 760.

The power of a state to levy taxes is not without limits, and one of its limitations is found in the clause of the federal constitution, that no state shall pass a law impairing the obligation of contracts. A change of the expressed stipulations of a contract, or a relief of a debtor from strict and literal compliance with its requirements, can no more be effected by an exertion of the taxing power than it can be by the exertion of any other power of a state legislature. The constitutional provision against impairing contract obligations is a limitation upon the taxing power, as well as upon all legislation, whatever form it may assume. Indeed, attempted state taxation is the mode most frequently adopted to affect contracts contrary to the constitutional inhibition. It most frequently calls for the exercise of our supervisory power. Murray *v.* Charleston, 96 U. S. 432, 444, 24 L. Ed. 760.

Act incorporating state bank of Ohio.—The 60th section of the act of the legislature of Ohio, entitled "An act to incorporate the state bank of Ohio and other

an old one, interferes with a contract or impairs its obligation, within the meaning of the constitution, even though such taxation may affect particular contracts, as it may increase the debt of one person and lessen the security of another, or may impose additional burdens upon one class and release the burdens of another, still the tax must be paid unless prohibited by the constitution, nor can it be said that it impairs the obligation of any existing contract in its true legal sense.[71]

b. *Repeal of Statutes Imposing Taxes.*—But the repeal of a statute imposing a tax does not impair the obligation of a contract.[72]

c. *Inheritance Taxes.*—A transfer or succession tax, not being a direct tax upon property, but a charge upon a privilege exercised or enjoyed under the law of the state, does not, when imposed in cases where the property passing consists of securities exempt by statute, impair the obligation of a contract within the meaning of the constitution of the United States.[73]

d. *Occupation and Business Taxes.*—Occupation and business taxes imposed upon resident agents of nonresident business houses have been held unobjectionable, though they deprive the agent of employment altogether.[74]

13. Bounties and Gratuities.—In order to make a contract that is inviolate under art. 1, § 10, of the federal constitution, the language must be plain and susceptible of no other reasonable construction. If the language of the statute does not and was not intended to form a contract, but simply amounted to the statement of the then pleasure of the legislature, to so remain until subsequently altered by it, it is in the nature of a privilege merely, and may be revoked at the pleasure of the sovereign.[75] Hence, if the law be a mere offer of a bounty, it may be withdrawn at any time, notwithstanding the recipients of such bounty may have incurred expense upon the faith of such offer.[76]

banking companies," passed February 24th, 1845, constitutes a contract upon the subject of taxation, which is binding upon the state; which is impaired by the subsequent act of the legislature, passed April 5th, 1859, entitled "An act for the assessment and taxation of all the property in this state, and for levying taxes thereon according to its true value in money." Wright *v.* Sill, 2 Black 544, 17 L. Ed. 333, citing State Bank *v.* Knoop, 16 How. 369, 14 L. Ed. 977; Dodge *v.* Woolsey, 18 How. 331, 15 L. Ed. 401; Mechanics', etc., Bank *v.* Debolt, 18 How. 380, 15 L. Ed. 458; Jefferson Branch Bank *v.* Skelly, 1 Black 436, 17 L. Ed. 173; Franklin Branch Bank *v.* Ohio, 1 Black 474, 17 L. Ed. 180. These cases are reviewed and distinguished in Shelby County *v.* Union, etc., Bank, 161 U. S. 149, 40 L. Ed. 650.

71. New taxes and increased taxes.—North Missouri R. Co. *v.* Maguire, 20 Wall. 46, 61, 22 L. Ed. 287, citing Blackwell on Tax Titles (2d Ed.), 408.

72. Repeal of statute imposing taxes no impairment.—Lane County *v.* Oregon, 7 Wall. 71, 19 L. Ed. 101.

73. Inheritance taxes.—Orr *v.* Gilman, 183 U. S. 278, 289, 46 L. Ed. 196. See the title SUCCESSION TAXES.

Where the general law (N. Y. Laws 1897) provided for a transfer tax upon property passing under a power of appointment, there is no impairment of contract obligation by such transfer by will after such law took effect, although the deed conferring the power was executed prior. Chanler *v.* Kelsey, 205 U. S. 466, 51 L. Ed. 882.

74. Occupation and business taxes.—A license tax imposed on a resident managing agent of a nonresident business house is not void on the ground that it impairs the obligation of a contract between the agent and his nonresident employer. And it is immaterial whether there was a stipulation in his contract of hiring for an employment for a definite period or not. It is inconceivable that the state should lose this right of taxation by the fact that the party taxed had entered into an engagement with his employer for the definite period. Kehrer *v.* Stewart, 197 U. S. 60, 49 L. Ed. 663. See, generally, the title LICENSES. See post, "Licenses," III, U.

75. Bounties and gratuities.—Stanislaus County *v.* San Joaquin, etc., Co., 192 U. S. 201, 48 L. Ed. 406, citing Christ Church *v.* Philadelphia County, 24 How. 300, 16 L. Ed. 602; Salt Co. *v.* East Saginaw, 13 Wall. 373, 20 L. Ed. 611; Tucker *v.* Ferguson, 22 Wall. 527, 22 L. Ed. 805; Welch *v.* Cook, 97 U. S. 541, 24 L. Ed. 1112; Railroad Commission Cases, 116 U. S. 307, 325, 29 L. Ed. 636; Grand Lodge *v.* New Orleans, 166 U. S. 143, 41 L. Ed. 951; Freeport Water Co. *v.* Freeport City, 180 U. S. 587, 599, 45 L. Ed. 679. See the title BOUNTIES, vol. 3, p. 508. As to exemptions from taxation, see the title TAXATION.

76. Bounties may be withdrawn.—Grand Lodge *v.* New Orleans, 166 U. S. 143, 146, 41 L. Ed. 951.

For example, general encouragements held out to all persons indiscriminately to engage in a particular trade or manufacture, whether in the shape of bounties, drawbacks, or other advantage, are always under the legislative control, and may at any time be discontinued.[77] As also are bounties offered for the killing of dangerous or destructive animals,[78] or bounties in the nature of pensions to persons honorably discharged from military service.[79]

14. Effect of Constitutional Provision Granting States Immunity from Suit—a. *In General.*—It is well settled that no action can be maintained in any federal court by the citizens of one of the states against a state, without its consent, even though the sole object of such suit be to bring the state within the operation of the constitutional provision which provides that "no state shall pass any law impairing the obligation of contracts." This immunity of a state from suit is absolute and unqualified, and the constitutional provision securing it is not to be so construed as to place the state within the reach of the process of the court. Accordingly, it is equally well settled that a suit against the officers of a state, to compel them to do the acts which constitute a performance by it of its contracts, is, in effect, a suit against the state itself.[80] On the other

77. Salt Co. *v.* East Saginaw, 13 Wall. 373, 20 L. Ed. 611, approved in Stanislaus County *v.* San Joaquin, etc., Co., 192 U. S. 201, 207, 48 L. Ed. 406.

A law offering to all persons and to corporations to be formed for the purpose, a bounty of ten cents for every bushel of salt manufactured in a state from water obtained by boring in the state, and exemption from taxation of the property used for the purpose, is not a contract in such a sense that it cannot be repealed. Salt Co. *v.* East Saginaw, 13 Wall. 373, 20 L. Ed. 611, approved in Grand Lodge *v.* New Orleans, 166 U. S. 143, 147, 41 L. Ed. 951; Stanislaus County *v.* San Joaquin, etc., Co., 192 U. S. 201, 207, 48 L. Ed. 406.

Such a law is nothing but a bounty law, and in its nature a general law, regulative of the internal economy of the state, dependent for its continuance upon the dictates of public policy, and the voluntary good faith of the legislature. Salt Co. *v.* East Saginaw, 13 Wall. 373, 20 L. Ed. 611, approved in Stanislaus County *v.* San Joaquin, etc., Co., 192 U. S. 201, 207, 48 L. Ed. 406.

78. **A law offering a bounty for the killing of every wolf** or other destructive animal is not a contract except to bestow the promised bounty upon those who earn it, so long as the law remains unrepealed. There is no pledge that it shall not be repealed at any time. Salt Co. *v.* East Saginaw, 13 Wall. 373, 20 L. Ed. 611.

79. **Military bounties or pensions.**—See, also, Newton *v.* Commissioners, 100 U. S. 548, 561, 25 L. Ed. 710, wherein a law, providing that persons who had served seven years in the militia and had been honorably discharged, were entitled to perpetual immunity from taxation to the extent of $500 each, was held to be repealable at any time by the legislature. Cited in Grand Lodge *v.* New Orleans, 166 U. S. 143, 150, 41 L. Ed. 951. See the title PENSIONS.

80. **Effect of constitutional provision granting states immunity from suit.**—Pennoyer *v.* McConnaughy, 140 U. S. 1, 9, 35 L. Ed. 363. See post, "How Relief Obtained in Case of Impairment," IX. See, generally, the title STATES.

"That a state cannot be sued by a citizen of another state, or of a foreign state, on the mere ground that the case is one arising under the constitution or laws of the United States, is clearly established by the decisions of this court in several recent cases. Louisiana *v.* Jumel, 107 U. S. 711, 27 L. Ed. 448; Hagood *v.* Southern, 117 U. S. 52, 29 L. Ed. 805; In re Ayers, 123 U. S. 443, 31 L. Ed. 216. Those were cases arising under the constitution of the United States, upon laws complained of as impairing the obligation of contracts, one of which was the constitutional amendment of Louisiana complained of in the present case. Relief was sought against state officers who professed to act in obedience to those laws. This court held that the suits were virtually against the states themselves and were consequently violative of the eleventh amendment of the constitution, and could not be maintained. It was not denied that they presented cases arising under the constitution; but, notwithstanding that, they were held to be prohibited by the amendment referred to." Hans *v.* Louisiana, 134 U. S. 1, 10, 33 L. Ed. 842.

"It cannot be doubted that the 11th amendment to the constitution operates to create an important distinction between contracts of a state with individuals and contracts between individual parties. In the case of contracts between individuals, the remedies for their enforcement or breach, in existence at the time they were entered into, are a part of the agreement itself, and constitute a substantial part of its obligation. Louisiana *v.* New Orleans, 102 U. S. 203, 26 L. Ed. 132. That obligation by virtue of the provision of Article 1, § 10, of the constitution of the United States, cannot be impaired by any subsequent state legislation. Thus, not only the covenants and conditions of the

hand, although the obligations of a state rest for their performance upon its honor and good faith, and cannot be made the subjects of judicial cognizance unless the state consents to be sued, or comes itself into court, yet where property or rights are enjoyed under a grant or contract made by a state, they cannot wantonly be invaded. Whilst the state cannot be compelled by suit to perform its contracts, any attempt on its part to violate property rights acquired under its contracts, may be judicially resisted; and any law impairing the obligation of contracts under which such property or rights are held is void and powerless to affect their enjoyment.[81] Hence, an officer of the state may be enjoined from executing a statute of a state which is unconstitutional in that it operates to impair the obligation of the contract, where the plaintiff in such a suit is not asking any affirmative relief, but only asks that the defendant be restrained and enjoined from doing certain acts which he alleges are violative of his contract made with the state. He merely asks that an injunction may issue against them to restrain them from acting under a statute of the state alleged to be unconstitutional, which acts will be destructive of his rights and privileges, and will work an irreparable mischief and damage to his property rights.[82]

contract are preserved, but also the substance of the original remedies for its enforcement. It is different with contracts between individuals and a state. In respect to these, by virtue of the 11th amendment to the constitution, there being no remedy by a suit against the state, the contract is substantially without sanction, except that which arises out of the honor and good faith of the state itself, and these are not subject to coercion. Although the state may, at the inception of the contract, have consented as one of its conditions to subject itself to suit, it may subsequently withdraw that consent and resume its original immunity, without any violation of the obligation of its contract in the constitutional sense. Beers *v.* Arkansas, 20 How. 527, 15 L. Ed. 991; Railroad Co. *v.* Tennessee, 101 U. S. 337, 25 L. Ed. 960. The very object and purpose of the 11th amendment were to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties." In re Ayers, 123 U. S. 443, 504, 31 L. Ed. 216.

Funding state debts.—Though a state may violate the obligation of its contracts, contained in statutory and constitutional provisions providing for the funding of its floating debt, yet ordinarily the eleventh amendment precludes any suit against the state or its officers to coerce them in their official capacity. Louisiana *v.* Jumel, 107 U. S. 711, 27 L. Ed. 448, cited in Christian *v.* Atlantic, etc., R. Co., 133 U. S. 233, 243, 33 L. Ed. 589. See ante, "Funding States Debts," III, D, 3, a.

81. How far redress may be had from a state.—Hans *v.* Louisiana, 134 U. S. 1, 20, 33 L. Ed. 842; Prout *v.* Starr, 188 U. S. 537, 47 L. Ed. 584; Graham *v.* Folsom, 200 U. S. 248, 50 L. Ed. 464.

The immunity from suit secured to the state is a part of the constitution of equal authority with every other, but no greater, and is to be construed and applied in harmony with all the provisions of the instrument. That immunity does not exempt the state from the operation of the constitutional provision that no state shall pass any law impairing the obligation of contracts. It is true, that no remedy for a breach of its contracts, by a state, by way of damages as compensation, or by means of process to compel its performance, is open, under the constitution in the courts of the United States, by a direct suit against the state itself, on the part of the injured party, being a citizen of another state, or a citizen or subject of a foreign state. It is equally true that whenever, in a controversy between parties to a suit of which these courts have jurisdiction, the question arising upon the validity of a law impairing the obligation of its contract, the jurisdiction is not thereby ousted, but must be exercised, with whatever legal consequences, to the rights of the litigants, may be the result of the determination. Virginia Coupon Cases, 114 U. S. 269, 29 L. Ed. 185, citing Fletcher *v.* Peck, 6 Cranch 87, 3 L. Ed. 162; New Jersey *v.* Wilson, 7 Cranch 164, 3 L. Ed. 303; Meigs *v.* McClung, 9 Cranch 11, 3 L. Ed. 639; Green *v.* Biddle, 8 Wheat. 1, 84, 5 L. Ed. 547; Providence Bank *v.* Billings, 4 Pet. 514, 7 L. Ed. 939; Wilcox *v.* Jackson, 13 Pet. 498, 10 L. Ed. 496; Woodruff *v.* Trapnall, 10 How. 190, 13 L. Ed. 383; Mitchell *v.* Harmony, 13 How. 115, 14 L. Ed. 75; Brown *v.* Huger, 21 How. 305, 16 L. Ed. 125; Jefferson Branch Bank *v.* Skelly, 1 Black 436, 17 L. Ed. 173; Grisar *v.* McDowell, 6 Wall. 363, 18 L. Ed. 863; Bates *v.* Clark, 95 U. S. 204, 24 L. Ed. 471; Wolff *v.* New Orleans, 103 U. S. 358, 26 L. Ed. 395; United States *v.* Lee, 106 U. S. 196, 27 L. Ed. 171; New Hampshire *v.* Louisiana, 108 U. S. 76, 27 L. Ed. 656; Cunningham *v.* Macon, etc., R. Co., 109 U. S. 446, 27 L. Ed. 992.

82. State officers may be enjoined if no affirmative relief is asked for.—Pennoyer

b. *Virginia Coupon Cases.*—But no proceedings can be instituted by any holder of such bonds or coupons against the commonwealth of Virginia, either directly by suit against the commonwealth by name, or indirectly against her executive officers to control them in the exercise of their official functions as agents of the state.[83]

E. Assessments.—Even as to third parties an assessment upon abutting owners for street improvements is not a contract in the sense in which the word is used in the constitution of the United States; and whether rights arising thereon have become vested depends upon circumstances.[84]

F. Compacts.[85]—The terms contract and compact are synonymous.[86] Accordingly it is held that both compacts between states,[87] and between a state and the United States,[88] are within the constitutional prohibition.

G. Confederate Contracts and Slave Contracts—1. CONFEDERATE CONTRACTS.—**A state statute providing for the scaling of Confederate** contracts, which allows the jury to place their own judgment upon the value of the contract in suit, and does not require them to take the value stipulated by

v. McConnaughy, 140 U. S. 1, 35 L. Ed. 363, following Osborn *v.* United States Bank, 9 Wheat. 738, 6 L. Ed. 204; Davis *v.* Gray, 16 Wall. 203, 21 L. Ed. 447; Board of Liquidation *v.* McComb, 92 U. S. 531, 23 L. Ed. 623; Virginia Coupon Cases, 114 U. S. 269, 311, 29 L. Ed. 185.

83. Virginia coupon cases.—McGahey *v.* Virginia, 135 U. S. 662, 684, 34 L. Ed. 304, cited and distinguished in Pennoyer *v.* McConnaughy, 140 U. S. 1, 15, 35 L. Ed. 363. See ante, "Virginia Coupon Cases," III, D, 3, a, (2).

84. Assessments upon abutting owners.—Baltimore, etc., R. Co. *v.* Nesbit, 10 How. 395, 13 L. Ed. 469; Garrison *v.* New York, 21 Wall. 196, 22 L. Ed. 612; Essex Public Road Board *v.* Skinkle, 140 U. S. 334, 340, 35 L. Ed. 446. See the title SPECIAL ASSESSMENTS.

In Garrison *v.* New York, 21 Wall. 196, 22 L. Ed. 612, this court decided that the New York act of 1871, authorizing the supreme court of the state to vacate an order made in 1870, confirming the report of the commissioners respecting property taken for a public improvement, if error, mistake, irregularity or illegality appeared in the proceedings, or the assessments for benefits or the awards for damage had been unfair and unjust, or inequitable or oppressive, and to refer the matter back to new commissioners to amend or correct the report, or to make a new assessment, was not unconstitutional. Mr. Justice Field, delivering the opinion of the court, said: "In the proceeding to condemn the property of the plaintiff for a public street, there was nothing in the nature of a contract between him and the city." Approved in Essex Public Road Board *v.* Skinkle, 140 U. S. 334, 340, 35 L. Ed. 446.

85. See, generally, the title STATES.

86. Contract and compact synonymous.—Green *v.* Biddle, 8 Wheat. 1, 92, 5 L. Ed. 547.

87. Compacts between states protected.—Green *v.* Biddle, 8 Wheat. 1, 5 L. Ed. 547; Hawkins *v.* Barney, 5 Pet. 457, 8 L. Ed. 190.

Compact between Kentucky and Virginia.—The propositions offered and agreed to by Virginia, looking to the security of land titles derived from the state of Virginia, but within the limits of the territory afterwards set apart as the state of Kentucky, having been accepted and ratified by Kentucky, and sanctioned by the congress of the United States, the admitting Kentucky into the Union upon the basis of such compact, constituted a contract which it is beyond the power of either commonwealth to impair. Green *v.* Biddle, 8 Wheat. 1, 92, 5 L. Ed. 547, approved in Stearns *v.* Minnesota, 179 U. S. 223, 245, 45 L. Ed. 162; Pennsylvania *v.* Wheeling, etc., Bridge Co., 13 How. 518, 566, 14 L. Ed. 249.

Kentucky, being a party to a compact which guarantied to claimants a land lying in that state, under titles derived from Virginia, their rights as they existed under the laws of Virginia, was incompetent to violate that contract, by passing any law which rendered those rights less valid and secure. Green *v.* Biddle, 8 Wheat. 1, 92, 5 L. Ed. 547.

Obstruction of navigation on Ohio River.—Congress has sanctioned the compact made between Virginia and Kentucky, viz: "That the use and navigation of the River Ohio, so far as the territory of Virginia or Kentucky is concerned, shall be free and common to the citizens of the United States." This compact is obligatory, and can be carried out by the federal supreme court. Pennsylvania *v.* Wheeling, etc., Bridge Co., 13 How. 518, 14 L. Ed. 249, following Green *v.* Biddle, 8 Wheat. 1, 5 L. Ed. 547, but distinguishing Wilson *v.* Black-Bird Creek Marsh Co., 2 Pet. 245, 250, 7 L. Ed. 412. See the title NAVIGABLE WATERS.

88. Compacts between states and United States.—A state may competently and constitutionally enter into a compact with the federal government whereby it agrees to hold in trust certain lands granted to it by the federal government and to dispose of them for the sole bene-

the parties, is null and void because it impairs the obligation of contracts.[89]

Contracts to Pay in Confederate Money.—Likewise, the supreme court of the United States has held that the notes of the Confederate States, in ordinary use as money during the rebellion, might constitute a valid consideration for a contract; and that provisions in the constitution of a state subsequently adopted, declaring such contracts void, was an impairment of the obligation of such contracts within the meaning of the federal constitution.[90]

fit of a specified railroad company; and any legislation in violation of such compact is ultra vires the state and void. Tucker *v.* Ferguson, 22 Wall. 527, 572, 22 L. Ed. 805.

A grant of public lands by the United States to a state upon conditions that the lands or their proceeds shall be devoted to their draining and reclamation is a contract binding upon the state. All the elements of the contract met in the transaction; that is to say, competent parties, proper subject matter, sufficient consideration and consent of minds, such contract cannot be violated by the legislation of the state without infringement of the constitution. McGee *v.* Mathis, 4 Wall. 143, 155, 18 L. Ed. 314, distinguished in United States *v.* Stockslayer, 129 U. S. 470, 477, 32 L. Ed. 785.

89. Scaling ordinances held void.—A statute of North Carolina of March, 1866, enacting that in all civil actions "for debts contracted during the late war, in which the nature of the obligation is not set forth, nor the value of the property for which such debts were created is stated, it shall be admissible for either party to show on the trial, by affidavit or otherwise, what was the consideration of the contract, and that the jury in making up their verdict, shall take the same into consideration, and determine the value of said contract in present currency in the particular locality in which it is to be performed, and render their verdict accordingly," in so far as the same authorizes the jury in such actions, upon the evidence thus before them, to place their own estimate upon the value of the contracts, instead of taking the value stipulated by the parties, impairs the obligation of such contracts, and is, therefore, within the inhibition upon the state of the federal constitution. Accordingly, in an action upon a contract for wood sold in that state during the war, at a price payable in Confederate currency, an instruction of the court to the jury, that the plaintiff was entitled to recover the value of the wood without reference to the value of the currency stipulated, was erroneous. Wilmington, etc., R. Co. *v.* King, 91 U. S. 3, 23 L. Ed. 186, Mr. Justice Bradley dissenting. See the title PAYMENT.

Confederate contracts, solvable in Confederate currency, are to be liquidated upon the basis of the value of Confederate currency as compared with lawful money of the United States at the time and place where made; and a statute which disregards this principle and leaves it to the discretion of the court or jury to award judgment or verdict for the actual value of the thing sold, or for the fair rent or hire of property leased, at the time of the contract, impairs the obligation of the contract by permitting it to be enforced in a manner different from that provided by its terms as made. Effinger *v.* Kenney, 115 U. S. 566, 572, 29 L. Ed. 495.

A statute of Virginia, of February, 1867—after declaring that, in an action or suit or other proceeding for the enforcement of any contract, express or implied, made between the first day of January, 1862, and the tenth of April, 1865, it shall be lawful for either party to show, by parol or other relevant testimony, what was the understanding and agreement of the parties, either express or implied, in respect to the kind of currency in which the same was to be performed, or with reference to which, as a standard of value, it was made—provides "that when the cause of action grows out of a sale or renting or hiring of property, whether real or personal, if the court, or, when it is a jury case, the jury, think that, under all the circumstances the fair value of the property sold, or the fair rent or hire of it, would be the most just measure of recovery in the action, either of these principles may be adopted as the measure of the recovery instead of the express terms of the contract." Held, that the statute in this provision sanctions the impairment of contracts, which is not, under the federal constitution, within the competency of the legislature of the state. Accordingly, in a suit to enforce a lien for unpaid purchase money of real estate sold during the war, for which a note was given payable in dollars, but shown to have been made with reference to Confederate notes, a decision that the plaintiff was entitled to recover the value of the land at the time of the sale, instead of the value of Confederate notes at that time, was erroneous. Effinger *v.* Kenney, 115 U. S. 566, 29 L. Ed. 495.

90. Contracts solvable in Confederate money.—Thorington *v.* Wright, 8 Wall. 1, 19 L. Ed. 361; Delmas *v.* Insurance Co., 14 Wall. 661, 20 L. Ed. 757.

A judgment of the state court, holding such a contract void, expressly based on the constitutional provision and not on the general ground of public policy, must be reversed in the federal supreme court. Delmas *v.* Insurance Co., 14 Wall. 661, 20 L. Ed. 757.

2. Slave Contracts.—Where a contract for the sale of a slave was lawful at the time it was made, it could not be impaired by a subsequent statutory or constitutional enactment declaring such contracts to be invalid.[91] Nor does the thirteenth amendment forbidding slavery and involuntary servitude operate retrospectively so as to impair contracts for the sale of slaves valid at the time they were made.[92]

H. Contracts of Enlistment.—Rules and regulations subsequently passed affecting a contract of enlistment are unobjectionable.[93]

I. Grants.—A grant is a contract executed, the obligation of which still continues.[94] Hence, a legislative grant cannot be repealed.[95]

J. Contracts of Municipalities[96]—1. In General.—In a very early case, Mr. Chief Justice Marshall said that the power of a municipal corporation "to make a contract, which should so operate as to bind its legislative capacities forever thereafter, and disable it from enacting a by-law, which the legislature enables it to enact, may well be questioned."[97] But the rule is well settled now

91. **Slave contracts were protected by the contract clause.**—Boyce *v.* Tabb, 18 Wall. 546, 21 L. Ed. 757, citing White *v.* Hart, 13 Wall. 646, 647, 20 L. Ed. 685. See the title SLAVERY AND INVOLUNTARY SERVITUDE.

Impairment by state constitution.—A contract for the sale of a slave valid under the law of the state at the time it was made, cannot be impaired by subsequent constitutional adoption or amendment any more than by the change of the statutory law of the state. Boyce *v.* Tabb, 18 Wall. 546, 21 L. Ed. 757.

Impairment by judicial interpretation.—Where a contract for the sale of a slave was valid under the laws as judicially interpreted at the time it was made, it cannot be impaired by a subsequent change in the judicial interpretation of the law. Boyce *v.* Tabb, 18 Wall. 546, 21 L. Ed. 757. See ante, "Judicial Decisions," II, F.

The provision of the constitution of Georgia, adopted in 1868, that "no court or officers shall have, nor shall the general assembly give, jurisdiction to try, or give judgment on, or enforce any debt, the consideration of which was a slave or the hire thereof," impaired the obligation of contracts for the hire or sale of slaves by depriving the parties of all remedy for the enforcement thereof, and was unconstitutional and void. White *v.* Hart, 13 Wall. 646, 20 L. Ed. 685. Accord: Osborn *v.* Nicholson, 13 Wall. 654, 20 L. Ed. 689. The cases are reviewed in New Orleans Waterworks Co. *v.* Louisiana Sugar Ref. Co., 125 U. S. 18, 35, 31 L. Ed. 607.

92. **Effect of 13th amendment on slave contracts.**—White *v.* Hart, 13 Wall. 647, 20 L. Ed. 685; Osborn *v.* Nicholson, 13 Wall. 654, 655, 20 L. Ed. 689; Boyce *v.* Tabb, 18 Wall. 546, 21 L. Ed. 757.

93. **Contracts of enlistment.**—At the time of complainant's enlistment in the navy the marine corps was subject to such laws and regulations as might at any time be established for the better government of the navy. Held, that it was a part of his contract of enlistment that he should obey such laws whenever passed. It was, therefore, no objection to the law of which he complained as operating retrospectively and impairing the terms of his enlistment, that they were passed after his entering the services. Wilkes *v.* Dinsman, 7 How. 89, 126, 12 L. Ed. 618. See the title ARMY AND NAVY, vol. 2, p. 527.

94. **A grant is an executed contract.**—Fletcher *v.* Peck, 6 Cranch 87, 137, 3 L. Ed. 162. See ante, "Land Grants," III, D, 7.

A law annulling conveyances between individuals, and declaring that the grantors should stand seized of their former estates, notwithstanding those grants, would be as repugnant to the constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances. An absolute conveyance and the rights derived therefrom are as much protected as a contract of conveyance. Fletcher *v.* Peck, 6 Cranch 87, 137, 3 L. Ed. 162.

95. **Repealing legislative grants.**—Pawlett *v.* Clark, 9 Cranch 292, 3 L. Ed. 735.

A legislative grant is not revocable. Terrett *v.* Taylor, 9 Cranch 43, 3 L. Ed. 650.

Conceding that the legislature of Virginia possessed the authority to enact the statute of 1776, ch. 2, making a new grant and confirming to the use of the church lands then held by the established church, such statute vested an indefeasible and irrevocable title, which it was beyond the power of the legislature to impair. Terrett *v.* Taylor, 9 Cranch 43, 50, 3 L. Ed. 650.

96. See, generally, the title MUNICIPAL CORPORATIONS.

97. **Early rule as to inviolability of municipal contracts.**—Goszler *v.* Georgetown, 6 Wheat. 593, 596, 5 L. Ed. 339.

When a government entered into a contract, there is no doubt of its power to bind itself to any extent not prohibited by its constitution; and its valid contracts, not so prohibited, are within the constitutional prohibition against the impairment

that cities or towns, whenever they engage in transactions not public in their nature, act under the same pecuniary responsibility as individuals, and are as much bound by their engagements as are private persons, nor is it in the power of the legislature to authorize them to violate their contracts.[98] As has been stated above, laws passed by a state impairing the obligation of a contract are void, and if a state cannot pass such a law, it follows that no agency can do so which acts under the state with delegated authority.[99]

2. How Obligation Impaired—a. *By Mere Refusal to Perform.*—But something more than a mere refusal of a municipal corporation to perform its contract is necessary to make a law impairing the obligation of contracts.[1]

b. *By Mere Denial of Liability.*—In like manner, mere statements of an intention on the part of one of the parties to a contract not to be bound by its obligation, even though such denial be on the part of a municipal corporation, is not legislation impairing the obligation of a contract.[2]

c. *By Failure to Perform Discretionary Duties.*—A statute of a state which merely provides that any surplus revenue of counties and municipalities, left after paying the expenditures of the current year, may be applied by the city council to the payment of the indebtedness of former years, does not amount to a contract within the meaning of the federal constitution.[3]

of the obligation of contracts. Goszler *v.* Georgetown, 6 Wheat. 593, 597, 5 L. Ed. 339.

98. Municipal contracts are inviolable under the present decisions.—Mount Pleasant *v.* Beckwith, 100 U. S. 514, 533, 25 L. Ed. 699.

99. Mount Pleasant *v.* Beckwith, 100 U. S. 514, 534, 25 L. Ed. 699, citing Cooley, Const. Lim. (4th Ed.) 241; Angell & Ames on Copr. (9th Ed.) §§ 332, 333. See ante, "Contracts of States," III, D.

1. Mere refusal of city to perform contract not within inhibition.—Dawson *v.* Columbia, etc., Trust Co., 197 U. S. 178, 182, 49 L. Ed. 713.

Where a city wrongfully refuses to perform its contract with a waterworks company, and there is no law giving color to such refusal; held, the mere fact of the city being a municipal corporation does not give to such refusal the character of a law impairing the obligation of contract. Dawson *v.* Columbia, etc., Trust Co., 197 U. S. 178, 49 L. Ed. 713.

2. Mere denial of liability by municipality.—Mercantile Trust, etc., Co. *v.* Columbus, 203 U. S. 311, 51 L. Ed. 198, citing St. Paul Gas Light Co. *v.* St. Paul, 181 U. S. 142, 45 L. Ed. 788.

A contract was made between a gas company and a municipality, whereby the city was to be lighted by gas. The city afterwards substituted electricity in some sections. An ordinance was issued commanding the gas company to remove the gas street-lamp posts in that portion of the city lighted by electricity, and allowed no interest to be paid on the cost of construction of the lamp posts ordered to be removed. Held, this ordinance did not impair the obligation of a contract made by the municipality with the gas company to furnish lights, and the city would not be relieved of the obligation to pay interest on the cost of the construction of the unused lamp posts, since, if the contract imposed the obligation to make such payment, the duty of the city to do so was left absolutely unaffected by the order to remove. St. Paul Gas Light Co. *v.* St. Paul, 181 U. S. 142, 148, 149, 45 L. Ed. 788.

Where a municipal ordinance was passed precluding a comptroller from auditing the claims of a gas company as a prerequisite to the appropriation by the city council of the necessary money to pay such claims, it was held that this ordinance did not impair an obligation of a contract, the auditing of the comptroller being merely advisory, and the payment of the claims could not have been procured without the passage of an appropriation by the council for that purpose. St. Paul Gas Light Co. *v.* St. Paul, 181 U. S. 142, 149, 150, 45 L. Ed. 788.

3. Failure to perform discretionary duties.—The legislature of the state of Louisiana in 1877 passed an act which may be epitomized as follows: That no police jury of any parish or municipal corporation in the state should make appropriations or expenditures of money in any year which should, separately or together with any appropriations or expenditures of the same year, be in actual excess of the actual revenue of the parish or municipality for that year; and that all the revenues of the parishes and municipalities of each year should be devoted to the expenditures of that year, provided "that any surplus of said revenues may be applied to the payment of the indebtedness of former years." Extra Sess. Acts, 1877, p. 47. The surplus having been left by this act under the control of the city council, it follows that this act gave to the claimant no contract right to such surplus. The city having power to dispose of it, the acts of 1882 and 1886, directing the municipality to appropriate

d. *By Change in Instrumentalities of Government.*—A mere change of an instrumentality of municipal government, without substantially impairing existing remedies for the enforcement of the contract of the municipality, does not impair the obligations of its contracts.[4]

3. Right to Contract Away Its Legislative Powers.—A municipal corporation cannot enter into a contract which abridges its own legislative power. Such an agreement is not within the protection of the constitutional prohibition against the impairment of contracts.[5]

4. Ultra Vires Contracts.—The contract clause of the federal constitution cannot be successfully invoked in favor of a contract, entered into by a municipality, that is ultra vires.[6] And this general rule has been applied to contracts by cities with waterworks companies,[7] to contracts by cities to convey public lands,[8]

the surplus to works of public improvement, impaired the obligation of no contract right in favor of claimant, since no right existed, and was therefore a valid exercise of legislative authority. United States *v.* Thoman, 156 U. S. 353, 39 L. Ed. 450.

4. Change in instrumentalities of government not an impairment.—New Orleans *v.* Benjamin, 153 U. S. 411, 429, 38 L. Ed. 764.

Repeal of act creating police board.—The act of the legislature of Louisiana repealing the act creating the board of metropolitan police established in 1868 for the government of the city of New Orleans and adjacent municipalities, and the vesting in the city of the function of maintaining its own police, held to be an act of this character and not in contravention of the constitution of the United States, because it was enacted in the exercise of the undisputed power of the state in that regard. New Orleans *v.* Benjamin, 153 U. S. 411, 429, 38 L. Ed. 764.

5. City cannot usually contract away its legislative powers.—Goszler *v.* Georgetown, 6 Wheat. 593, 597, 5 L. Ed. 339, approved in East Hartford *v.* Hartford Bridge Co., 10 How. 511, 534, 13 L. Ed. 518.

The legislative body cannot part with its powers by any proceedings, so as not to be able to continue the exercise of them. It can and should exercise them, again and again, as often as the public interest requires. And though private interests may intervene and then should not be injured except on terms allowed by the constitution; yet public interests in one place or corporation may be affected injuriously by laws, without any redress, as legislation on public matters looks to the whole and not to a part, and may, for the benefit of the whole to the injury of a part, change what is held under it by public bodies for public purposes. The legislature, therefore, cannot properly divest itself of such control, nor devolve it upon towns or counties, nor cease from any cause to exercise it on all suitable occasions. Its members are made by the people agents or trustees for them, and can possess no authority to sell or grant their power over the trust to others. East Hartford *v.* Hartford Bridge Co., 10 How. 511, 535, 13 L. Ed 518. Accord: Goszler *v.* Georgetown, 6 Wheat. 593, 596, 598, 5 L. Ed. 339; Clark *v.* Washington, 12 Wheat. 40, 54, 6 L. Ed 544.

6. Ultra vires contracts of cities not protected.—Railroad Co. *v.* Falconer, 103 U. S. 821, 26 L. Ed. 471; New Orleans *v.* New Orleans Waterworks Co., 142 U. S 79, 35 L. Ed. 943. See the title CORPORATIONS, vol. 4, p. 745.

A municipal corporation can make such contracts only as are authorized by its charter or act of incorporation. A contract or compact entered into between a municipal corporation and a part of its inhabitants, if it is ultra vires, is not binding, and is not within the constitutional prohibition against the impairment of contracts. Goszler *v.* Georgetown, 6 Wheat. 593, 597, 5 L. Ed. 339.

7. Ultra vires contracts with water companies.—A city cannot set up that its contract with a water supply company has been impaired by subsequent legislation, when the contract is ultra vires and void, having been so declared by the highest court of the state. Since being void it is incapable of being impaired. New Orleans *v.* New Orleans Waterworks Co., 142 U. S. 79, 35 L. Ed. 943. See the title WATER COMPANIES AND WATERWORKS.

8. Where a municipal corporation, having no authority to convey public lands, undertakes by ordinance to make such conveyance subject to the subsequent approval of the state, and before such approval enacts another ordinance relating to lands embraced in the first and containing provisions with reference to quantity conveyed and the quantity reserved to the city different to those contained in the first ordinance, and the legislature afterwards enacts a statute affirming and approving both ordinances, such statute does not impair the obligation of the grant contained in the first ordinance, since the city having no power to make the grant therein contained, the grantees acquired no right under it except as it was approved by the legislature in conjunction with the latter

to contracts to subscribe to railroad stock,[9] and to contracts bartering away its legislative powers.[10]

5. Particular Contracts Considered—a. *Municipal Aid Contracts*—(1) *In General.*—An authority to a county, contained in the charter of a railroad company authorizing the county to subscribe for the stock of the company and vote bonds to pay for the same, is not a contract between the state and the county protected by the contract clause of the constitution; and a subsequent revocation by a change of the state constitution, before the subscription is actually made, is not an impairment of the obligation of any contract.[11] On the other hand, where a county or other municipal subdivision acting under competent authority enters into a valid contract to aid, by subscription or otherwise, the construction of a railroad, such contract is within the protection of the contract clause of the constitution, and cannot be impaired by a subsequent constitutional amendment forbidding municipal subscriptions or donations in aid of such enterprise, adopted before the contract was carried into execution.[12] And in order that there may be a contract to be impaired in the case of a municipal

ordinance. Hoadley *v.* San Francisco, 124 U. S. 639, 646, 31 L. Ed. 553.

Nor does it help the case of the grantee making contract rights under the first ordinance that the land, the title to which was in the federal government at the time of the enactment of such ordinance, was afterwards relinquished and granted to the city for the usages and purposes specified in the ordinance of the city as ratified and approved by the act of the legislature. The first ordinance, the second ordinance, and the act of approval are all to be taken together, and the right conferred by the first ordinance is to be construed and confirmed only as limited by the second ordinance, said second ordinance having been enacted previous to the legislative act of approval. Hoadley *v.* San Francisco, 124 U. S. 639, 646, 31 L. Ed. 553. See the title PUBLIC LANDS.

9. Ultra vires municipal aid contracts.—An ultra vires contract by a municipality to subscribe to railroad stock does not prevent the state from prohibiting such subscriptions by municipalities. Railroad Co. *v.* Falconer, 103 U. S. 821, 26 L. Ed. 471, distinguishing Moultrie County *v.* Rockingham, etc., Bank, 92 U. S. 631, 23 L. Ed. 631. See the title MUNICIPAL, COUNTY, STATE AND FEDERAL AID.

In accordance with the petition of the taxpayers of a town in New York, dated March 25, 1872, the county judge appointed commissioners, who were empowered and directed to subscribe for stock in a railroad company when its road should be constructed through a certain village. The road was not so constructed until October 20, 1875. Held, that as, by the terms of the petition and the proceedings of the judge thereon, the construction of the road was a condition precedent to the exercise by the commissioners of their power to make the subscription, they, being merely agents of the town, had no authority to act in the premises until that condition was performed. A contract, therefore, under date of June 14, 1872, between the company and the commissioners, whereby the latter assumed to bind the town to subscribe for stock when the road should be so constructed, being ultra vires, no rights of the company were impaired by the amendment to the constitution of the state (infra, p. 822), which took effect January 1, 1875, and prohibited all municipal aid to corporations by subscriptions of stock, or otherwise. Railroad Co. *v.* Falconer, 103 U. S. 821, 26 L. Ed. 471, distinguishing Moultrie County *v.* Rockingham, etc., Bank, 92 U. S. 631, 23 L. Ed. 631.

10. Contracts bartering away right of city to grade streets.—The ordinance of May, 1799, by which the corporation of Georgetown first exercised the power of grading its streets, is not in the nature of a compact, and may be altered by the corporation. Goszler *v.* Georgetown, 6 Wheat. 593, 597, 5 L. Ed. 339.

11. Inviolability of municipal aid contracts.—Aspinwall *v.* Commissioners, 22 How. 364, 377, 16 L. Ed. 296, reaffirmed in Wadsworth *v.* Supervisors, 102 U. S. 534, 26 L. Ed. 221, distinguished in Moultrie County *v.* Rockingham, etc., Bank, 92 U. S. 631, 635, 23 L. Ed. 631. See Pearsall *v.* Great Northern R. Co., 161 U. S. 646, 666, 40 L. Ed. 838. See the title MUNICIPAL, COUNTY, STATE AND FEDERAL AID.

12. Municipal aid contracts held inviolable.—Clay County *v.* Society for Savings, 104 U. S. 579, 590, 26 L. Ed. 856, citing Concord *v.* Portsmouth Sav. Bank, 92 U. S. 625, 23 L. Ed. 628; Seibert *v.* Lewis, 122 U. S. 284, 30 L. Ed. 1161; Seibert *v.* United States, 129 U. S. 192, 32 L. Ed. 645. See Graham *v.* Folsom, 200 U. S. 248, 50 L. Ed. 464.

Municipal corporations, says Mr. Justice Field, so far as they are invested with subordinate legislative powers for local purposes, are mere instrumentalities of the state for the convenient administration of their affairs; but when authorized

subscription in aid of a railroad, it is not necessary that a subscription should have actually been made upon the books of the company. If there was an authorized contract existing between the city or county when a new constitution forbidding and invalidating such contracts came into operation, the effect of such new constitution was to impair the obligation of the contract, and was, therefore, as to such contract inoperative and void.[13] But county aid bonds illegally issued, because the statute which authorized their issuance did not conform to the constitutional requirement as to the enactment of statutes as repeatedly decided by the state courts, do not constitute contracts which are protected by the federal constitution.[14]

(2) *Conditions and Restrictions.*—A statute of a state operating retrospectively, which provides that any bond issued by a county in payment of subscriptions to stock of a railroad company thereafter issued, must have upon it the requisite certificate before it shall be deemed to have been completely executed, does not infringe the contract clause.[15] Nor does the fact that one more officer must examine and certify the bond before it can be issued, place such an ad-

to take stock in railroad company, and issue their obligations in payment of the stock, they are to that extent to be deemed private corporations, and their obligations are secured by all the guaranties which protect the engagements of private individuals. Broughton *v.* Pensacola, 93 U. S. 266, 269, 23 L. Ed. 896; Mount Pleasant *v.* Beckwith, 100 U. S. 514, 529, 25 L. Ed. 699.

13. **Actual subscription held unnecessary.**—Moultrie County *v.* Rockingham, etc., Bank, 92 U. S. 631, 635, 23 L. Ed. 631, citing Nugent *v.* Supervisors, 19 Wall. 241, 22 L. Ed. 83, and distinguishing Aspinwall *v.* Commissioners, 22 How. 364, 16 L. Ed. 296; distinguished in Railroad Co. *v.* Falconer, 103 U. S. 821, 26 L. Ed. 471.

The contract subscription to the stock of a railroad company and authorized by the act of the legislature of a state, does not become complete until the subscription is actually made on the books of the company for the stock. Until the subscription is made, the contract is unexecuted, and obligatory upon neither party. Therefore the constitutional amendment subsequently adopted prohibiting such subscriptions does not come within the inhibition of § 10, article 1, of the federal constitution which provides that no state shall pass any law impairing the obligation of contracts. Aspinwall *v.* Commissioners, 22 How. 364, 16 L. Ed. 296, distinguished in Moultrie County *v.* Rockingham, etc., Bank, 92 U. S. 631, 635, 23 L. Ed. 631.

County and municipal aid contracts.—Where a county, under authority contained in the charter of a railroad company, has voted in favor of a county subscription of the stock of the company and for a bond issue to pay for the same, and before the county commissioners have made the subscription, a state constitution is adopted forbidding such bond issues, it was held that the mere vote to subscribe did not of itself form such a contract with the railroad company as will be protected by the 10th section first article of the constitution of the United States; that until the subscription was actually made the contract was unexecuted and obligatory upon neither party. Aspinwall *v.* Commissioners, 22 How. 364, 379, 16 L. Ed. 296.

Charter provisions authorizing county aid to railroad.—The charter of the Ohio and Mississippi Railroad Company passed by the legislature of Indiana in 1848, and a supplement in 1849, authorizing the county commissioners of a county through which the road passed to subscribe for stock and issue bonds, provided a majority of the qualified voters of the county voted, on the 1st of March, 1849, that this should be done. The election was held on the appointed day, and a majority of the voters voted that the subscription should be made. But before the subscription was made the state adopted a new constitution, which went into effect on the 1st of November, 1851. One of the articles of this constitution prohibited such subscriptions unless paid for in cash, and prohibited also a county from loaning its credit or borrowing money to pay such subscriptions. In 1852, the county commissioners of Daviess county subscribed for stock in the railroad company and issued their bonds for the amount. Held, that the provision of the railroad charter, authorizing the commissioners to subscribe, did not constitute a contract between the state and the railroad company, but merely conferred a power upon the county and public corporation or civil institution of government, which could be modified, changed, enlarged, or restrained, by the legislative authority of the state. Aspinwall *v.* Commissioners, 22 How. 364, 16 L. Ed. 296.

14. **Defect in title of act authorizing issuance of county bonds.**—Zane *v.* Hamilton County, 189 U. S. 370, 47 L. Ed. 858. See the title STATUTES.

15. **Certificate required on county aid bonds.**—Hoff *v.* Jasper County, 110 U. S. 53, 28 L. Ed. 68.

ditional burden on the parties to the subscription as to impair the obligation of their contract. It is in reality no more than providing that two officers shall sign a municipal bond instead of one before the body politic shall be bound by an instrument to be put on the market and sold as commercial paper.[16]

b. *Contracts with Street Railroads*[17]—(1) *Extension of Franchises.*—Municipal ordinances extending the franchises of a street railway on conditions which involve the expenditure of large sums of money, and resulting in substantial benefits to the public, constitute contracts protected by article 1, § 10, of the federal constitution.[18]

(2) *Paving between the Tracks.*—Nor can a contract entered into between a municipal corporation and a railway company defining the duty of the company with respect to paving and repairing the streets upon which its tracks were laid, valid at the time it was entered into, by the law as it then stood, be impaired either by subsequent legislation or judicial decision.[19] But under the general right to alter, amend or repeal corporate charters, contracts already existing with regard to their duty to pave may be extended.[20]

(3) *Grading and Leveling Streets.*—A city ordinance giving a railway company permission to build bridges over its tracks is not a contract between the city and the railway company. Therefore, a later ordinance, changing the grade of the street and destroying the bridges, is not a violation of the contract clause of the constitution.[21]

16. Certification of bonds.—Hoff *v.* Jasper County, 110 U. S. 53, 28 L. Ed. 68.

Although when a subscription was made by a county to railroad stock, in exchange for its own bond, a bond if signed by the presiding justice would have been sufficient, the obligation of the contract of subscription is not impaired by a law passed afterwards which requires the signature of the clerk of the court to the bond as well as that of the presiding justice. Hoff *v.* Jasper County, 110 U. S. 53, 28 L. Ed. 68.

17. See the title STREET RAILWAYS.

18. Extension of franchises.—Where two railway companies are granted franchises expiring at different times, followed by a consolidation under valid Ohio laws; and subsequently ordinances involving public benefits are accepted by consolidated company, which ordinances refer to rights granted by them as terminating with the "grant of the main line," the legislative intent to so extend or change the franchises, when for a reasonable time, will be inferred; and will constitute a contract which may not be impaired within the constitutional provision. Cleveland *v.* Cleveland Electric R. Co., 201 U. S. 529, 50 L. Ed. 854.

Where a railway company obtains separate franchises for two different lines, expiring at different times, and numerous ordinances permit extensions and add new privileges, but contain no clear and unambiguous language showing a legislative intent to merge the franchises; and where a subsequent consolidation, accepted by the city, distinctly denies any rights greater than those of the constituent companies; held, that there is no merger of the franchises, and that a grant to a new company of rights in one line, after expiration of the franchise as to that line, impairs no contract obligations within the constitutional prohibition. Cleveland Electric R. Co. *v.* Cleveland, 204 U. S. 116, 51 L. Ed. 399.

19. Paving and repairing the street between its tracks.—Chicago *v.* Sheldon, 9 Wall. 50, 55, 19 L. Ed. 594. See post, "Laws Concerning Civil Institutions or Governmental Subjects," IV.

20. Extension of existing duty to pave.—By § 1090 of the code of Iowa it was provided that articles of incorporation, by laws, rules and regulations of corporations thereafter organized, should at all times be subject to legislative control, and might be at any time altered, abridged or set aside by law and that every franchise obtained or enjoyed by such corporation might be regulated, withheld, or made subject to conditions imposed upon the enjoyment thereof, whenever the general assembly should deem necessary for the public good. Held, that no municipality in the state had the power to grant to a street railway company any right, privilege or franchise to be held and enjoyed exempt from the operation of this section. Therefore, the grant by a municipality to a street railway company of the right of operating a street railway company with the requirement that it should pave the streets between the rails, created no contract between the company and the state or city which was impaired by an ordinance further requiring it to pave the street for one foot outside of the rails. Sioux City St. R. Co. *v.* Sioux City, 138 U. S. 98, 34 L. Ed. 898.

21. Grading and leveling streets.—Wabash R. Co. *v.* Defiance, 167 U. S. 88, 42

(4) *Regulation of Rates.*—Where the constitution or statutes of a state existing at the time the charter is granted by the city to a street railway, provide that no irrevocable or uncontrollable grant of special privileges or immunities shall be made, but that all privileges granted by the legislature or created under its authority shall be subject thereto, subsequent legislation reducing the rates to be charged do not impair the obligation of the contract, especially where such rate does not seem to be in any way confiscatory.[22] But a state legislature, unless prohibited by constitutional provisions, may authorize a municipal corporation to contract with a street railway company as to the rates of fare, and so bind during the specified period any future common council from altering or in any way interfering with such contract.[23] The contract once having been made, the power of the city over the subject, so far as altering the rates of fare or other matters properly involved in and being a part of the contract, is suspended for the period of the running of the contract.[24]

(5) *Right of Consolidated Company.*—Where a street railway is chartered before a new constitution takes effect, but is subsequently consolidated with other roads, or accepts new privileges, all the contracts, privileges, and franchises conferred after the adoption of such constitution are subject to its provisions.[25]

L. Ed. 87. See, also, the title STREETS AND HIGHWAYS.

22. Regulation of street railroad rates.—San Antonio Traction Co. *v.* Altgelt, 200 U. S. 304, 50 L. Ed. 491. See the title CORPORATIONS, vol. 4, p. 634.

Special rates to school children.—Where a city granted a railway certain privileges, under a Texas special act providing that all contracts with such railway should be "in all respects legal and binding," and twenty-three years later fixed the rates by ordinance, after a new constitution had made inalienable the right to regulate and revoke franchise privileges, and after an authorized assignment to a new company of "all the property, assets, rights and privileges;" held, that such assignment is subject to the provisions of the new constitution, and that a subsequent act requiring half-rates to school children does not impair the obligation of any contract. San Antonio Traction Co. *v.* Altgelt, 200 U. S. 304, 50 L. Ed. 491.

23. A state may authorize a city to make irrevocable contracts.—Detroit *v.* Detroit Citizens' St. R. Co., 184 U. S. 368, 382, 46 L. Ed. 592, citing New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650, 29 L. Ed. 516; New Orleans Waterworks Co. *v.* Rivers, 115 U. S. 674, 29 L. Ed. 525; St. Tammany Waterworks *v.* New Orleans Waterworks, 120 U. S. 64, 30 L. Ed. 563; Walla Walla City *v.* Walla Walla Water Co., 172 U. S. 1, 9, 43 L. Ed. 341; Los Angeles *v.* Los Angeles City Water Co., 177 U. S. 558, 570, 44 L. Ed. 886; Freeport Water Co. *v.* Freeport City, 180 U. S. 587, 593, 45 L. Ed. 679.

Where a city council, authorized by legislature, has passed an ordinance prescribing that the rate of fare charged by a street railway company shall not exceed five cents, and the company accepts such ordinance, it is held that a contract arises between the city and the company, giving the company the right to charge a rate of five cents, and such rate cannot be reduced by the city, by virtue of its authority to prescribe from time to time rules and regulations for the operation of the road. Detroit *v.* Detroit Citizens' St. R. Co., 184 U. S. 368, 46 L. Ed. 592.

The language of § 20 in the Michigan Street Railway Act of 1867, which provides that the rate of fare agreed upon shall not be increased without the consent of the city authorities, does not mean that the rate may be reduced without the consent of the railway companies. Detroit *v.* Detroit Citizens' St. R. Co., 184 U. S. 368, 389, 46 L. Ed. 592.

A city has no right to reduce the fares of a street railway company as agreed upon between it and the railway though such agreement is made subsequent to the amendment of March 27, to § 34 of the Michigan Tram. Railway Act. This amendment is a general provision regarding regulations or conditions, destroying or unreasonably impairing rights or franchises already granted, or depriving the company of rights of construction and operation, while the matter of rates of fare is specially provided for by § 20 of the Street Railway Act, which provides for an agreement on that subject. Detroit *v.* Detroit Citizens' St. R. Co., 184 U. S. 368, 46 L. Ed. 592.

24. Detroit *v.* Detroit Citizens' St. R. Co., 184 U. S. 368, 382, 46 L. Ed. 592.

25. Effect of consolidation.—San Antonio Traction Co. *v.* Altgelt, 200 U. S. 304, 50 L. Ed. 491, citing Shields *v.* Ohio, 95 U. S. 319, 24 L. Ed. 357; Railroad Co. *v.* Maine, 96 U. S. 499, 24 L. Ed. 836; Railroad Co. *v.* Georgia, 98 U. S. 359, 25 L. Ed. 185; Keokuk, etc., R. Co. *v.* Missouri, 152 U. S. 301, 38 L. Ed. 450, 14 Sup. Ct. Rep. 592; Yazoo, etc., R. Co. *v.*

c. *Grants of Exclusive Privileges.*—See ante, "Contracts of States," III, D.

(1) *To Waterworks Companies*—aa. *In General.*[26]—In accordance with the general rule that the presumptions are against the grant of exclusive privileges, it has been held repeatedly that the granting of franchises to private individuals to construct waterworks in a city and supply the inhabitants thereof with water does not preclude the city from afterwards erecting its own waterworks.[27]

bb. *When Privileges Exclusive.*—But a contract entered into by a municipality granting to a water company the right to supply its inhabitants with water, upon condition of the performance of its service by the grantee, is as much protected by the contract clause as similar grants directly by a state legislature.[28]

Adams, 180 U. S. 1, 23, 45 L. Ed. 395, 21 Sup. Rep. 240.

The Texas constitution of 1876 provides that all privileges and franchises granted by or under authority of the legislature shall be subject to the control thereof. Held, that any exemption from regulation of rates, which may have existed in favor of a street railway by virtue of prior legislation, was lost by the foreclosure and sale of its property, and its absorption, together with another company, by a new corporation, although the enabling ordinance expressly transferred all the rights and privileges granted to the old companies, including all the limitations, contracts and obligations. Hence, a legislative act requiring half rate tickets for school children impaired no contract obligation. San Antonio Traction Co. *v.* Altgelt, 200 U. S. 304, 50 L. Ed. 491.

26. See the title WATER COMPANIES AND WATERWORKS.

27. When privileges of water companies not exclusive.—Pearsall *v.* Great Northern R. Co., 161 U. S. 646, 663, 40 L. Ed. 838; Bienville Water Supply Co. *v.* Mobile, 175 U. S. 109, 44 L. Ed. 92; Skaneateles Waterworks Co. *v.* Skaneateles, 184 U. S. 354, 46 L. Ed. 585.

Long Island Water Supply Co. *v.* Brooklyn, 166 U. S. 685, 696, 41 L. Ed. 1165; Joplin *v.* Southwest Missouri Light Co., 191 U. S. 150, 48 L. Ed. 127; Skaneateles Waterworks Co. *v.* Skaneateles, 184 U. S. 354, 46 L. Ed. 585. These cases hold that the grant of the franchise does not of itself raise an implied contract that the grantor will not do any act to interfere with the rights granted to the waterworks company, and that, in the absence of the grant of an exclusive privilege, none will be implied against the public, but must arise, if at all, from some specific contract binding upon the municipality. Helena Waterworks Co. *v.* Helena, 195 U. S. 383, 388, 49 L. Ed. 245.

Construction of particular contract.—A grant of an exclusive privilege, for a term of years, of supplying a municipal corporation and its people with water drawn by means of a system of waterworks from a particular stream is not impaired by a grant to other persons of the privilege of supplying, during the same period, the same corporation and people with water drawn from a different stream or river. Stein *v.* Bienville Water Supply Co., 141 U. S. 67, 35 L. Ed. 622, distinguishing New Orleans Waterworks Co. *v.* Rivers, 115 U. S. 674, 29 L. Ed. 525 and St. Tammany Waterworks *v.* New Orleans Waterworks, 120 U. S. 64, 30 L. Ed. 563, followed in Hamilton Gas Light, etc., Co. *v.* Hamilton City, 146 U. S. 258, 265, 36 L. Ed. 963.

There is no impairment of the obligation of contract where a city builds its own waterworks, under the general laws of Montana, before the expiration of a franchise which is expressly stated not to be exclusive. In the absence of an express contract that the city will not erect its own plant, none will be implied, though the grantee may have contracted to furnish water to all inhabitants desiring it during contract period. Helena Waterworks Co. *v.* Helena, 195 U. S. 383, 49 L. Ed. 245.

A waterworks company, granted a franchise by the village of Skaneateles under the New York act of 1873, acquired no contract right, express or implied, to any exclusive privilege of using the streets of the village for supplying it with water, but merely the right to be a corporation, together with authority to lay its water pipes in the streets of the village. Nor can any contract be implied, after the expiration of maximum statutory contract, from the foregoing facts; nor any legal duty be placed upon the village to acquire the property of the existing corporation. Hence, where the village builds its own waterworks, at the expiration of express contract, there is no impairment of the obligation of contract. Skaneateles Waterworks Co. *v.* Skaneateles, 184 U. S. 354, 46 L. Ed. 585.

28. Exclusive privileges to waterworks companies.—Walla Walla City *v.* Walla Walla Water Co., 172 U. S. 1, 43 L. Ed. 341.

The obligation of a contract for the exclusive privilege of supplying water to a city and its inhabitants is probably impaired by a subsequent municipal ordinance, and a legislative enactment under which the municipality is proceeding to issue and market its bonds for the purpose of constructing its own waterworks system. Mercantile Trust, etc., Co. *v.*

And notwithstanding the well-established rule which requires grants of franchises and special privileges to be most strongly construed in favor of the public, and that where the privilege claimed is doubtful nothing is to be taken by mere implication as against public rights, it is held that a contract which gives to a water company exclusive right to erect, maintain and operate waterworks for a definite term, to supply water for public and private use, is a grant of an exclusive privilege, which would be impaired under the contract clause of the constitution, if the city should erect its own works during the term of the contract.[29] Moreover, under a general power conferred by a state legislature upon a municipality to provide for the erection and maintenance of a system of waterworks, the city can, in exercising this legislative power, exclude itself from constructing and operating waterworks for a period of years stipulated for in a contract, although there be an express provision against making an exclusive contract.[30]

cc. *Regulation of Water Rates.*—A city may exclude itself wholly[31] or in

Columbus, 203 U. S. 311, 51 L. Ed. 198, citing Walla Walla City *v.* Walla Walla Water Co., 172 U. S. 1, 43 L. Ed. 341; Vicksburg Waterworks Co. *v.* Vicksburg, 185 U. S. 65, 46 L. Ed. 808; S. C., 202 U. S. 453, 50 L. Ed. 1102; Davis, etc., Mfg. Co. *v.* Los Angeles, 189 U. S. 207, 47 L. Ed. 782; Knoxville Water Co. *v.* Knoxville, 200 U. S. 22, 50 L. Ed. 353, and distinguishing St. Paul Gas Light Co. *v.* St. Paul, 181 U. S. 142, 45 L. Ed. 788.

Pursuant to power vested in it by the state, the city council, on March 15, 1887, passed "An ordinance to secure a supply of water for the city of Walla Walla," by which it granted, under certain restrictions, to the water company, for the period of twenty-five years from the date of the ordinance, "the right to lay, place and maintain all necessary water mains, pipes, connections and fittings in all the highways, streets and alleys of said city, for the purpose of furnishing the inhabitants thereof with water." After this contract had been in force and the stipulated rentals paid for about six years, on June 20, 1893, an ordinance was passed "to provide for the construction of a system of waterworks" for the purpose of supplying the city and its inhabitants with water; to authorize the purchase and condemnation of land for that purpose, and the issue of bonds to the amount of $160,000 to provide the necessary funds. Held, that the grant of a right to supply gas or water to a municipality and its inhabitants through pipes and mains laid in the streets, upon condition of the performance of its service by the grantee, is the grant of a franchise vested in the state, in consideration of the performance of a public service, and after performance by the grantee, is a contract protected by the constitution of the United States against state legislation to impair it. Walla Walla City *v.* Walla Walla Water Co., 172 U. S. 1, 43 L. Ed. 341.

Under authority of Mississippi act of March 18, 1886, the city of Vicksburg contracted with the Samuel R. Bullock Company and their assigns for the exclusive privilege of supplying water to the city, and of erecting and maintaining the necessary plant for such purpose, for the period of thirty years. Held, that unless the contract can be avoided for invalidity, any legislation inconsistent with its terms, and within the period of its existence, necessarily impairs the obligation of a contract and is void. Vicksburg Waterworks Co. *v.* Vicksburg, 185 U. S. 65, 46 L. Ed. 808.

29. Construction of grants.—Vicksburg *v.* Vicksburg Waterworks Co., 202 U. S. 453, 50 L. Ed. 1102, citing Knoxville Water Co. *v.* Knoxville, 200 U. S. 22, 50 L. Ed. 353; Walla Walla City *v.* Walla Walla Water Co., 172 U. S. 1, 43 L. Ed. 341.

30. Rule where city is forbidden to grant exclusive franchises.—Vicksburg *v.* Vicksburg Waterworks Co., 202 U. S. 453, 50 L. Ed. 1102, following Walla Walla City *v.* Walla Walla Water Co., 172 U. S. 1, 43 L. Ed. 341.

Cases distinguished.—"Cases are not infrequent where, under a general power to cause the streets of a city to be lighted or to furnish its inhabitants with a supply of water, without limitation as to time, it has been held that the city has no right to grant an exclusive franchise for a period of years; but these cases do not touch upon the question how far the city, in the exercise of an undoubted power to make a particular contract, can hedge it about with limitations designed to do little more than bind the city to carry out the contract in good faith and with decent regard for the rights of the other party." Vicksburg *v.* Vicksburg Waterworks Co., 202 U. S. 453, 468, 50 L. Ed. 1102; Walla Walla City *v.* Walla Walla Water Co., 172 U. S. 1, 43 L. Ed. 341.

31. City may exclude itself wholly from right to regulate rates.—Vicksburg *v.* Vicksburg Waterworks Co., 206 U. S. 496, 51 L. Ed. 1155, citing New Orleans Waterworks Co. *v.* Rivers, 115 U. S. 674, 29 L. Ed. 525; Walla Walla City *v.* Walla Walla Water Co., 172 U. S. 1, 7, 43 L. Ed. 341; Los Angeles *v.* Los Angeles

part, as by agreeing that they shall not be reduced below a certain amount,[32] from the right to regulate water rates. But as a general rule municipalities have full power to regulate the price to be charged by water companies.[33]

(2) *To Gas and Electric Light Companies.*—And the general rule stated

City Water Co., 177 U. S. 558, 44 L. Ed. 886; Freeport Water Co. *v.* Freeport City, 180 U. S. 587, 593, 45 L. Ed. 679.

The city of Vicksburg was authorized to provide by contract for the erection of a waterworks plant, and thereafter entered into a thirty years contract, giving the company the right to regulate its own rates within a certain maximum. Held, that a state has undoubted power to exclude itself from the right of regulation, where such action is not grossly unreasonable, or may delegate such power to its cities by clear language to that effect; and that the city of Vicksburg has so excluded itself in this case, and any subsequent regulation would impair the obligation of contract. Vicksburg *v.* Vicksburg Waterworks Co., 206 U. S. 496, 51 L. Ed. 1155.

32. City may partially deprive itself from right to regulate rates.—A municipal ordinance was passed fixing water rates to be charged and collected, and in an action to contest the constitutionality of this ordinance, it was held that it was unnecessary to show that the income of the water company was reduced by the city in order for the ordinance to violate the clause in the constitution prohibiting the impairment of the obligation of a contract. Los Angeles *v.* Los Angeles City Water Co., 177 U. S. 558, 580, 44 L. Ed. 883.

In Los Angeles *v.* Los Angeles City Water Co., 177 U. S. 558, 44 L. Ed. 886, where a city leased its waterworks for a term of thirty years, giving power to the lessees to furnish water and collect rents therefor, but reserving to itself the right to regulate the water rates, provided that they should not be reduced to less than those then charged by the lessees, it was held that after the lessees had complied with the conditions it was not in the power of the city authorities, by ordinance or otherwise, to impose additional burdens as a condition to the exercise of the rights and privileges granted, nor to reduce the rates below those prevailing at the date of the contract.

Impairment by subsequent decisions.—In an action by the city waterworks to contest the constitutionality of a municipal ordinance fixing water rates to be charged and collected, it was held that a contract declared by the highest court of the state to be permitted by the existing constitution, could not be affected by subsequent decisions or changes in the constitution and thereby impair its obligation. Los Angeles *v.* Los Angeles City Water Co., 177 U. S. 558, 575, 44 L. Ed. 886.

Estoppel.—A municipal ordinance fixed its water rates at a rate inconsistent with a provision in a contract made with the water company. The company, in compliance with the ordinance, paid the various rates for several years, but at the same time protested against the city's right to pass such an ordinance. Held, there was no such acquiescence as estopped the water company from contesting the constitutionality of the city ordinance as impairing the obligation of a contract within the meaning of the constitution. Los Angeles *v.* Los Angeles City Water Co., 177 U. S. 558, 578, 579, 44 L. Ed. 886.

33. Generally municipalities may regulate water rates.—There is no impairment of the obligation of contract where a city regulates the price of water under authority of the general law (Ky. Act of June 14, 1893), although its contract with the water company was made prior to such law, and gives the company "power and authority to make and enforce as a part of the condition upon which it will supply water to its consumers, all needful rules and regulations not inconsistent with the law or provisions of this ordinance." Freeport Water Co. *v.* Freeport City, 180 U. S. 587, 45 L. Ed. 679; Rogers Park Water Co. *v.* Fergus, 180 U. S. 624, 45 L. Ed. 702; Joplin *v.* Southwest Missouri Light Co., 191 U. S. 150, 48 L. Ed. 127; Owensboro *v.* Owensboro Waterworks Co., 191 U. S. 358, 48 L. Ed. 217.

The Knoxville Water Company was incorporated under a Tennessee general act, which expressly set out that such act was in no way to interfere with the police or general powers of the corporate authorities, who should have power by ordinance to regulate the price of water supplied by such companies. The object of incorporation was stated in the articles to construct waterworks and supply the city and inhabitants with water, and "to charge such prices for the same as may be agreed upon between said company and said parties." In its contract with the city, the company agreed to supply private consumers, "at a rate not to exceed five cents per one hundred gallons." Held, that the city had power to regulate the price under the general law, which power it did not contract away; and hence an ordinance lowering rates did not impair the obligation of contract. Knoxville Water Co. *v.* Knoxville, 189 U. S. 434, 47 L. Ed. 887.

Where the Florida constitution invested the legislature with "full power" to prevent excessive charges by persons and corporations performing services of a public nature, and the legislature afterwards empowered the municipalities to

above as to water companies has been applied where exclusive privileges have been claimed by electric light companies.[34]

6. Ordinances Granting Privileges to Public Service Companies.—A city ordinance permitting the construction of a tunnel under a navigable stream so as to obstruct navigation, is not a contract that is impaired by a subsequent order to remove and lower the same so as to meet the present needs of navigation.[35]

7. Regulation of Streets and Highways.—Statutes or ordinances which merely transfer the reserved power of the state or municipality to regulate the use of the streets and highways in such manner as not to injuriously affect the public interests, from one public functionary to another, do not impair the obligation of contract.[36]

K. Implied and Constructive Contracts.—The protecting power of the constitutional provision against impairing the obligation of contracts, extends to implied contracts as much so as to express contracts.[37] But it has been said that while the courts repudiate all constructive exceptions to the constitutional prohibitions, they equally repudiate its application to constructive contracts. Thus they will preserve and protect an immunity from taxation when it is

prescribe maximum reasonable charges for water; held, that an ordinance lowering rates did not impair the obligation of a contract made between the adoption of the constitution and the passing of the legislative act, the construction of the Florida courts, that the right was inalienable in the legislature, being followed. Tampa Water Works Co. *v.* Tampa, 199 U. S. 241, 50 L. Ed. 172, Brown and Peckham, JJ., dissenting.

34. Claim of exclusive privilege by electric light companies.—Joplin *v.* Southwest Missouri Light Co., 191 U. S. 150, 48 L. Ed. 127, distinguishing Walla Walla City *v.* Walla Walla Water Co., 172 U. S. 1, 43 L. Ed. 341.

Where an electric light company was incorporated under the Missouri act of 1891, which gave the cities the right either to erect their own plants or to grant franchises for such purpose, and its contract with the city of Joplin did not expressly prohibit a municipal plant, or competitive plants, no such contract can be implied, and the erection of such plant within the contract term does not impair the obligation of the contract. Joplin *v.* Southwest Missouri Light Co., 191 U. S. 150, 48 L. Ed. 127.

35. Ordinance granting privileges to tunnel under navigable rivers.—Where an Illinois act required, as a condition to the right to cross its cars under the Chicago river, that a certain railway company's tunnel should be so located and constructed as not unnecessarily to interrupt navigation; and where by a valid ordinance the city of Chicago authorized the building of the tunnel, but did not stipulate that it would not exert whatever powers it had to protect navigation, or would pay for any subsequent alterations of the tunnel built under its authority; held, that an ordinance afterwards passed, requiring the lowering of the tunnel to allow for changes in navigation, at the sole cost of such railway company, impaired the obligation of no contract. West Chicago St. R. Co. *v.* Illinois, 201 U. S. 506, 50 L. Ed. 845.

36. Regulation of streets and highways.—The grant of permission to a telegraph company to put in electrical subways and requiring the work to be done under the supervision of the commissioner of public works is not impaired by the subsequent passage of an act requiring the plans, and specifications to be submitted to a board of subway commissioners in place of a single commissioner. New York State *v.* Squire, 145 U. S. 175, 36 L. Ed. 666. See the title STREETS AND HIGHWAYS.

37. Implied contracts are protected.—Fisk *v.* Jefferson Police Jury, 116 U. S. 131, 134, 29 L. Ed. 587. See, generally, the title IMPLIED CONTRACTS.

"As to what constitutes a contract, no diversity of opinion exists; all the elementary writers on the subject, sanctioned by judicial decisions, consider it briefly and simply an agreement in which a competent party undertakes to do, or not to do a particular thing; but all know, that the agreement does not always, nay, seldom, if ever, upon its face, specify the full extent of the terms and conditions of the contract; many things are necessarily implied, and to be governed by some rule not contained in the agreement; and this rule can be no other than the existing law when the contract is made, or to be executed." Opinion of Thompson, J., in Ogden *v.* Saunders, 12 Wheat. 213, 297, 6 L. Ed. 606.

Statute avoiding previous payments.—Where a statute was so construed by a state court as to declare void all payments previously made and accepted by the state, it was held that the state having accepted payments prior to the passage of the statute, this construction impaired the obligation of an implied contract, and it was unnecessary for the state

granted in terms,[38] yet they will not raise an immunity by implication where there is no express contract.[39]

L. Incorporeal Hereditaments.—A gift by the crown, or by the state of incorporeal hereditaments, such as corporate franchises, although without consideration, when executed, is, in the strictest sense of the terms, a grant, which it is beyond the power of the state to impair.[40]

M. Judgments[41]—1. IN GENERAL.—While it is true in some sense and for some purposes that judgments have been treated and considered as contracts, yet they are only contracts because they are evidences of a debt or obligation on the part of the defendant due to the plaintiff. A judgment presupposes and is founded upon some antecedent obligation or contract, the essential nature of which was not changed by being put into the form of a judgment. In deciding how far a judgment may be affected by subsequent legislation, therefore, we must look mainly to the original contract.[42] And in accordance with this it seems to have been decided in some of the earlier cases that a judgment founded upon a contract was protected by the contract clause.[43] But the true rule seems to be that a judgment is in no sense a contract between the parties within the meaning of the contract clause of the federal constitution, because the most important elements of a contract are wanting. There is no aggregatio mentium. The defendant has not voluntarily assented or promised to pay.[44]

court to refer to the statute in order to have this effect. Houston, etc., R. Co. *v.* Texas, 177 U. S. 66, 100, 44 L. Ed. 673.

38. New Jersey *v.* Wilson, 7 Cranch 164, 3 L. Ed. 303.

39. Constructive exemptions, as from taxation.—Opinion of Baldwin, J., citing Providence Bank *v.* Billings, 4 Pet. 514, 563, 7 L. Ed. 939; Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 583f, 9 L. Ed. 773.

40. Incorporeal hereditaments.—Dartmouth College *v.* Woodward, 4 Wheat. 518, 684, 4 L. Ed. 629, opinion of Story, J. See the title CORPORATIONS, vol. 4, p. 677.

"All incorporeal hereditaments, whether they be immunities, dignities, offices, or franchises, or other rights, are deemed valuable in law. The owners have a legal estate and property in them, and legal remedies to support and recover them, in case of any injury, obstruction or disseisin of them. Whenever they are the subjects of a contract or grant, they are just as much within the reach of the constitution as any other grant." Dartmouth College *v.* Woodward, 4 Wheat. 518, 699, 4 L. Ed. 629.

41. See the title JUDGMENTS AND DECREES.

42. Judgments as contracts.—Blount *v.* Windley, 95 U. S. 173, 175, 176, 24 L. Ed. 424.

43. When judgment a contract.—It is entirely within the competency of the state supreme court to authorize an inquiry into the cause of action on which the judgment of a municipal creditor was rendered, when he prays for its enforcement by proceedings which were authorized by legislation existing at its date, but subsequently repealed. Whether such repeal is effectual to deprive him of the process prayed, depends upon the question whether the judgment was founded upon a contract, the obligation of which the state was prohibited from impairing, or upon a cause of action arising ex delicto, which is not within the protection of the contract clause of the constitution. Louisiana *v.* Police Jury, 111 U. S. 716, 720, 28 L. Ed. 574.

"The inquiry, however, which may be thus instituted into the nature of the original cause of action, does not, where the judgment was rendered upon a contract, authorize a re-examination of the validity of the contract, or of the propriety of the judgment. That would involve a retrial of the case." Louisiana *v.* Police Jury, 111 U. S. 716, 721, 28 L. Ed. 574.

A judgment for damages, estimated in money, is sometimes called by text-writers a specialty or contract of record, because it establishes a legal obligation to pay the amount recovered; and, by a fiction of law, a promise to pay is implied where such legal obligation exists. It is on this principle that an action ex contractu will lie upon a judgment. Louisiana *v.* New Orleans, 109 U. S. 285, 288, 27 L. Ed. 936, approved in Freeland *v.* Williams, 131 U. S. 405, 413, 33 L. Ed. 193, citing Chitty on Contracts, Perkins' Ed., 87.

But this fiction cannot convert a transaction wanting the assent of parties into one which necessarily implies it. Judgments for torts are usually the result of violent contests, and are imposed upon the losing party by a higher authority against his will and protest. Louisiana *v.* New Orleans, 109 U. S. 285, 288, 27 L. Ed. 936, approved in Freeland *v.* Williams, 131 U. S. 405, 413, 33 L. Ed. 193.

44. Better rule is that judgment is not a contract.—Morley *v.* Lake Shore, etc., R. Co., 146 U. S. 162, 36 L. Ed. 925, re-

2. Judgments Based upon Rights and Obligations Arising Ex Delicto. —It is well settled that a judgment, duly rendered in a court of law, in an action of tort, is not protected by the contract clause of the federal constitution.[45]

affirmed in Read *v.* Mississippi County, 188 U. S. 739, 47 L. Ed. 677; Gates *v.* Parmly, 191 U. S. 557, 48 L. Ed. 301.

45. Judgments based upon contracts ex delicto are not protected.—Freeland *v.* Williams, 131 U. S. 405, 33 L. Ed. 193, citing Satterlee *v.* Matthewson, 2 Pet. 380, 7 L. Ed. 458; Garrison *v.* New York, 21 Wall. 196, 22 L. Ed. 612; Louisiana *v.* New Orleans, 109 U. S. 285, 27 L. Ed. 936. See post, "Statutes Barring Actions Ex Delicto," VII, F, 6.

Judgments based upon rights and obligations arising ex delicto are not protected by the contract clause of the constitution. Louisiana *v.* New Orleans, 109 U. S. 285, 27 L. Ed. 936; Garrison *v.* New York, 21 Wall. 196, 203, 22 L. Ed. 612; Freeland *v.* Williams, 131 U. S. 405, 33 L. Ed. 193.

And it was decided by the federal supreme court, in the case of Louisiana *v.* New Orleans, 109 U. S. 285, 27 L. Ed. 936, that a liability for a tort, created by statute, although reduced to judgment by a recovery for the damages suffered, did not thereby become a debt by contract, in the sense of the constitution of the United States, forbidding state legislation impairing its obligation, for the reason that "the term 'contract' is used in the constitution in its ordinary sense as signifying the agreement of two or more minds, for considerations proceeding from one to the other, to do or not to do certain acts. Mutual assent to its terms is of its very essence." Approved in Chase *v.* Curtis, 113 U. S. 452, 464, 28 L. Ed. 1038; Freeland *v.* Williams, 131 U. S. 405, 413, 33 L. Ed. 193.

"It may be doubted whether a judgment not founded upon an agreement, express or implied, is a contract within the meaning of the constitutional prohibition. It is sometimes called by text-writers a contract of record, because it establishes a legal obligation to pay the amount recovered, and, by fiction of law, where there is a legal obligation to pay a promise to pay is implied. It is upon this principle, says Chitty, that an action in form ex contractu will lie on a judgment of a court of record. But it is not perceived how this fiction can convert the result of a proceeding, not founded upon an agreement, express or implied, but upon a transaction wanting the assent of the parties into a contract within the meaning of the clause of the federal constitution which forbids any legislation impairing its obligation. The purpose of the constitutional prohibition was the maintenance of good faith in the stipulations of parties against any state interference. If no assent be given to a transaction no faith is pledged in respect to it, and there would seem in such case to be no room for the operation of the prohibition." Garrison *v.* New York, 21 Wall. 196, 203, 22 L. Ed. 612.

Action for destruction of property by a mob.—As the contract clause of the constitution was intended to secure the observance of good faith in the stipulation of parties against state action, it cannot be invoked when no such stipulation exists, and therefore not against legislation which interferes merely with the enforcement of claims for damages from the violence of mobs or of judgments upon such claims. Louisiana *v.* Police Jury, 111 U. S. 716, 720, 28 L. Ed. 574.

Thus the obligation of a city under a statute requiring it to make compensation for property destroyed by mobs and riotous assemblages, is not within the protection of the constitution. Such liability is not contractual but rests upon the act of the legislature and may be withdrawn at pleasure. Louisiana *v* New Orleans, 109 U. S. 285, 287, 27 L. Ed. 936.

And it is immaterial that rights of compensation arising under such statutes have been put into judgment. A statute prohibiting the city from paying such a judgment, or depriving it of the power of taxation to the extent that it is unable to pay such judgment, does not impair the obligation of a contract. Louisiana *v.* New Orleans, 109 U. S. 285, 289, 27 L. Ed. 936.

Tortious taking of property under usages of warfare.—Under a provision of the West Virginia constitution of 1872, that "No citizen of this state who aided or participated in the late war between the government of the United States and a part of the people thereof, on either side, shall be liable, in any proceeding, civil or criminal; nor shall his property be seized or sold under final process issued upon judgments or decrees heretofore rendered, or otherwise, because of any act done, according to the usages of civilized warfare in the prosecution of said war, by either of the parties thereto"—and where the legislature provided for carrying this section into effect upon defendant's filing a statement of facts under oath; held, that there was no impairment of the obligation of contract as to such provision, when it was invoked to set aside a judgment based upon a tortious taking of cattle under the recognized usages of civilized warfare, a judgment for a tort not being a contract. Freeland *v.* Williams, 131 U. S. 405, 33 L. Ed. 193, citing Satterlee *v.* Matthewson, 2 Pet. 380, 7 L. Ed. 458; Garrison *v.* New York, 21 Wall. 196, 22 L. Ed. 612; Louisiana *v.*

The rendition of a judgment on a cause of action arising ex delicto does not convert a noncontractual duty into a contractual obligation, even though an action in form ex contractu may be maintained on the judgment.[46] Accordingly the revocation of the right or power of a municipal corporation to levy taxes to pay judgments founded upon a cause of action arising ex delicto, does not impair the obligation of any contract, since such judgments are not within the protection of the contract clause.[47] Nor does a judgment against a corporation, if founded upon a tort, become a debt of the corporation existing and arising ex contractu.[48]

3. Interest upon Judgments.—In accordance with the general rule stated above that a judgment is not a contract within the meaning of art. 1, § 10, of the federal constitution, a statute passed by a state reducing the rate of interest upon all judgments obtained in the courts of the state is valid, even as to judgments obtained prior to its passage.[49]

N. Legislative Contracts—1. In General.—"It has become the established law of this court that a legislative enactment, in the ordinary form of a statute, may contain provisions which, when accepted as the basis of action by individuals or corporations," become contracts between them and the state within the protection of the contract clause of the federal constitution.[50] The

New Orleans, 109 U. S. 285, 27 L. Ed. 936.

Vacation of order confirming report.—An act of the legislature of the state of New York, passed in 1871, in relation to the widening and straightening of Broadway, in the city of New York, authorizing the supreme court of the state to vacate an order made in 1870 confirming the report of commissioners of estimate and assessment respecting the property taken, from which order no appeal was allowable, if error, mistake, irregularity, or illegal acts appeared in the proceedings of the commissioners, or the assessments for benefit or the awards for damage, or either of them, had been unfair and unjust or inequitable or oppressive as respects the city or any person affected thereby, and to refer the matter back to new commissioners to amend or correct the report, or to make a new assessment, is not unconstitutional as impairing the obligation of contracts, or depriving a person of a vested right without due process of law. Garrison *v.* New York, 21 Wall. 196, 22 L. Ed. 612, approved in Louisiana *v.* New Orleans, 109 U. S. 285, 27 L. Ed. 936; Freeland *v.* Williams, 131 U. S. 405, 414, 33 L. Ed. 193; Essex Public Road Board *v.* Skinkle, 140 U. S. 334, 35 L. Ed. 446.

46. Merger of cause of action in judgment does not alter case.—Louisiana *v.* New Orleans, 109 U. S. 285, 27 L. Ed. 936; Garrison *v.* New York, 21 Wall. 196, 22 L. Ed. 612, distinguished in Morley *v.* Lake Shore, etc., R. Co., 146 U. S. 162, 36 L. Ed. 925.

47. Revocation of right to levy taxes to pay judgments upon causes ex delicto.—Louisiana *v.* New Orleans, 109 U. S. 285, 27 L. Ed. 936.

Revocation of power to tax to pay judgment.—Judgments founded upon causes of action arising ex delicto, as upon a statutory obligation to make compensation for property destroyed by mobs, etc., not being within the protection of the contract clause, the revocation of the power to tax, existing at the time of their rendition, is not, as to them, an impairment of the obligation of the contract. Louisiana *v.* Police Jury, 111 U. S. 716, 720, 28 L. Ed. 574; Louisiana *v.* New Orleans, 109 U. S. 285, 27 L. Ed. 936.

When, therefore, a judgment creditor claims that the obligation of his contract has been impaired by the revocation of power to tax existing at the time of its rendition, it is competent for the court to inquire whether such judgment is founded upon a cause of action arising ex delicto or ex contractu. Louisiana *v.* Police Jury, 111 U. S. 716, 720, 28 L. Ed. 574.

48. Judgment against corporation arising upon a tort.—Chase *v.* Curtis, 113 U. S. 452, 28 L. Ed. 1038, citing Louisiana *v.* New Orleans, 109 U. S. 285, 27 L. Ed. 936.

49. Recovery of interest upon judgments.—Morley *v.* Lake Shore, etc., R. Co., 146 U. S. 162, 36 L. Ed. 925, Harlan, Field and Brewer, JJ., dissenting.

50. Legislative contracts cannot be impaired.—New Jersey *v.* Yard, 95 U. S. 104, 114, 24 L. Ed. 352. See ante, "Contracts of States," III, D.

It is a principle that, on general questions of policy, a legislature cannot bind those which shall succeed it; but it is equally true that a legislature may make a contract which will be binding upon those that shall come after it. Woodruff *v.* Trapnall, 10 How. 190, 207, 13 L. Ed. 383.

If the legislature, therefore, says to public-spirited citizens: "If you will embark, with your time, money, and skill, in an enterprise which will accommodate

commonest case of a legislative contract is that of a charter granted to a corporation.[51] And the statute of a state may make a contract as well by reference to a previous enactment making one, and extending the rights, etc., granted by such enactment to a new party, as by direct enactment setting forth the contract in all its particular terms. And a third contract may be made in a subsequent statute by importation from the previously imported contract, in the former statute, and a fourth contract by importation from a third.[52]

2. CONSTRUCTION OF LEGISLATIVE CONTRACTS.—It is true that legislative contracts are to be construed most favorably to the state if on a fair consideration to be given the charter, any reasonable doubts arise as to their proper interpretation; but, as every contract is to be construed to accomplish the intention of the parties to it, if there is no ambiguity about it, and this intention clearly appears on reading the instrument, it is as much the duty of the court to uphold and sustain it, as if it were a contract between private persons.[53]

O. Marriage Contracts.[54]—A contract of marriage does not come within the meaning of the term "contract" as used in the contract clause of the federal constitution.[55] Hence it does not restrict the right of the legislature to legislate upon the subject of divorce, either as to granting legislative divorces or as to authorizing the granting of divorces by the courts.[56]

P. Ordinances and Constitutions—1. ORDINANCES.—A city ordinance

the public necessities, we will grant to you, for a limited period, or in perpetuity, privileges that will justify the expenditure of your money, and the employment of your time and skill," such a grant is a contract, with mutual considerations, and justice and good policy alike require that the protection of the law should be assured to it. The Binghampton Bridge, 3 Wall. 51, 74, 18 L. Ed. 137.

51. Corporate charters are contracts.—Terrett *v.* Taylor, 9 Cranch 43, 3 L. Ed. 650; Dartmouth College *v.* Woodward, 4 Wheat. 518, 4 L. Ed. 629, distinguished in United States *v.* Stockslager, 129 U. S. 470, 32 L. Ed. 785; Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 549, 583c, 9 L. Ed. 773; West River Bridge Co. *v.* Dix, 6 How. 507, 531, 12 L. Ed. 535; Richmond, etc., R. Co. *v.* Louisa R. Co., 13 How. 71, 82, 14 L. Ed. 55; The Binghampton Bridge, 3 Wall. 51, 73, 18 L. Ed. 137; Home of the Friendless *v.* Rouse, 8 Wall. 430, 19 L. Ed. 495; Washington University *v.* Rouse, 8 Wall. 439, 19 L. Ed. 498; Wilmington Railroad *v.* Reid, 13 Wall. 264, 266, 20 L. Ed. 568; Tomlinson *v.* Jessup, 15 Wall. 454, 458, 24 L. Ed. 204; Holyoke Co. *v.* Lyman, 15 Wall. 500, 21 L. Ed. 133; Davis *v.* Gray, 16 Wall. 203, 232, 21 L. Ed. 447; The Delaware Railroad Tax, 18 Wall. 206, 225, 21 L. Ed. 888; Pacific R. Co. *v.* Maguire, 20 Wall. 36, 43, 22 L. Ed. 282; Chicago, etc., R. Co. *v.* Iowa, 94 U. S. 155, 161, 24 L. Ed. 94; Turnpike Co. *v.* Illinois, 96 U. S. 63, 68, 24 L. Ed. 651; Newton *v.* Commissioners, 100 U. S. 548, 557, 25 L. Ed. 710; Railway Co. *v.* Philadelphia, 101 U. S. 528, 539, 29 L. Ed. 912; Stone *v.* Mississippi, 101 U. S. 814, 816, 25 L. Ed. 1079; Memphis, etc., R. Co. *v.* Railroad Comm'rs, 112 U. S. 609, 623, 28 L. Ed. 837; Georgia, etc., Banking Co. *v.* Smith, 128 U. S. 174, 182, 32 L. Ed. 377; Reagan *v.* Farmers' Loan, etc., Co., 154 U. S. 362, 392, 38 L. Ed. 1014, followed and reaffirmed in Reagan *v.* Mercantile Trust Co., 154 U. S. 413, 38 L. Ed. 1028; Reagan *v.* Mercantile Trust Co., 154 U. S. 418, 38 L. Ed. 1030; Reagan *v.* Farmers' Loan, etc., Co., 154 U. S. 420, 38 L. Ed. 1031. See the title CORPORATIONS, vol. 4, p. 677.

A charter incorporating a bank is a contract. Providence Bank *v.* Billings, 4 Pet. 514, 7 L. Ed. 939; Ohio Life Ins., etc., Co. *v.* Debolt, 16 How. 416, 437, 14 L. Ed. 997.

A bank, where the stock is owned by individuals, is a private corporation. Its charter is a legislative contract, and cannot be changed without its assent. State Bank *v.* Knoop, 16 How. 369, 14 L. Ed. 977.

Right to exact tolls.—A chartered right, namely, a right not merely to improve a river, but to exact tolls for the use of the improvement, created by an act of incorporation, is a contract which cannot be set aside by either party to it. Monongahela Nav. Co. *v.* United States, 148 U. S. 312, 344, 37 L. Ed. 463, citing Dartmouth College *v.* Woodward, 4 Wheat. 518, 4 L. Ed. 629.

52. How legislative contracts are made and entered into.—The Binghampton Bridge, 3 Wall. 51, 18 L. Ed. 137.

53. Construction of legislative contracts.—Home of the Friendless *v.* Rouse, 8 Wall. 430, 437, 19 L. Ed. 495.

54. See the title MARRIAGE.

55. Marriage contracts not protected by this clause.—Maynard *v.* Hill, 125 U. S. 190, 31 L. Ed. 654.

56. Unrestricted right of legislature with regard to divorces.—Hunt *v.* Hunt, 131 U. S., appx. clxv, 24 L. Ed. 1109.

"That the framers of the constitution did not intend to restrain the states in the regulation of their civil institutions,

has been held not to be a contract within the meaning of the contract clause of the federal constitution.[57]

2. STATE CONSTITUTIONS.—Nor is a state constitution a contract within the meaning of that clause of the constitution of the United States which prohibits the states from passing laws impairing the obligation of contracts. It is the fundamental law adopted by the people for their government in a state of the United States, and as such it may be construed and carried into effect by the courts of the state, without review by the federal supreme court, except in cases where what is done comes, or is supposed to come, in conflict with the constitution of the United States.[58] Therefore a state statute which violates a state constitution is not a "law impairing the obligation of contracts" within the meaning of that term as used in art. 1, § 10, clause 1, of the constitution of the United States.[59]

Q. Statutes Prescribing Penalties and Forfeitures.[60]—A provision that a party shall forfeit a particular sum, in case he does not perform an act required by law, has always, in the construction of statutes, been regarded not as

adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted. The provision of the constitution never has been understood to embrace other contracts than those which respect property, or some object of value, and confer rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the legislature to legislate on the subject of divorces." Opinion of Mr. Chief Justice Marshall in Dartmouth College *v.* Woodward, 4 Wheat. 629, 4 L. Ed. 629, approved in Newton *v.* Commissioners, 100 U. S. 548, 557, 25 L. Ed. 710; Maynard *v.* Hill, 125 U. S. 190, 210, 31 L. Ed. 654.

A general law regulating divorces from the contract of marriage, like a law regulating remedies in other case of breaches of contract, is not necessarily a law impairing the obligation of such contract. But a law prohibiting a breach of the marriage contract, by imposing a forfeiture of the rights acquired under it, or dissolving it, because the mutual obligations are no longer observed, is not a law impairing the obligation of a contract. Opinion of Story, J., in Dartmouth College *v.* Woodward, 4 Wheat. 518, 696, 4 L. Ed. 629.

Power of legislature to dissolve marriages.—Quære, whether the state has the power where neither of the parties assent, and where there has been no breach of the marital obligation, the legislature may annul the contract of marriage. Opinion of Story, J., in Dartmouth College *v.* Woodward, 4 Wheat. 518, 696, 697, 4 L. Ed. 629.

Nature of the contract.—"Whilst marriage is often termed by text-writers and in decisions of courts a civil contract—generally to indicate that it must be founded upon the agreement of the parties, and does not require any religious ceremony for its solemnization—it is something more than a mere contract. The consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created, which they cannot change." "It is not, then a contract within the meaning of the clause of the constitution which prohibits the impairing the obligation of contracts." Maynard *v.* Hill, 125 U. S. 190, 210, 31 L. Ed. 654.

Congressional restriction upon powers of territorial legislatures.—"The 14th section of the organic act of Oregon provides that the inhabitants of the territory shall be entitled to all the rights, privileges, and advantages granted and secured to the people of the territory of the United States northwest of the river Ohio by the articles of compact contained in the ordinance of July 13, 1787, for the government of the territory. The last clause of article two of that ordinance declares 'that no law ought ever to be made or have force in said territory that shall in any manner whatever interfere with or affect private contracts or engagements bona fide and without fraud previously formed.' This clause, though thus enacted, and made applicable to the inhabitants of Oregon, cannot be construed to operate as any greater restraint upon legislative interference with contracts than the provision of the federal constitution. It was intended, like that provision, to forbid the passage of laws which would impair rights of property vested under private contracts or engagements, and can have no application to the marriage relation." Maynard *v.* Hill, 125 U. S. 190, 214, 31 L. Ed. 654.

57. **City ordinances are not contracts.**—Pacific Electric R. Co. *v.* Los Angeles, 194 U. S. 112, 48 L. Ed. 896. See the title ORDINANCES.

58. **A state constitution is not a contract.**—Church *v.* Kelsey, 121 U. S. 282, 30 L. Ed. 960.

59. **Effect where state statutes violate state constitutions.**—Church *v.* Kelsey, 121 U. S. 282, 283, 30 L. Ed. 960.

60. See the title PENALTIES AND FORFEITURES.

a contract with the delinquent party, but as a punishment for an offense.[61] For example, a state statute providing for a penalty or forfeiture against a railroad company for failure to locate their road in the manner provided for in the act, is not a contract the obligation of which is impaired by an act of the legislature repealing the penalty.[62] So, also, it has been decided that a state legislature may make banking corporations subject to certain penalties for not performing their duties, such as paying their notes on demand in specie, and this does not violate any contract.[63]

R. Contracts and Property Rights Acquired from Great Britain.—All contracts and property rights acquired by corporations or individuals from the British government prior to the separation of the colonies from the mother country remain, subsist, and are protected under and by the constitution of the United States and of the respective states. The states have no right to impair the contract or property rights acquired from the British crown prior to the separation.[64]

S. Directions to Officers Contained in Statutes.—Mere executory directions to officers to perform acts, which may be revoked or suspended by a subsequent resolution, do not create contracts in the sense of the constitution.[65]

T. Guaranty.—An undertaking on the part of the state, in granting a charter to a banking corporation, to receive the notes of the bank in payment of debts due the state, is a contract within the meaning of that term as used in art. 1, § 10, of the federal constitution. It is a continuing guaranty by the state,

61. Statutes prescribing penalties and forfeitures.—Maryland *v.* Baltimore, etc., R. Co., 3 How. 534, 11 L. Ed. 714.

62. Rights of county under contract between state and railroad company that roads shall be located through said county.—The state of Maryland in 1836 passed a law directing a subscription of $3,000,000 to be made to the capital stock of the Baltimore and Ohio Railroad Company, with the following proviso: "That if the said company shall not locate the said road in the manner provided for in this act, then and in that case they shall forfeit $1,000,000 to the state of Maryland for the use of Washington County." The company having failed to locate its road through Washington County as required and the county commissioners of that county having instituted proceedings for the recovery of the $1,000,000 penalty, the state passed another act repealing so much of the prior act as made it the duty of the company to construct its road by the prescribed route, and remitting and releasing the penalty, and directing the discontinuance of any suit brought to recover the same. Upon objection that this statute impaired the obligation of contract, and divested interest in the county of Washington thereunder, was held that the original proviso requiring the location of the road through Washington County, and imposing the penalty in the event of the failure to so locate it, created no contract and vested no interest in Washington County or the commissioners thereof; that it was a question solely of state policy, which the state had a right to change at any time it should see fit, and neither the commissioners, nor the county, nor any one of its citizens acquired any separate or private interest under it, which could be maintained in a court of justice. Maryland *v.* Baltimore, etc., R. Co., 3 How. 534, 11 L. Ed. 714.

63. Penalties for failure of banks to perform their duties.—Planters' Bank *v.* Sharp, 6 How. 301, 331, 12 L. Ed. 447.

64. Contracts and property rights acquired from Great Britain.—Dawson *v.* Godfrey, 4 Cranch 321, 323, 2 L. Ed. 634; Terrett *v.* Taylor, 9 Cranch 43, 50, 3 L. Ed. 650; Dartmouth College *v.* Woodward, 4 Wheat. 518, 651, 707, 4 L. Ed. 629; Society for the Propagation of the Gospel *v.* New Haven, 8 Wheat. 464, 5 L. Ed. 662.

65. Mere executory direction to officer.—An act of congress which confirms a private land claim, and which directs that, in as much as the government has already devoted the land in question to other purposes, certificates of new location, to be located upon the public lands, but not specifying any particular land, shall be issued to the claimant, does not create a contract between the government and the claimant or confer upon him anything more than a mere expectancy. It is a mere executory direction to the officers of the government which may be revoked or suspended by a subsequent resolution, directing that such certificates be withheld until the further order of congress, without impairing the obligation of any contract or depriving the claimant of a valid right. United States *v.* Stockslager, 129 U. S. 470, 32 L. Ed. 785, distinguishing Fletcher *v.* Peck, 6 Cranch 87, 3 L. Ed. 162; McGee *v.* Mathis, 4 Wall. 143, 18 L. Ed. 314; Morrow *v.* Whitney, 95 U. S. 551, 24 L. Ed. 456.

that the notes shall be so received. Such a contract will be binding on an individual, and is not less so on a state.[66]

U. Licenses.[67]—Occupation and business taxes or licenses are not generally regarded as contracts within the meaning of art. 10, § 1, of the federal constitution.[68] Thus, permission granted by a city council to a waterworks company, to supply the city and its inhabitants with water, though put in the form of an ordinance, is in effect but a license, and hence is not protected by the contract clause of the federal constitution.[69]

IV. Laws Concerning Civil Institutions or Governmental Subjects.

A. In General.—The word contract, in its broadest sense would comprehend the political relation between the government and its citizens; would extend to offices held within a state for state purposes, and to many of those laws concerning civil institutions, which must change with circumstances and be modified by ordinary legislation, which deeply concerns the public, and which, to preserve good government, the public judgment must control.[70] But the framers of the constitution did not intend, by the constitutional prohibition against the passage of laws impairing the obligation of contracts, to restrain the states in the regulation of their civil institutions, adopted for internal government.[71]

B. Police Power.—For example, the police power is a governmental power which neither the legislature nor the people themselves can bargain away.[72]

66. Contracts of guaranty.—Woodruff *v.* Trapnall, 10 How. 190, 13 L. Ed. 383. See the title GUARANTY, ante, p. 580.

67. See the titles INTERSTATE AND FOREIGN COMMERCE; INTOXICATING LIQUORS; LICENSES. See ante, "Occupation and Business Taxes," III, D, 3, a, (2), cc.

68. A mere license by a state is always revocable. The power to revoke can only be restrained at all by an explicit contract upon good considerations to that effect. Christ Church *v.* Philadelphia County, 24 How. 300, 16 L. Ed. 602; Tomlinson *v.* Jessup, 15 Wall. 454, 24 L. Ed. 204; Humphrey *v.* Pegues, 16 Wall. 244, 21 L. Ed. 326; Doyle *v.* Continental Ins. Co., 94 U. S. 535, 540, 24 L. Ed. 148.

Licenses to foreign corporations are not contracts.—An insurance company conformed to the requirements of the act of the legislature of Georgia, and received from the comptroller general a certificate authorizing it to transact business in that state for one year from January 1, 1874. That act does not, expressly or by implication, limit or restrain the exercise of the taxing power of the state, or of any municipality. An ordinance of the city council of Augusta, passed January 5, 1874, imposed from that date an annual license tax "on each and every fire, marine, or accidental insurance company located, having an office or doing business within" that city. Held, that the ordinance is not in violation of that clause of the constitution of the United States which declares that "no state shall pass any law impairing the obligation of contracts." Home Ins. Co. *v.* City Council, 93 U. S. 116, 23 L. Ed. 825, citing License Tax Cases, 5 Wall. 462, 18 L. Ed. 497, approved in New Orleans Waterworks Co. *v.* Louisiana Sugar Ref. Co., 125 U. S. 18, 31 L. Ed. 607; Postal Tele. Cable Co. *v.* Charleston, 153 U. S. 692, 695, 38 L. Ed. 871.

69. License to water company held not a contract.—New Orleans Waterworks Co. *v.* Louisiana Sugar Ref. Co., 125 U. S. 18, 31 L. Ed. 607. See New Orleans City, etc., R. Co. *v.* New Orleans, 143 U. S. 192, 36 L. Ed. 121.

70. Laws concerning civil institutions.—Dartmouth College *v.* Woodward, 4 Wheat. 518, 627, 629, 4 L. Ed. 629; Aspinwall *v.* Commissioners, 22 How. 364, 377, 16 L. Ed. 296. See ante, "Marriage Contracts," III, O.

"The contracts which the constitution protects are those that relate to property rights, not governmental." Stone *v.* Mississippi, 101 U. S. 814, 820, 25 L. Ed. 1079.

71. States not restrained in regulation of civil institutions.—Aspinwall *v.* Commissioners, 22 How. 364, 365, 16 L. Ed. 296, following Dartmouth College *v.* Woodward, 4 Wheat. 518, 627, 4 L. Ed. 629; Stone *v.* Mississippi, 101 U. S. 814, 820, 25 L. Ed. 1079.

The principle there laid down in the Dartmouth College Case, and since maintained in the cases which have followed and been controlled by it, has no application where the statute in question is a public law relating to a public subject within the domain of the general legislative power of the state, and involving the public rights and public welfare of the entire community affected by it. The two classes of cases are separated by a broad line of demarcation. Newton *v.* Commissioners, 100 U. S. 548, 557, 25 L. Ed. 710; Dartmouth College *v.* Woodward, 4 Wheat. 518, 4 L. Ed. 629; East Hartford *v.* Hartford Bridge Co., 10 How. 511, 13 L. Ed. 518; Butler *v.* Pennsylvania, 10 How. 402, 13 L. Ed. 472.

72. Usually, where a contract, not contrary to public policy, has been entered

C. Power of State over Counties and Municipalities—1. In General.—The power of the states with respect to municipal corporations, is of the same absolute character.[73] With respect to the location, boundaries, and government of counties, county seats, municipalities, etc., the power of the state is absolute and unalienable. In all these cases there can be no contract and no irrepealable law, because they are governmental subjects. They involve public interests, and legislative acts concerning them are necessarily public laws. With regard to them, each succeeding legislature stands upon the same footing as its predecessors, and no one legislature has any power to bind another by any unalterable law or contract with reference thereto. In other words, the right of the legislature to do at all times whatever the varying circumstances and present exigencies may require in reference to the location of counties and municipalities cannot be bargained away.[74]

2. Location or Establishment of County Seats.—The location or establishment of a count seat at a certain place upon the terms and conditions which have been complied with, is not a contract within the meaning of the contract clause of the federal constitution.[75]

D. Exercise of Eminent Domain—1. In General.—The right of eminent domain is an element of sovereignty, and does not fall within the inhibition of § 10, art. 1, of the constitution of the United States which prohibits legislation impairing the obligation of contracts.[76] Hence, an unexecuted right of

into between parties competent to contract, it is not within the power of either party to withdraw from its terms without the consent of the other; and the obligation of such a contract is constitutionally protected from hostile legislation. Chicago, etc., R. Co. *v.* Nebraska, 170 U. S. 57, 72, 42 L. Ed. 948. See the title POLICE POWER.

73. Power of states with respect to cities and towns.—Cooley, Const. Lim., pp. 232, 342; Newton *v.* Commissioners, 100 U. S. 548, 559, 25 L. Ed. 710. See post, "Legislative Control over Municipal Corporations," VI, B.

74. Newton *v.* Commissioners, 100 U. S. 548, 559, 25 L. Ed. 710.

75. Location of county seat.—By an act of the legislature of Ohio, passed February 16, 1846, it was provided that, upon the fulfillment of certain terms and conditions by the proprietors or citizens of the town of Canfield in Mahoning County, the county seat should be "permanently established" at that town. Those terms and conditions having been complied with, the county seat was established accordingly. On April 9, 1874, the legislature passed an act providing for the removal of the county seat to Youngstown. Certain citizens of Canfield thereupon filed their bill setting forth that the act of 1846, and the proceedings thereunder, constituted, within the meaning of the constitution, an executed contract the obligation of which was impaired by the later act, and praying for a perpetual injunction against the contemplated removal. Held: 1. That no such contract existed. 2. That the act of 1846 was a public law relating to a public subject with respect to which the legislature which enacted it had no power to bind a subsequent one. 3. That if that act and the proceedings under it constituted a contract, it was satisfied on the part of the state by establishing the county seat at Canfield, with the intent that it should remain there. 4. That there was no stipulation that the county seat should remain there in perpetuity. 5. That the practical interpretation of the phrase "permanently established," which has been in long and frequent use in the statutes of Ohio with respect to county seats established otherwise than temporarily, is, though by no means conclusive, entitled to consideration. Newton *v.* Commissioners, 100 U. S. 548, 25 L. Ed. 710, approved in Crenshaw *v.* United States, 134 U. S. 99, 105, 33 L. Ed. 825; Illinois Cent. R. Co. *v.* Illinois, 146 U. S. 387, 459, 36 L. Ed. 1018.

In the interpretation of statutes like that of 1846 (supra), the rule is that, as against the state, nothing is to be taken as conceded but what is given in express and explicit terms, or by an implication equally clear. Newton *v.* Commissioners, 100 U. S. 548, 25 L. Ed. 710. See the title COUNTIES, vol. 4, p. 834.

76. The right of eminent domain a sovereign right.—Long Island Water Supply Co. *v.* Brooklyn, 166 U. S. 685, 41 L. Ed. 1165, citing West River Bridge Co. *v.* Dix, 6 How. 507, 12 L. Ed. 535; New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650, 29 L. Ed. 516; Adirondack R. Co. *v.* New York State, 176 U. S. 335, 44 L. Ed. 492. See the title EMINENT DOMAIN, vol. 5, p. 746.

The constitution of the United States cannot be so construed as to take away this right of the states. West River Bridge Co. *v.* Dix, 6 How. 507, 12 L. Ed. 535.

The exercise of the right of eminent domain does not interfere with the inviolability of contracts. All property is held

a railroad company to acquire lands by condemnation for the construction of its railroad, cannot be held to be in itself a vested right surviving the existence of the franchise or an unauthorized circumscription of its scope. Nor does the mere filing of a map of a proposed route take the case out of this rule.[77] But, of course, wherever the state or municipality undertakes to condemn the property of a corporation existing under a contract between itself and such corporation, such condemnation is subject to the rule of just compensation as in all other cases of the exercise of such power.[78]

2. Corporate Charters.—Thus, a corporate charter, like all private rights, is subject to the right of eminent domain in the state.[79] Because manifestly the

by tenure from the state, and all contracts are made subject to the right of eminent domain. Therefore the contract is not violated by the exercise of the right. West River Bridge Co. *v.* Dix, 6 How. 507, 12 L. Ed. 535, approved in Green *v.* Biddle, 8 Wheat. 1, 89, 5 L. Ed. 547; Planters' Bank *v.* Sharp, 6 How. 301, 331, 12 L. Ed. 447; New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650, 673, 29 L. Ed. 516.

Error to state court.—The illegal seizure of private property on the pretense of exercising the right of eminent domain, such act being an abuse of the power of the state under the sanction of a state law, is not a violation of the contract between the state and the owner of the land so seized, in the sense and meaning of the constitution. Such invasion and illegal seizure under the pretended exercise of the power of eminent domain is not sufficient to confer jurisdiction upon the federal supreme court upon the ground that the obligation of the grant from the state to the owner of property has been impaired. It rests with state legislatures and state courts to protect their citizens from injustice and oppression of this description. Mills *v.* St. Clair County, 8 How. 569, 585, 12 L. Ed. 1201.

77. Unexecuted right to condemn lands.—Adirondack R. Co. *v.* New York State, 176 U. S. 335, 44 L. Ed. 492.

Where the court of appeals of the state of New York said, "There is no property in a naked railroad route existing on paper only, that the state is obliged to pay for when it needs the land covered by that route for a great public use, and its officers are authorized to act by appropriate legislation," the United States supreme court held that it accepted the views of this court, and that the perpetual injunction granted by the state against a railroad company's taking certain lands by condemnation proceedings impaired the obligation of no contract between it and the railroad company. Adirondack R. Co. *v.* New York State, 176 U. S. 335, 346, 44 L. Ed. 492.

78. Compensation must always be made.—Long Island Water Supply Co. *v.* Brooklyn, 166 U. S. 685, 41 L. Ed. 1165, explaining and distinguishing Hall *v.* Wisconsin, 103 U. S. 5, 26 L. Ed. 302.

79. Corporate charters may be condemned.—Richmond, etc., R. Co. *v.* Louisa R. Co., 13 How. 71, 14 L. Ed. 55.

A charter incorporating a bridge company and vesting it with right to take tolls for a definite number of years, is a contract between the state and the company, but, like all private rights, it is subject to the right of eminent domain in the state. West River Bridge Co. *v.* Dix, 6 How. 507, 12 L. Ed. 535, approved in Long Island Water Supply Co. *v.* Brooklyn, 166 U. S. 685, 691, 41 L. Ed. 1165.

The right of the state to condemn and appropriate the property or franchise granted, under its power of eminent domain, is one of the implied conditions of all grants and charters made by the state; and when the state exercises its right of taking the property or franchise under this reserved power, it is not an impairment of the obligation, but the exercise of its rights on the part of the state under an essential and inseparable condition of the contract. West River Bridge Co. *v.* Dix, 6 How. 507, 533, 12 L. Ed. 535.

"If, in the judgment of the state, the public interests will be best subserved by an abandonment of the policy of granting exclusive privileges to corporations, other than railroad companies, in consideration of services to be performed by them for the public, the way is open for the accomplishment of that result, with respect to corporations whose contracts with the state are unaffected by that change in her organic law. The rights and franchises which have become vested upon the faith of such contracts can be taken by the public, upon just compensation to the company, under the state's power of eminent domain. West River Bridge Co. *v.* Dix, 6 How. 507, 531, 12 L. Ed. 535; Richmond, etc., R. Co. *v.* Louisa R. Co., 13 How. 71, 83, 14 L. Ed. 55; Boston Water-Power Co. *v.* Boston & Worcester Railroad, 23 Pick. 360, 393; Boston & Lowell Railroad Co. *v.* Salem & Lowell Railroad Co., 2 Gray, 1, 35. In that way the plighted faith of the public will be kept with those who have made large investments upon the assurance by the state that the contract with them will be performed." New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650, 673, 29 L. Ed. 516.

Crossings.—In accordance with the general rule that the exercise of the right of eminent domain does not interfere with

right of property in a chartered corporation is no more sacred and intangible than the right in the person of the citizen.[80]

3. PROPERTY OF WATER SUPPLY COMPANY.—The property of a water supply company existing and operating under a contract with a municipality, is private property and as much subject to be taken under eminent domain proceedings by the state as any other property; and such condemnation proceedings do not impair the obligation of any contract with the municipality.[81]

4. CONDEMNATION OF STOCK.—A statute of a state which provides for the condemnation of the minority shares in a corporation, does not impair the obligation of any contract.[82]

E. Public Offices and Officers—1. GENERAL POWER OF STATE LEGISLATURES.—The legislative power of a state, except so far as restrained by its own constitution, is at all times absolute with respect to all offices within its reach. It may at pleasure create or abolish them, or modify their duties. It may also shorten or lengthen the term of service. And it may increase or diminish the salary or change the mode of compensation.[83] Nor is it within the power of one legislature to prevent its successors from repealing an act creating a public office.[84]

the inviolability of contracts, it has been held that the legislature has power to authorize the construction of one railroad across another. Richmond, etc., R. Co. *v.* Louisa R. Co., 13 How. 71, 14 L. Ed. 55, following West River Bridge Co. *v.* Dix, 6 How. 507, 12 L. Ed. 535.

80. West River Bridge Co. *v.* Dix, 6 How. 507, 12 L. Ed. 535.

81. **Condemnation of property of water company.**—Long Island Water Supply Co. *v.* Brooklyn, 166 U. S. 685, 41 L. Ed. 1165.

The constitution of the United States (§ 10, art. 1) regarding the impairing of obligation of contracts, is not violated by a state statute authorizing a city to acquire by condemnation, the franchise, reservoir, machinery, etc., of a water company, even though the city has an unexpired contract with the water company to purchase water from it for 25 years as a fixed sum per hydrant. The constitutional guarantee of just compensation is not a limitation of the power to take, but a condition of its exercise. The prohibition against a law impairing the obligation of a contract does not stay the power of eminent domain. Long Island Water Supply Co. *v.* Brooklyn, 166 U. S. 685, 41 L. Ed. 1165.

82. **Condemnation of corporate stock.**—Where the public interest is best subserved by the improvement of railroad property, which can only be done by a purchasing company, and three-fourths of the shares are held by such company, a Connecticut statute providing for condemnation of the minority stock impairs the obligation neither of an existing lease of the property, nor of the contract with the stockholders. Offield *v.* New York, etc., R. Co., 203 U. S. 372, 51 L. Ed. 231. See the title STOCK AND STOCKHOLDERS.

83. **Power of legislature over offices and officers.**—Matter of Hennen, 13 Pet. 230, 10 L. Ed. 138; Butler *v.* Pennsylvania, 10 How. 402, 13 L. Ed. 472; Newton *v.* Commissioners, 100 U. S. 548, 559, 25 L. Ed. 710; Stone *v.* Mississippi, 101 U. S. 814, 25 L. Ed. 1079; United States *v.* McDonald, 128 U. S. 471, 32 L. Ed. 506; Crenshaw *v.* United States, 134 U. S. 99, 33 L. Ed. 825. See, generally, the title PUBLIC OFFICERS.

"Nor does the fact that a constitution may forbid the legislature from abolishing a public office or diminishing the salary thereof during the term of the incumbent, change its character or make it property. True, the restrictions limit the power of the legislature to deal with the office, but even such restrictions may be removed by constitutional amendment. In short, generally speaking, the nature of the relation of a public officer to the public is inconsistent with either a property or a contract right." Taylor *v.* Beckham, No. 1, 178 U. S. 548, 577, 44 L. Ed. 1187.

The view that a public office is not property has been generally entertained in this country. The decisions are numerous to the effect that public offices are mere agencies or trusts and that the incumbents thereof have no vested property or contract rights therein. Nor are the salary and emoluments property, secured by contract, except compensation for services actually rendered. Taylor *v.* Beckham, No. 1, 178 U. S. 548, 576, 577, 44 L. Ed. 1187. Accord: Butler *v.* Pennsylvania, 10 How. 402, 416, 13 L. Ed. 472; Crenshaw *v.* United States, 134 U. S. 99, 104, 33 L. Ed. 825; Blake *v.* United States, 103 U. S. 227, 26 L. Ed. 462.

The title to public office is not a contract.—In the absence of constitutional restraints, the state may discontinue the office in the midst of the term for which the incumbent was elected, or reduce the compensation attached thereto, except as to services already rendered. Butler *v.* Pennsylvania, 10 How. 402, 416, 13 L. Ed. 472.

84. **One legislature cannot tie the hands of its successor.**—Crenshaw *v.* United

2. Limitations of General Rule.—But though, as a general proposition, a state may abolish any public office created by a public law,[85] yet even with respect to those offices the circumstance may be such as to create an exception. When the legislature makes a contract with a public officer, as in case of a stipulated salary for his services during a limited period, this, during the limited period, is just as much a contract within the purview of the constitutional prohibition, as a like contract would be between two private citizens.[86]

3. Limiting, Enlarging or Repealing Authority of Public Officers.—The state legislature has power to enlarge, repeal and limit the authority of public officers.[87]

4. Discharge of Public Officers—a. *In General.*—An officer appointed for a definite time or during good behavior has no vested interest or contract right in his office of which congress cannot deprive him.[88]

b. *Army Officers.*—And in this respect of official tenure there is no difference in law between officers in the army and other officers of the government.[89]

5. Government Offices.—Although an office is an employment, it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to perform a service without becoming an

States, 134 U. S. 99, 108, 33 L. Ed. 825.

85. Generally states may abolish public offices.—Newton *v.* Commissioners, 100 U. S. 548, 559, 25 L. Ed. 710; Hall *v.* Wisconsin, 103 U. S. 5, 10, 26 L. Ed. 302.

Rights of professor in a state university —Ouster by state as violation of contract. —The plaintiff was elected as professor of mathematics in the University of Missouri, through the curators appointed by the state for governing that institution, and it was resolved that he should hold his office for six years from July 5, 1856, "subject to law." Held, that plaintiff accepted his office subject to the laws then in existence, and subject to any law which might thereafter be enacted, and that it was competent for the legislature to appoint new curators and vacate his office without any fault on his part being assigned, at any time it might see fit to do so regardless of whether the six years had expired or not. Head *v.* University, 19 Wall. 526, 22 L. Ed. 160.

86. When a public office may not be abolished.—"But even with respect to those offices the circumstances may be such as to create an exception. In Trustees of Dartmouth College *v.* Woodward, Mr. Justice Story said: 'It is admitted that the state legislatures have power to enlarge, repeal, and limit the authorities of public officers in their official capacities, in all cases where the constitutions of the states respectively do not prohibit them; and this, among others, for the very reason that there is no express or implied contract that they shall always during their continuance in office exercise such authorities. * * * But when the legislature makes a contract with a public officer, as in case of a stipulated salary for his services during a limited period, this, during the limited period, is just as much a contract within the purview of the constitutional prohibition, as a like contract would be between two private citizens.' 4 Wheat. 518, 694, 4 L. Ed. 629." Hall *v.* Wisconsin, 103 U. S. 5, 10, 26 L. Ed. 302.

87. The state legislature has power to enlarge, repeal and limit the authorities of public officers, in their official capacities in all cases where the constitution of the states respectively do not prohibit them; there being no express or implied contract that they shall always, during their continuance in office, exercise such authority. Opinion of Story, J., in Dartmouth College *v.* Wodward, 4 Wheat. 518, 694, 4 L. Ed. 629.

88. Discharge of public officers.—Crenshaw *v.* United States, 134 U. S. 99, 104, 33 L. Ed. 825.

"In substance, a statute under which one takes office, and which fixes the term of office at one year, or during good behavior is the same as one which adds to those provisions the declaration that the incumbent shall not be dismissed therefrom. Whatever the form of the statute, the officer under it does not hold by contract. He enjoys a privilege revocable by the sovereignty at will; and one legislature cannot deprive its successor of the power of revocation." Crenshaw *v.* United States, 134 U. S. 99, 108, 33 L. Ed. 825.

89. Army officers have no vested right to office.—Crenshaw *v.* United States, 134 U. S. 99, 107, 33 L. Ed. 825, citing Blake *v.* United States, 103 U. S. 227, 26 L. Ed. 462. See the title ARMY AND NAVY, vol. 2, p. 499.

The contract clause of the federal constitution is not infringed by the provision in the naval appropriation act of August 5, 1882, c. 391, § 1, directing the favorable discharge from the navy, with one years' pay, of those cadets not needed to fill any vacancy in the service happening during the year proceeding their graduation. Crenshaw *v.* United States, 134 U. S. 99, 33 L. Ed. 825.

officer.[90] A government office is different from a government contract. The latter, from its nature, is necessarily limited in its duration and specific in its objects. The terms agreed upon define the rights and obligations of both parties and neither may depart from them without the assent of the other.[91]

6. Salaries and Emoluments of Public Officers.—Except as to compensation for services actually rendered,[92] a state legislature may increase or diminish the salary of an officer or change the mode of compensation, because the salary and emoluments of an office are not property, secured by contract.[93] But when the legislature makes a contract with a public officer, as in case of a stipulated salary for his service during a limited period, this, during the period

90. **Government offices.**—Hall *v.* Wisconsin, 103 U. S. 5, 8, 26 L. Ed. 302; United States *v.* Maurice, 2 Brock. 96.

91. **Government office different from government contract.**—United States *v.* Hartwell, 6 Wall. 385, 18 L. Ed. 830; Hall *v.* Wisconsin, 103 U. S. 5, 8, 26 L. Ed. 302.

Surveying officers.—By an act of the legislature of Wisconsin entitled an "An act to provide for a geological, mineralogical, and argicultural survey of the state," approved March 3, 1857, the plaintiff was appointed one of the "commissioners" to assist in making the survey. Pursuant to the statute a contract was executed between the plaintiff and the government of the state, wherein it was stipulated that plaintiff was to perform the duties therein enumerated for a certain specified consideration, said contract "to continue till the third day of March, 1863," etc. It was held that the relation between plaintiff and the state was contractual, and not that of an office holder, and that the state should not impair the obligation of its contract by repealing the statute under the authority of which plaintiff was employed. Hall *v.* Wisconsin, 103 U. S. 5, 26 L. Ed. 302, citing Dartmouth College *v.* Woodward, 4 Wheat. 518, 694, 4 L. Ed. 629, distinguished in Missouri *v.* Walker, 125 U. S. 339, 344, 31 L. Ed. 769, cited in Long Island Water Supply Co. *v.* Brooklyn, 166 U. S. 685, 690, 41 L. Ed. 1165.

92. **Power of legislature as to salaries already earned.**—Butler *v.* Pennsylvania, 10 How. 402, 13 L. Ed. 472; Fisk *v.* Jefferson Police Jury, 116 U. S. 131, 29 L. Ed. 587.

"We do not assert the proposition that a person elected to an office for a definite term has any such contract with the government or with the appointing body as to prevent the legislature or other proper authority from abolishing the office or diminishing its duration or removing him from office. So, though when appointed the law has provided a fixed compensation for his services, there is no contract which forbids the legislature or other proper authority to change the rate of compensation for salary or services after the change is made, though this may include a part of the term of the office then unexpired." Fisk *v.* Jefferson Police Jury, 116 U. S. 131, 133, 29 L. Ed. 587; Butler *v.* Pennsylvania, 10 How. 402, 13 L. Ed. 472.

But, after the services have been rendered, under a law, resolution, or ordinance which fixes the rate of compensation, there arises an implied contract to pay for those services at that rate. This contract is a completed contract. Its obligation is perfect, and rests on the remedies which the law then gives for its enforcement. Fisk *v.* Jefferson Police Jury, 116 U. S. 131, 134, 29 L. Ed. 587.

Where an officer of a municipal corporation has acquired a vested contract right against the corporation to a stipulated compensation for services already rendered, and which, but for a subsequent constitutional amendment restricting the power of taxation, he could enforce, such amendment impairs the obligation of his contract, and, so far as his rights are concerned, is inoperative. Fisk *v.* Jefferson Police Jury, 116 U. S. 131, 29 L. Ed. 587, citing Von Hoffman *v.* Quincy, 4 Wall. 535, 18 L. Ed. 403; Louisiana *v.* Police Jury, 111 U. S. 716, 28 L. Ed. 574.

The promised compensation for services actually performed and accepted, during the continuance of the particular agency or office, may be claimed against the state both upon principle of contract and of equity. Butler *v.* Pennsylvania, 10 How. 402, 416, 13 L. Ed. 472.

Validity of statute abolishing fees of office as to the then incumbent.—Quære, whether the act of congress, abolishing the fees of justices of the peace, in the District of Columbia, can affect those justices who were in commission when the act was passed? United States *v.* More, 3 Cranch 159, 2 L. Ed. 397.

93. **Legislature may increase or diminish salaries.**—Butler *v.* Pennsylvania, 10 How. 402, 13 L. Ed. 472; United States *v.* Fisher, 109 U. S. 143, 27 L. Ed. 885; Taylor *v.* Beckham, No. 1, 178 U. S. 548, 44 L. Ed. 1187.

Salaries of canal commissioners.—In 1836 the state of Pennsylvania passed a law directing canal commissioners to be appointed annually, by the governor, and that their term of office should commence on the first of February in every year. The pay was four dollars per diem. In April, 1843, certain persons being then in office as commissioners, the legislature passed another law, providing, amongst

limited, is just as much a contract, within the purview of the constitutional prohibition, as a like contract would be between two private individuals.[94]

F. Control over Navigable Waters.—The rule that there can be no irrepealable contract upon governmental subjects, applies with very great force to the control of the soils and beds of navigable waters in the great public harbors, held by the people in trust for their common use and of common right as an incident to their sovereignty.[95]

V. Contracts of Private Individuals.

A. Form and Sufficiency of Contract.[96]—Of course where there is no contract to violate, there can be no impairment.[97] Moreover before the contract clause can be invoked to protect an agreement, it must have all the essentials of a valid contract,[98] such as a sufficient consideration, etc.[99] This for the reason that the term "contract" is used in the constitution in its ordinary sense as signifying the agreement of two or more minds, for considerations proceeding from one to the other, to do or not to do certain acts. Therefore mutual assent

other things, that the per diem should be only three dollars, the reduction to take effect upon the passage of the law; and that in the following October, the commissioners should be elected by the state. The commissioners then in office claimed the full allowance during their entire year, upon the ground that the state had no right to pass a law impairing the obligation of a contract. Held, that there was no contract between the state and the commissioners, within the meaning of the constitution of the United States, and that statute was not repugnant to the contract clause of the constitution. Butler *v.* Pennsylvania, 10 How. 402, 13 L. Ed. 472, approved in Crenshaw *v.* United States, 134 U. S. 99, 104, 33 L. Ed. 825.

Salaries of judicial officers.—The act of June 17th, 1880, entitled an act to regulate the salaries of chief justices and associate justices in the territories, fixing the annual salary of the chief justice of the territory of Wyoming at $3,000, was not a contract that the salary should not be reduced during his term of office. Butler *v.* Pennsylvania, 10 How. 402, 13 L. Ed. 472. Nor was there any provision of the constitution which forbade a reduction. Clinton *v.* Englebrecht, 13 Wall. 434, 20 L. Ed. 659. United States *v.* Fisher, 109 U. S. 143, 145, 27 L. Ed. 885, approved in Crenshaw *v.* United States, 134 U. S. 99, 107, 33 L. Ed. 825.

94. Opinion of Story, J., in Dartmouth College *v.* Woodward, 4 Wheat. 518, 694, 4 L. Ed. 629, approved in Hall *v.* Wisconsin, 103 U. S. 5, 26 L. Ed. 302.

95. Control over navigable waters cannot be contracted away.—"We hold, therefore, that any attempted cession of the ownership and control of the state in and over the submerged lands in Lake Michigan, by the act of April 16, 1869, was inoperative to affect, modify or in any respect to control the sovereignty and dominion of the state over the lands, or its ownership thereof, and that any such attempted operation of the act was annulled by the repealing act of April 15, 1873, which to that extent was valid and effective. There can be no irrepealable contract in a conveyance of property by a grantor in disregard of a public trust, under which he was bound to hold and manage it." Illinois Cent. R. Co. *v.* Illinois, 146 U. S. 387, 460, 36 L. Ed. 1018, following Newton *v.* Commissioners, 100 U. S. 548, 25 L. Ed. 710. See the title NAVIGABLE WATERS.

96. See the title CONTRACTS, vol. 4, p. 552.

97. No contract no impairment.—Although by the general law of Louisiana a father's guardianship of his minor children imports a mortgage on his immovable property in their favor, yet this mortgage does not make such a contract between the guardian to the minor as that the legislature may not, by special statute, authorize the father to sell his property divested of the tacit mortgage, especially where the proceeds are still preserved to the minors by an investment which the statute prescribes. Lobrano *v.* Nelligan, 9 Wall. 295, 19 L. Ed. 694.

98. See the title CONTRACTS, vol. 4, p. 552.

99. Necessity for consideration.—The contract must not be a mere gratuity. There must be a sufficient consideration, or, no matter how long the alleged right has been enjoyed, it may be resumed by the state at its pleasure. Christ Church *v.* Philadelphia County, 24 How. 300, 16 L. Ed. 602; Newton *v.* Commissioners, 100 U. S. 548, 561, 25 L. Ed. 710.

Mere executory contracts cannot be enforced at law, unless there be a valuable consideration to sustain them; and in this respect such contracts are not aided by the constitutional provisions against impairment; that provision does not create a new obligation, or give any efficacy to nude pacts. Opinion of Story, J., in Dartmouth College *v.* Woodward, 4 Wheat. 518, 683, 4 L. Ed. 629.

But where a voluntary gift or agreement

is of its very essence.[1] The prohibition of the federal constitution was intended to secure the observance of good faith in the stipulation of parties against any state action. Where a transaction is not based upon any assent of parties, it cannot be said that any faith is pledged with respect to it; and no case arises for the operation of the prohibition.[2]

B. How Obligation Impaired.—1. LAWS CHANGING THE CONSTRUCTION OF PRE-EXISTING STATUTES.—It is not within the constitutional power of the legislature to alter the rights of parties by changing the construction of pre-existing statutes.[3] Hence, it is not within the constitutional power of a state

has become executed, the rights acquired thereunder become as irrevocable as though founded upon a valuable consideration. Property conveyed without consideration becomes, as against the donor, the absolute property of the donee, and whether the donor be the state or a private individual, the right of the donee becomes vested and the state has no power to divest or impair the same. Opinion of Story, J., in Dartmouth College *v.* Woodward, 4 Wheat. 518, 683, 4 L. Ed. 629.

Legislative contracts.—There is no necessity of looking for the consideration for a legislative contract outside of the objects for which the corporation was created. "These objects were deemed by the legislature to be beneficial to the community, and this benefit constitutes the consideration for the contract, and no other is required to support it. This has been the well-settled doctrine of this court on this subject since the case of Dartmouth College *v.* Woodward, 4 Wheat. 518, 625, 4 L. Ed. 629." Home of the Friendless *v.* Rouse, 8 Wall. 430, 437, 19 L. Ed. 495.

1. Meaning of term "contract" in the constitution.—Chase *v.* Curtis, 113 U. S. 452, 28 L. Ed. 1038.

2. Mutual assent is necessary.—Louisiana *v.* New Orleans, 109 U. S. 285, 288, 27 L. Ed. 936, approved in Freeland *v.* Williams, 131 U. S. 405, 413, 33 L. Ed. 193, citing Garrison *v.* New York, 21 Wall. 196, 203, 22 L. Ed. 612.

It may be doubted whether a judgment not founded upon an agreement, express or implied, is a contract within the meaning of the constitutional prohibition. It is sometimes called by tax-writers a contract of record, because it establishes a legal obligation to pay the amount recovered, and, by fiction of law, where there is a legal obligation to pay, a promise to pay is implied. It is upon this principle, says Chitty, that an action in form ex contractu will lie on a judgment of a court of record. But it is not perceived how this fiction can convert the result of a proceeding, not founded upon an agreement express or implied, but upon a transaction wanting the assent of the parties, into a contract within the meaning of the clause of the federal constitution which forbids any legislation impairing its obligation. The purpose of the constitutional prohibition was the maintenance of good faith in the stipulations of parties against any state interference. If no assent be given to a transaction no faith is pledged in respect to it, and there would seem in such case to be no room for the operation of the prohibition. Garrison *v.* New York, 21 Wall. 196, 203, 22 L. Ed. 612.

"In Louisiana *v.* New Orleans, 109 U. S. 285, 288, 27 L. Ed. 936, in which it was contended on behalf of an owner of a judgment that it was a contract, and within the protection of the federal constitution as such, it was said that 'the term "contract" is used in the constitution in its ordinary sense, as signifying the agreement of two or more minds, for considerations proceeding from one to the other, to do, or not to do, certain acts. Mutual assent to its terms is of its very essence.' Where the transaction is not based upon any assent of parties it cannot be said that any faith is pledged with respect to it, and no case arises for the operation of the constitutional prohibition." Morley *v.* Lake Shore, etc., R. Co., 146 U. S. 162, 170, 36 L. Ed. 925, reaffirmed in Read *v.* Mississippi County, 188 U. S. 739, 47 L. Ed. 677; Gates *v.* Parmly, 191 U. S. 557, 48 L. Ed. 301. See ante, "Judgments," III, M.

3. Laws changing construction of statutes.—The rights of the parties must necessarily be determined by the law as it was when the contract was made, and it is not within the constitutional power of the legislature to alter the rights of parties by declaring that an existing law, under which those rights accrued, shall be construed in a different manner from that in which it was intended and constituted by the courts of the state at the time those rights accrued. Statutes declaring the construction of existing statutes can only operate prospectively as to rights previously acquired under the existing statute. Koshkonong *v.* Burton, 104 U. S. 668, 679, 26 L. Ed. 886.

In Stockdale *v.* Insurance Companies, 20 Wall. 323, 331, 22 L. Ed. 348, the federal supreme court, speaking by Mr. Justice Miller, said, that "both on principle and authority it may be taken to be true, that a legislative body may, by statute, declare the construction of previous statutes so as to bind the courts in reference to all transactions occuring after the passage of the law, and may, in many cases, thus furnish the rule to govern the courts in transactions that are past, provided no constitutional right of the party concerned is violated." Sedgwick, Contr. Stat. and

legislature to take from a plaintiff his right, whether arising on express or implied contract, to interest upon interest, if, when his contract is made and entered into, he had such right under the laws of the state.[4]

2. Laws Affecting Validity, Construction, Discharge and Enforcement—a. *In General.*—The principle that laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms, embraces alike those which affect its validity, construction, discharge, and enforcement.[5]

b. *Laws Construing Terms in Contracts.*—Thus, a statute declaring that the word "ton" should thereafter be held, in prior as well as subsequent contracts, to mean half or double the weight before prescribed, would affect the construction of the contract, and there can be no doubt that such a law passed by a state would be held void as impairing the obligation of pre-existing contracts.[6]

c. *Statute of Frauds.*—Likewise, a statute of frauds embracing pre-existing parol contracts not before required to be in writing, would affect the validity of pre-existing contracts, and there can be no doubt that such a law passed by a state would impair the obligation of the contract.[7]

d. *Laws Annexing Conditions to Its Enforcement*—(1) *In General.*—Where conditions are annexed to the enforcement of a contract subsequently to the making thereof, of such a nature as to substantially impair rights secured by the contract, such law will be held invalid.[8] In other words, a law which alters

Const. Law (2d Ed.), pp. 214, 227; Cooley, Const. Lim. 93, 94. Koshkonong *v.* Burton, 104 U. S. 668, 679, 26 L. Ed. 886.

4. Right to compound interest.—Koshkonong *v.* Burton, 104 U. S. 668, 26 L. Ed. 886.

5. Laws affecting validity, construction, discharge and enforcement.—Von Hoffman *v.* Quincy, 4 Wall. 535, 18 L. Ed. 403, approved in Edwards *v.* Kearzey, 96 U. S. 595, 24 L. Ed. 793.

Illustrations of this proposition are found, in the obligation of the debtor to pay interest after the maturity of the debt, where the contract is silent; in the liability of the drawer of a protested bill to pay exchange and damages, and in the right of the drawer and indorser to require proof of demand and notice. These are as much incidents and conditions of the contract as if they rested upon the basis of a distinct agreement. Von Hoffman *v.* Quincy, 4 Wall. 535, 550, 18 L. Ed. 403, citing Green *v.* Biddle, 8 Wheat. 1, 92, 5 L. Ed. 547; Ogden *v.* Saunders, 12 Wheat. 213, 231, 6 L. Ed. 606; Bronson *v.* Kinzie, 1 How. 311, 319, 11 L. Ed. 143; McCracken *v.* Hayward, 2 How. 608, 612, 11 L. Ed. 397.

6. Laws construing terms in contracts.—Von Hoffman *v.* Quincy, 4 Wall. 535, 552, 18 L. Ed. 403; Edwards *v.* Kearzey, 96 U. S. 595, 24 L. Ed. 793.

7. Statutes of frauds.—Von Hoffman *v.* Quincy, 4 Wall. 535, 552, 18 L. Ed. 403; Edwards *v.* Kearzey, 96 U. S. 595, 24 L. Ed. 793. See the title FRAUDS, STATUTE OF, ante, p. 451.

Thus, a law which declares that no action shall be brought whereby to charge a person upon his agreement to pay the debt of another, or upon an agreement relating to lands, unless the same be reduced to writing, impairs a contract made by parol, whether the law precede or follow the making of such contract; and if the argument that this law also impairs in the former case the obligation of the contract, be sound, it must follow that the statute of frauds, and all other statutes which in any manner meddle with contracts, impair their obligation, and are, consequently, within the operation of this section and article of the constitution. It will not do to answer that, in the particular case put and in others of the same nature, there is no contract to impair, since the pre-existing law denies all remedy for its enforcement, or forbids the making of it, since it is impossible to deny that the parties have expressed their will in the form of a contract, notwithstanding the law denies to it any valid obligation. Ogden *v.* Saunders, 12 Wheat. 213, 256, 6 L. Ed. 606.

8. Statute forbidding recovery on debts not returned for taxation.—When, on the 1st of January, 1870, suit was brought on a promissory note given in March, 1864, payable in March, 1865, a law passed in October, 1870, which enacted (by one section) that in all suits pending on any contract made before June 1st, 1865, it should not be lawful for the plaintiff to have a verdict unless he made it appear that all taxes chargeable by law on the same had "been duly paid for each year since the making of the same;" and enacted (by another section) that it should be a condition precedent to such recovery that "the said debt had been regularly given in for taxes and the taxes paid," and (by other sections) made other retrospective enactments—impaired the obligation of a

the terms of a contract by imposing new conditions, or dispensing with those expressed, is a law which impairs its obligation.[9] But every state has the power to prescribe the legal and equitable obligation to a contract to be made and executed within its jurisdiction. It may impose such conditions and restrictions upon the creditor as its judgment and policy may dictate in so far as concerns future contracts. Therefore a statute exempting property from judicial sale for the owner's debts, or forbidding its sale until an appraised valuation is bid, or extending the period of redemption, or of foreclosure of mortgage liens, is valid as to future contracts.[10]

(2) *Confirmation of Title to Land.*—An act repealing a statute which confirmed to certain claimants of land their title thereto upon their complying with certain conditions precedent, is not a law impairing the obligation of contracts, where the conditions have not been complied with at the time of the repeal.[11]

e. *Laws Affecting Discharge of Contracts.*—A statute providing that a previous contract of indebtment may be extinguished by a process of bankruptcy, would involve its discharge, and there can be no doubt that such a law passed by a state would impair the obligation of the contract.[12]

3. Laws Merely Affecting Value of Contract or Facility of Performance.—Nor does every statute which affects the value of a contract impair its obligation. It is one of the contingencies to which parties look now in making a large class of contracts, that they may be affected in many ways by state and national legislation. For such legislation demanded by the public good, however it may retroact on contracts previously made, and enhance the cost and difficulty of performance, or diminish the value of such performance to the other party, there is no restraint in the federal constitution, so long as the obligation of performance remains in full force.[13]

4. Laws Denying Negotiability to Choses in Action.—But a subse-

contract and was unconstitutional. Walker *v.* Whitehead, 16 Wall. 314, 21 L. Ed. 357.

9. Case of the State Tax on Foreign-Held Bonds. 15 Wall. 300, 320, 21 L. Ed. 179; New York, etc., R. Co. *v.* Pennsylvania, 153 U. S. 628, 647, 38 L. Ed. 846.

10. When conditions and restrictions may be imposed.—Bronson *v.* Kinzie, 1 How. 311, 321, 11 L. Ed. 143, cited and discussed in Gantly *v.* Ewing, 3 How. 707, 717, 11 L. Ed. 794; Hooker *v.* Burr, 194 U. S. 415, 422, 48 L. Ed. 1046.

11. Confirmation of title to land.—The Pennsylvania act of March 28, 1787, entitled "An act for ascertaining and confirming to certain persons, called Connecticut claimants, the lands claimed by them within the county of Luzerne," etc., and providing for the presentation of claims before commissioners, etc., did not constitute a valid contract between the state of Pennsylvania and such of the Connecticut claimants as had presented their claims before its repeal, since the lands in question did not belong to the state of Pennsylvania, but to private individuals, and the state could make no valid contract for transferring private property from one individual to another. Therefore, the suspension or repeal of said statutes was not in violation of the contract clause of the federal constitution. Vanhorne *v.* Dorrance, 2 Dall. 304, 320, 1 L. Ed. 391.

12. Laws affecting discharge of contracts.—Von Hoffman *v.* Quincy, 4 Wall. 535, 552, 18 L. Ed. 403; Edwards *v.* Kearzey, 96 U. S. 595, 24 L. Ed. 793. See the title BANKRUPTCY, vol. 2, p. 804.

13. Laws merely affecting value of contract.—Curtis *v.* Whitney, 13 Wall. 68, 70, 20 L. Ed. 513.

As said by the federal supreme court in Curtis *v.* Whitney, 13 Wall. 68, 70, 20 L. Ed. 513: "Nor does every statute which affects the value of a contract impair its obligation. It is one of the contingencies to which parties look now in making a large class of contracts, that they may be affected in many ways by state and national legislation." If parties wish to guard against contingencies of that kind they must do so by such clear and explicit language as will take their contracts out of the established rule that public grants, susceptible of two constructions, must receive the one most favorable to the public. Approved in Hamilton Gas Light, etc., Co. *v.* Hamilton City, 146 U. S. 258, 268, 36 L. Ed. 963.

Notice in case of tax sales.—A statute which requires the holder of a tax certificate made before its passage to give notice to an occupant of the land, if there be one, before he takes his tax deed, does not impair the obligation of the contract evidenced by the certificate. Curtis *v.* Whitney, 13 Wall. 68, 20 L. Ed. 513, cited and approved in Vance *v.* Vance, 108 U. S. 514, 518, 27 L. Ed. 808.

quent statute withdrawing the right of negotiation from choses in action, negotiable under prior statutes, is void under the contract clause.[14]

5. Laws Regulating Right of Disposition of Property.—It was said in one case that state statutes prohibiting all sales of certain kinds of property, or all sales by certain classes of persons or corporations, are forbidden by the federal constitution whenever they operate to impair the obligation of contracts. The power of the state to regulate and control the right of disposition of property, cannot be exercised to the extent of affecting the obligation of contracts.[15]

C. Redemption from Tax Sales.—The authority of the legislature to frame rules by which the right of redemption from tax sales may be rendered effectual cannot be questioned, and among the most appropriate and least burdensome of these is the notice required by statute.[16] Therefore, a statute which requires the holder of a tax certificate made before its passage to give notice to an occupant of the land, if there be one, before he takes his tax deed, does not impair the obligation of the contract evidenced by the certificate.[17]

D. Contracts of Stockholders.—Where the constitution of a state makes each stockholder in a corporation "individually liable for its debts, over and above the stock owned by him," in a further sum at least equal in amount to such stock, and the corporation incurs debts, and is then authorized to obtain subscriptions for new stock, but does not now obtain them, and the constitution of the state is afterwards amended and declares that "in no case shall any stockholder be individually liable in any amount over or above the amount of stock owned by him," and the corporation then, for the first time, issues the new stock, the holders of such new stock are not personally liable under the first constitution.[18]

14. Statute prohibiting transfer or assignment of notes, choses in action, etc.—The statute, applicable to existing contracts, and which forbids the transfer or assignment of promissory notes or other choses in action, which were transferrable and assignable by the payee at the time they were made, under the penalty of rendering such note or chose in action wholly invalid in case of its attempted transfer or assignment, is unconstitutional as impairing the obligation of contracts. Planters' Bank *v.* Sharp, 6 How. 301, 326, 328, 12 L. Ed. 447, approved in Pearsall *v.* Great Northern R. Co., 161 U. S. 646, 663, 40 L. Ed. 838. See, generally, the title BILLS, NOTES AND CHECKS, vol. 3, p. 292.

Where a bank was chartered with power to "have, possess, receive, retain, and enjoy to themselves and their successors, lands, rents, tenements, hereditaments, goods, chattels, and effects of what kind soever, nature, and quality, and the same to grant, demise, alien, or dispose of for the good of the bank," and also "to receive money on deposit and pay away the same free of expense, discount bills of exchange and notes, and to make loans," etc., and, in the course of business under this charter, the bank discounted and held promissory notes, and then the legislature of the state passed a law declaring that "it shall not be lawful for any bank in the state to transfer, by indorsement or otherwise, any note, bill receivable, or other evidence of debt; and if it shall appear in evidence, upon the trial of any action upon any such note, bill receivable, or other evidence of debt, that the same was transferred, the same shall abate upon the plea of the defendant,"—this statute conflicts with the constitution of the United States, and is void. Planters' Bank *v.* Sharp, 6 How. 301, 12 L. Ed. 447, distinguishing those cases in which it is held that states may pass insolvent laws, suspending or taking away actions on contracts, where the debtor goes into insolvency, on the ground that there another remedy is still given on the contract, before the commissioners of insolvency, and a payment is made pro rata, as far as means exist. But here there is no other remedy given, or any part payment made. Indeed, it seems that a forfeiture of all right to recover on the note, in any way, is inflicted here as a penalty for making that very transfer which the bank before, by the act of incorporation, as well as by the note itself, was authorized to make.

15. Laws regulating right to dispose of property.—Planters' Bank *v.* Sharp, 6 How. 301, 326, 12 L. Ed. 447.

16. Redemption from tax sales.—Curtis *v.* Whitney, 13 Wall. 68, 71, 20 L. Ed. 513, approved in Barrett *v.* Holmes, 102 U. S. 651, 657, 26 L. Ed. 291. See, generally, the title TAXATION.

17. Notice by holder of tax certificate.—Curtis *v.* Whitney, 13 Wall. 68, 20 L. Ed. 513.

18. Personal liability of stockholders.—Ochiltree *v.* Railroad Co., 21 Wall. 249, 22 L. Ed. 546. See post, "Statutory Liabilities," VII, K. See generally, the title STOCK AND STOCKHOLDERS.

E. Interest—1. In General.—Interest on a principal sum may be stipulated for in the contract itself, either to run from the date of the contract until it matures, or until payment is made; and its payment in such a case is as much a part of the obligation of contract as the principal, and equally within the protection of the constitution.[19] But if the contract itself does not provide for interest then, of course, interest does not accrue during the running of the contract, and whether, after maturity and a failure to pay, interest shall accrue, depends wholly on the law of the state, as declared by its statutes.[20] If the state declares that, in case of the breach of a contract, interest shall accrue, such interest is in the nature of damages, and, as between the parties to the contract, such interest will continue to run until payment, or until the owner of the cause of action elects to merge it into judgment.[21]

2. Interest on Judgments.—After the cause of action, whether a tort or a broken contract, not itself prescribing interest till payment, shall have been merged into a judgment, whether interest shall accrue upon the judgment is a matter not of contract between the parties, but of legislative discretion, which is free, so far as the constitution of the United States is concerned, to provide for interest as a penalty or liquidated damages for the nonpayment of the judgment, or not to do so.[22] When such provision is made by statute, the owner of the judgment, is, of course, entitled to the interest so prescribed until payment is received, or until the state shall, in the exercise of its discretion, declare that such interest shall be changed or cease to accrue. Should the statutory damages for nonpayment of a judgment be determined by a state, either in whole or in part, the owner of a judgment will be entitled to receive and have a vested right in the damages which shall have accrued up to the date of the legislative change; but after that time his rights as to interest as damages are, as when he first obtained his judgment, just what the legislature chooses to declare. He has no contract whatever on the subject with the defendant in the judgment, and his right is to receive, and the defendant's obligation is to pay, as damages, just what the state chooses to prescribe.[23] Interest allowed for nonpayment of judgments is in the nature of statutory damages, and if the plaintiff has received all such damages which accrued while his judgment remained unpaid, there is no change or withdrawal of remedy. His right was to collect such damages as the state, in its discretion, provided should be paid by defendants who should fail to promptly pay judgments which should be entered against them, and such right has not been destroyed or interfered with by legislation. The discretion exercised by the legislature in prescribing what, if any, damages shall be paid by way of compensation for delay in the payment of judgments, is based on reasons of public policy, and is altogether outside the sphere of private contracts.[24]

3. Usurious Interest.—Where the right to interest called for in a contract

19. **Rule where interest is stipulated for in the contract.**—Morley *v.* Lake Shore, etc., R. Co., 146 U. S. 162, 168, 36 L. Ed. 925, reaffirmed in Read *v.* Mississippi County, 188 U. S. 739, 47 L. Ed. 677; Gates *v.* Parmly, 191 U. S. 557, 48 L. Ed. 301. See ante, "Judgments," III, M. See the title INTEREST.

20. **Rule where contract does not stipulate for interest.**—Morley *v.* Lake Shore, etc., R. Co., 146 U. S. 162, 168, 36 L. Ed. 925, reaffirmed in Read *v.* Mississippi County, 188 U. S. 739, 47 L. Ed. 677; Gates *v.* Parmly, 191 U. S. 557, 48 L. Ed. 301.

21. Morley *v.* Lake Shore, etc., R. Co., 146 U. S. 162, 168, 36 L. Ed. 925, reaffirmed in Read *v.* Mississippi County, 188 U. S. 739, 47 L. Ed. 677; Gates *v.* Parmly, 191 U. S. 557, 48 L. Ed. 301.

22. **Rule where cause of action is merged into judgment.**—Morley *v.* Lake Shore, etc., R. Co., 146 U. S. 162, 168, 36 L. Ed. 925, reaffirmed in Read *v.* Mississippi County, 188 U. S. 739, 47 L. Ed. 677; Gates *v.* Parmly, 191 U. S. 557, 48 L. Ed. 301. See the title JUDGMENTS AND DECREES.

23. **State may regulate interest on judgments.**—Morley *v.* Lake Shore, etc., R. Co., 146 U. S. 162, 168, 36 L. Ed. 925. Reaffirmed in Read *v.* Mississippi County, 188 U. S. 739, 47 L. Ed. 677; Gates *v.* Parmly, 191 U. S. 557, 48 L. Ed. 301.

24. **Interest for nonpayment of judgment is in nature of statutory damages.**—Morley *v.* Lake Shore, etc., R. Co., 146 U. S. 162, 171, 36 L. Ed. 925, reaffirmed in Read *v.* Mississippi County, 188 U. S.

was legal at the time of entering into the contract, statutes making such rate subsequently usurious, and unenforcible, and operating retrospective as to existing contracts, are unconstitutional as impairing the obligation of those contracts.[25]

4. Interest upon Redemption of Property Sold at Foreclosure of Mortgages.—But a statute of a state reducing the rate of interest to be paid by a purchaser at a decretal sale, does not impair the obligation of any contract existing between the mortgagor and mortgagee.[26]

5. Right to Compound Interest.—It is not within the constitutional power of a state legislature to take from a plaintiff his right, whether arising on express or implied contract, to interest upon interest, if, when his contract is made and entered into, he had such right under the laws of the state.[27]

F. Appointment and Removal of Trustees.—A statute authorizing a chancellor to appoint a devisee of a life estate in a trust for life, remainder over, to execute the trust, does not violate the obligation of a contract.[28] But it does impair the obligation of contract, to substitute a new trustee in place of the one named in a railroad mortgage.[29]

739, 47 L. Ed. 677; Gates *v.* Parmly, 191 U. S. 557, 48 L. Ed. 301.

25. **Usury statutes operating retrospectively impair the contract.**—Sturges *v.* Crowninshield, 4 Wheat. 122, 207, 4 L. Ed. 529. See post, "Defenses," VII, E. See the title USURY.

26. **Interest upon redemption of property sold under mortgage.**—A statute of Illinois in force when a mortgage was executed, prescribing the rate of interest which the amount bid or paid by the purchaser should bear as between him and the party redeeming, has no relation to the contract between the mortgagor and mortgagee, hence a statute decreasing the rate of interest to which the decretal purchaser is entitled upon redemption on sales thereafter made, does not impair the obligation of the contract between the mortgagor and mortgagee; and where the mortgagee becomes the purchaser at such decretal sale, the rights of the purchaser are not of the essence of the mortgage contract, but depend upon the law in force at the time of the decretal sale. Connecticut, etc., Ins. Co. *v.* Cushman, 108 U. S. 51, 27 L. Ed. 648, approved in Barnitz *v.* Beverly, 163 U. S. 118, 128, 41 L. Ed. 93; Hooker *v.* Burr, 194 U. S. 415, 48 L. Ed. 1046, distinguished in Bradley *v.* Lightcap, 195 U. S. 1, 21, 49 L. Ed. 65. See post, "Mortgages," VII, Q, 3. See the title MORTGAGES AND DEEDS OF TRUST.

27. **Right to interest upon interest cannot be taken away.**—Koshkonong *v.* Burton, 104 U. S. 668, 26 L. Ed. 886.

Thus it is not within the constitutional power of the legislature to take from the holder of municipal bonds his right, whether arising on express or implied contract, to interest upon interest, if, when the coupons were executed and delivered, he or the then holder thereof had such right under the law of the state. Koshkonong *v.* Burton, 104 U. S. 668, 679, 26 L. Ed. 886.

28. **Validity of statute authorizing discharge of testamentary trustees and substitution of others.**—A New York statute authorized the chancellor of the state to discharge trustees named in a will (the purpose of the trust being to hold real estate and to pay the rents to a person named for life and on his death to dispose of the fee to his children), and to appoint new trustees in their place. The trustees having been discharged pursuant to the statute, it was competent for the legislature, by a supplemental act, to grant power to the chancellor to appoint, as such trustee, in the place of those discharged, the devisee of the life estate, and authorize him to execute the trust. It appearing that the act was passed with the knowledge and at the request of the original trustees, such discharge and substitution did not violate the obligation of a contract as to them; that as to the cestuis que trust, there was no matter of contract involved in the substitution of new trustees, and that they could not complain for the reason that the substitution of a new trustee did not defeat or impair the trust or divest their interest. Williamson *v.* Suydam, 6 Wall. 723, 738, 18 L. Ed. 967, followed in Williamson *v.* Moore, 154 U. S., appx., 557, 38 L. Ed. 1088. See the title TRUSTS AND TRUSTEES.

29. **Substitution of trustees in railroad mortgages.**—"Manifestly it is not in the power of the state legislature, without the consent of the cestuis que trust, to substitute a new trustee in place of the persons named in the mortgage. This would impair the obligation of the contract. The salability of railroad bonds depends in no inconsiderable degree upon the character of the persons who are selected to manage the trust. If these persons are of well-known integrity and pecuniary ability the bonds are more readily sold than if this were not the case. It is natural that it should be so, and on this

VI. Legislative Control over Public and Private Corporations.

A. Legislative Control over Private Corporations—1. CONTROL OVER FOREIGN CORPORATIONS.—There is no impairment of the obligation of a contract of employment between a foreign packing company and its resident manager, by a Georgia law imposing a license tax upon agents representing such business within the state; the power of taxation overriding any such contract.[30] And a national benevolent association, by the mere act of chartering a local state council, obtains no contract rights as against such council after the severance of the relation; and a Virginia act chartering such local body, under the same name it used as a council of the national order, with exclusive power to charter subordinate councils within the state, impairs no obligation of contract, even though the national body is thereby excluded from the state.[31] But the power of a state to impose conditions upon foreign corporations doing business in the state, cannot be exercised to discharge the citizens of the state from their contract obligations.[32] Moreover a state may preclude itself by statute from all right to impose any greater liabilities on foreign than on domestic corporations.[33]

2. INSURANCE COMPANIES.—A statute of a state which authorizes an insurance company, organized under the assessment plan, to change its business to the regular premium plan, does not impair the obligation of contracts with holders of policies issued under the old plan.[34]

3. REORGANIZATION OF CORPORATIONS.—The general railroad law of a state making provision for the creation of a new corporation upon the reorganization of a railroad by the purchaser at a foreclosure sale, does not constitute a contract protected by article 1, § 10, of the federal constitution.[35] Ac-

account the trustees usually appointed in this class of mortgages are persons of good reputation in the cities where these bonds are likely to sell. To change them is to change the contract in an important particular, and this cannot be done without the consent of the parties for whose benefit the trust was created." Knapp *v.* Railroad Co., 20 Wall. 117, 122, 22 L. Ed. 328.

30. Right to tax nonresident agents.—Kehrer *v.* Stewart, 197 U. S. 60, 49 L. Ed. 663. See ante, "Licenses," III, U. See the title FOREIGN CORPORATIONS, ante, p. 305.

31. Foreign benevolent associations.—National Council *v.* State Council, 203 U. S. 151, 51 L. Ed. 132.

32. Imposing conditions upon foreign corporations.—A membership was taken in a foreign loan association, forty-six shares being subscribed for, which entitled such member to a loan on making proper application. The subscriber made application for a loan. Later, a statute was enacted restricting the right of the association to do business in the state. Held, the member, in complying with the by-laws of the association, had acquired a right to a loan, and the obligation of the contract previously made by the loan association was not impaired by the passage of this statute. Bedford *v.* Eastern Building, etc., Ass'n, 181 U. S. 227, 240, 241, 45 L. Ed. 834.

33. Right to impose greater liabilities on foreign than on domestic corporations.—Where a New Jersey corporation is allowed to do business in Colorado, on the payment of a prescribed fee and issuance of proper certificate therefor, and statute provides that such corporation shall then be subject to all the liabilities of domestic corporations, held, that this constitutes a contract whereby the state agrees to impose no greater liabilities than on domestic corporations, during the statutory life of its domestic corporations; and that a subsequent statute imposing greater liabilities on foreign corporations impairs the obligation of such contract, although the right to alter, amend or annul corporate charters or privileges is made inalienable by the state constitution. American Smelting, etc., Co. *v.* Colorado, 204 U. S. 103, 51 L. Ed. 393, Fuller, C. J., and Harlan, Moody, and Holmes, JJ., dissenting.

34. State authorizing adoption of premium plan.—Where a Minnesota insurance company changed from the assessment to the premium plan, under authority of general state laws, and with the consent of a majority of the policy holders, the state law prohibiting any change that would impair contract obligations, and the original articles allowing amendment except as to one article not affected; held, that the original articles made no contract with policy holders to continue the old plan, and that the change made, not affecting the essential character of the business, did not impair the obligation of contract nor require the winding up of the business. Wright *v.* Minnesota Mut. Life Ins. Co., 193 U. S. 657, 48 L. Ed. 832. See the title INSURANCE.

35. Reorganization acts.—It cannot be admitted that a statutory provision for becoming a corporation in futuro can be-

cordingly a tax subsequently imposed upon the purchasers of a road sold under foreclosure as a condition precedent to the filing of the certificate of incorporation and becoming a body politic and corporate, does not impair the obligation of contract.[36]

4. Appropriation of Corporate Assets for Payment of Certain Debts.—The assets of an insolvent corporation are a fund for the payment of its debts, and if held by corporation may be taken on legal process; so a state law depriving creditors of this right and otherwise appropriating the assets, violates the obligation of their contracts.[37] And more especially is this true where the appropriation by the state is for the payment of its own debts.[38]

5. Exemption from Governmental Control—a. *In General.*—By the former decisions of the federal supreme court it was held that where one corporation is given the rights, powers and privileges of another, such legislative transfer of the privileges of the original corporation included an exemption from taxation or other governmental control granted by the state to the first corpora-

come a contract, in that sense of the clause of the constitution of the United States which prohibits state legislation impairing its obligation, until it has become vested as a right by an actual organization under it; and then it takes effect, as of that date and subject to such laws as may then be in force. People *v.* Cook, 148 U. S. 397, 408, 37 L. Ed 498, quoting from Memphis, etc., R. C *v.* Railroad Comm'rs, 112 U. S. 609, 2 L. Ed. 837. See the title CORPORATIONS, vol. 4, p. 786.

The act of 1874 (amended in 1876) in reference to reorganizing of railways sold under mortgages, and providing for the formation of new companies, is not such a contract between the plaintiff and the state, that a later statute of 1886, providing for the payment of a certain per cent of the capital stock, as a condition precedent to obtaining a charter, would be unconstitutional as impairing the obligation of a contract. People *v.* Cook, 148 U. S. 397, 37 L. Ed. 498, following Memphis, etc., R. Co. *v.* Railroad Comm'rs, 112 U. S. 609, 28 L. Ed. 837, followed in Grand Rapids, etc., R. Co. *v.* Osborn, 193 U. S. 17, 48 L. Ed. 598.

The provisions of an act to facilitate the reorganization of railroads sold under a mortgage, and to provide for the formation of new companies, do not constitute a contract on the part of the state with either the corporations, or the mortgagees, bondholders or purchasers at foreclosure sale. They are merely matters of law instead of contract, and the right therein conferred upon purchasers of the corporate properties and franchises sold under foreclosure of mortgages thereon, to reorganize and become a new corporation, is subject to the laws of the state existing or in force at the time of such reorganization and the grant of a new charter of incorporation. Memphis, etc., R. Co. *v.* Railroad Comm'rs, 112 U. S. 609, 28 L. Ed. 837; People *v.* Cook, 148 U. S. 397, 410, 37 L. Ed. 498.

A Michigan act of 1873 provided for the reorganization of railroads, and that such corporations should have "the same rights, powers and privileges as are or may be secured to the original company." Subsequently an act of 1884 provided for a uniform schedule for passenger carriage. Held, that where a new corporation bought up a railroad at foreclosure sale, such corporation had no contract rights by virtue of the act of 1873, but took subject to the general law; and the enforcement of the act of 1884 was not an impairment of the contract obligation. Grand Rapids, etc., R. Co. *v.* Osborn, 193 U. S. 17, 48 L. Ed. 598.

36. Conditions imposed upon reorganization.—People *v.* Cook, 148 U. S. 397, 37 L. Ed. 498.

37. Appropriation of corporate assets for payment of certain debts.—Curran *v.* Arkansas, 15 How. 304, 14 L. Ed. 705.

38. Appropriation for payment of state's own debts.—It was decided in Curran *v.* Arkansas, 15 How. 304, 14 L. Ed. 705, that if the capital of a state bank, incorporated with the usual banking powers of discount, deposit, and circulation, be withdrawn by the state, either for the payment of it own debts or for deposit in the state treasury, it is a violation of the pledges by which the capital of the bank, though derived from state resources or state obligations, was set apart and appropriated as the basis of the independent credit of the bank; and that a law passed to effect such a withdrawal or misappropriation impaired the validity of the contracts held by the creditors of the bank. Barings *v.* Dabney, 19 Wall. 1, 9, 22 L. Ed. 90.

An act of the legislature requiring the managers of an insolvent bank belonging to the state to hold its assets appropriated to the payment of certain specified debts, creates a trust in favor of the creditors holding said debts, and, if assented to by them, amounts to a contract with them to carry out said trust. Barings *v.* Dabney, 19 Wall. 1, 22 L. Ed. 90.

If such an act, however, has the effect to appropriate the assets of the bank to pay the debts of the state, to the preju-

tion.[39] But other and later cases have essentially modified the rule as stated in these cases. It is now the rule, notwithstanding early decisions and dicta to the contrary, that a statute authorizing or directing a grant or transfer of the privileges of a corporation, which enjoys immunity from taxation or regulation by the state, should not be interpreted as including that immunity.[40] Accordingly the general rule is that a special statutory exemption, such as immunity from taxation, from the right to determine rates of fare, or to control tolls, and the like, does not pass to a new corporation succeeding others by consolidation or purchase, in the absence of express direction to that effect in the statute.[41] And

dice of bill holders and other creditors of the bank, it is repugnant to that clause of the constitution which prohibits a law impairing the obligation of contracts and is void. Barings *v.* Dabney, 19 Wall. 1, 22 L. Ed. 90, following Curran *v.* Arkansas, 15 How. 304, 14 L. Ed. 705.

Such an act passed by the legislature of South Carolina, in reference to the assets of the bank of the state of South Carolina, declared to be void. Barings *v.* Dabney, 19 Wall. 1, 22 L. Ed. 90.

When stock wholly owned by state.—Though the stock of a bank be altogether owned by a state, if the bank is insolvent its assets cannot be appropriated by legislative act or otherwise to pay the debts of the state, as distinguished from the debts of the bank. Those assets are a trust fund first applicable to the payment of the debts of the bank. Barings *v.* Dabney, 19 Wall. 1, 22 L. Ed. 90, following Curran *v.* Arkansas, 15 How. 304, 14 L. Ed. 705.

39. Early rule as to personal nature of exemption from legislative control.—Humphrey *v.* Pegues, 16 Wall. 244, 21 L. Ed. 326; Southwestern R. Co. *v.* Georgia, 92 U. S. 676, 23 L. Ed. 762; Chesapeake, etc., R. Co. *v.* Virginia, 94 U. S. 718, 24 L. Ed. 310; Tennessee *v.* Whitworth, 117 U. S. 129, 135, 29 L. Ed. 830; Gunter *v.* Atlantic, etc., R. Co., 200 U. S. 273, 50 L. Ed. 477. As to exemptions from taxation, see the title TAXATION.

40. Present rule is that exemption is personal and does not pass to a successor.—Railroad Co. *v.* Commissioners, 103 U. S. 1, 26 L. Ed. 359; Chesapeake, etc., R. Co. *v.* Miller, 114 U. S. 176, 29 L. Ed. 121; Southwestern R. Co. *v.* Wright, 116 U. S. 231, 29 L. Ed. 626; Picard *v.* East Tennessee, etc., R. Co., 130 U. S. 637, 642, 32 L. Ed. 1051; Wilmington, etc., R. Co. *v.* Alsbrook, 146 U. S. 279, 36 L. Ed. 972; Keokuk, etc., R. Co. *v.* Missouri, 152 U. S. 301, 38 L. Ed. 450; Norfolk, etc., R. Co. *v.* Pendleton, 156 U. S. 667, 39 L. Ed. 574; Phœnix, etc., Ins. Co. *v.* Tennessee, 161 U. S. 174, 40 L. Ed. 660; Gulf, etc., R. Co. *v.* Hewes, 183 U. S. 66, 46 L. Ed. 86; Rochester R. Co. *v.* Rochester, 205 U. S. 236, 51 L. Ed. 784.

The federal supreme court has frequently had occasion to decide whether an immunity from the exercise of governmental power which has been granted by contract to one, has by legislative authority been vested in or transferred to another, and in the decisions certain general principles, which control in the determination of the cases at bar, have been established. Although the obligations of such a contract are protected by the federal constitution from impairment by the state, the contract itself is not property which, as such, can be transferred by the owner to another, because, being personal to him with whom it was made, it is incapable of assignment. The person with whom the contract is made by the state may continue to enjoy its benefits unmolested as long as he chooses, but there his rights end, and he cannot by any form of conveyance transmit the contract or its benefits to a successor. Morgan *v.* Louisiana, 93 U. S. 217, 23 L. Ed. 860; Wilson *v.* Gaines, 103 U. S. 417, 26 L. Ed. 401; Louisville, etc., R. Co. *v.* Palmes, 109 U. S. 244, 27 L. Ed. 922; Picard *v.* East Tennessee, etc., R. Co., 130 U. S. 637, 32 L. Ed. 1051; St. Louis, etc., R. Co. *v.* Gill, 156 U. S. 649, 39 L. Ed. 567; Norfolk, etc., R. Co. *v.* Pendleton, 156 U. S. 667, 39 L. Ed. 574; Rochester R. Co. *v.* Rochester, 205 U. S. 236, 247, 51 L. Ed. 784.

41. Immunity from taxation, change of rates, etc.—Georgia, etc., Banking Co. *v.* Smith, 128 U. S. 174, 32 L. Ed. 377; St. Louis, etc., R. Co. *v.* Gill, 156 U. S. 649, 39 L. Ed. 567; Norfolk, etc., R. Co. *v.* Pendleton, 156 U. S. 667, 39 L. Ed. 574; Covington, etc., Turnpike Road Co. *v.* Sandford, 164 U. S. 578, 41 L. Ed. 560; Minneapolis, etc., R. Co. *v.* Gardner, 177 U. S. 332, 44 L. Ed. 793; People's Gas Light, etc., Co. *v.* Chicago, 194 U. S. 1, 17, 48 L. Ed. 851. See the titles CORPORATIONS, vol. 4, p. 634; TAXATION.

Reduction of rates for gas.—An Illinois act of June 5, 1897, authorized the consolidation of gas companies doing business in the same town or city, but provided that any consolidated corporation should be subject to all the legal obligations resting upon the constituent companies prior to and consistent with such consolidation. Held, that an immunity from regulation, held by one company under its charter, is not extended to other companies by the fact of consolidation; and that a subsequent ordinance reducing rates did not impair the obligation of any contract as to them. People's Gas Light, etc., Co. *v.* Chicago, 194 U. S. 1, 48 L. Ed. 851.

Where a gas company is exempt from regulation under its charter, but after-

the same rule is applicable where the constituent companies are merely owned and operated by one of them as authorized by the legislature.[42] But the state, by virtue of the same power which created the original contract of exemption, may either by the same law, or by subsequent laws, authorize or direct the transfer of the exemption to a successor in title.[43]

b. *Rule of Construction.*—As in determining whether a contract of exemption from a governmental power was granted, so in determining whether its transfer to another was authorized or directed, every doubt is resolved in favor of the continuance of the governmental power, and clear and unmistakable evidence of the intent to part with it is required.[44] In that case the exemption is taken not by reason of the inherent right of the original holder to assign it, but by the action of the state in authorizing or directing its transfer.[45]

6. Right to Compel Railroads to Provide Station Facilities.—Although a railroad company has been permitted by the railroad commissioners to discontinue one of its stations at a certain place, nevertheless a subsequent statute directing the re-establishment of such depot at the same place does not impair the obligation of any contract rights which the company has acquired from the state.[46]

B. Legislative Control over Municipal Corporations—1. In General.—Municipal corporations, such as counties, cities and towns, are simply political subdivisions of the state, and exist by virtue of the exercise of the power of the state through its legislative department. The legislature can at any time terminate the existence of the corporation itself, and provide other and different means for the government of the district comprised within the limits of the former city. The city is the creature of the state.[47] In other words, concessions of

wards consolidates with other companies under a general law, and such exemption is held not to extend to such other companies by the fact of consolidation, the question whether a regulating ordinance impairs the obligation of contract as to the part of the system originally exempt, is not raised by a bill for relief as to the entire system, and which is not framed in the alternative. People's Gas Light, etc., Co. *v.* Chicago, 194 U. S. 1, 16, 48 L. Ed. 851.

42. People's Gas Light, etc., Co. *v.* Chicago, 194 U. S. 1, 17, 48 L. Ed. 851.

43. Congress may authorize transfer of exemption to corporate successor.—Rochester R. Co. *v.* Rochester, 205 U. S. 236, 248, 51 L. Ed. 784.

44. Rule of construction as to transfer of corporate exemptions.—Rochester R. Co. *v.* Rochester, 205 U. S. 236, 248, 51 L. Ed. 784. See the title CORPORATIONS, vol. 4, p. 691.

45. Rochester R. Co. *v.* Rochester, 205 U. S. 236, 248, 51 L. Ed. 784.

Duty of street railroads to repair between tracks.—A contract of immunity from the exercise of governmental power is personal to him with whom it is made, and is not transferred under an assignment of "estate, property, rights, privileges and franchises." Such assignment, where a selling railway company is dissolved by operation of law, is subject to the general law at the time of the transfer; and where a New York act requires railways to repair the street between its rails, and there is no authorized transfer of a contract exemption held by an assignor, there is no contract with the assignee which will be impaired by the enforcement of such act. Rochester R. Co. *v.* Rochester, 205 U. S. 236, 51 L. Ed. 784. See the title STREET RAILWAYS.

46. Statute compelling railroads to establish depots.—Railroad Co. *v.* Hamersley, 104 U. S. 1, 26 L. Ed. 629.

47. Legislature has full control over its political subdivisions.—Terrett *v.* Taylor, 9 Cranch 43, 3 L. Ed. 650; Dartmouth College *v.* Woodward, 4 Wheat. 518, 4 L. Ed. 629; East Hartford *v.* Hartford Bridge Co., 10 How. 511, 533, 534, 13 L. Ed. 518; United States *v.* Railroad Co., 17 Wall. 322, 21 L. Ed. 597; Commissioners *v.* Commissioners, 92 U. S. 307, 23 L. Ed. 552; Board of Comm'rs *v.* Lucas, 93 U. S. 108, 23 L. Ed. 822; Broughton *v.* Pensacola, 93 U. S. 266, 23 L. Ed. 896; New Orleans *v.* Clark, 95 U. S. 644, 24 L. Ed. 521; Mount Pleasant *v.* Beckwith, 100 U. S. 514, 25 L. Ed. 699; Mobile *v.* Watson, 116 U. S. 289, 29 L. Ed. 620; New Orleans *v.* New Orleans Waterworks Co., 142 U. S. 79, 35 L. Ed. 943; Williams *v.* Eggleston, 170 U. S. 304, 42 L. Ed. 1047; Covington *v.* Kentucky, 173 U. S. 231, 43 L. Ed. 679; Worcester *v.* Worcester Consol. St. R. Co., 196 U. S. 539, 548, 49 L. Ed. 591.

In respect to public corporations, which exist only for public purposes, such as counties, towns, cities, etc., the legislature may, under proper limitations, change, modify, enlarge, or restrain them; securing, however, the property for the use of those for whom, and at whose expense, it was purchased. Dartmouth College *v.*

power to municipal corporations are of high importance; but they are not contracts, and consequently are subject to legislative control within limitation, unless the legislature oversteps the limits of the constitution.[48] For example, the legislature of a state, in the exercise of its general legislative power over municipal corporations within the state, may abrogate the provision of a contract between a city and a street railroad company with the assent of the latter with

Woodward, 4 Wheat. 518, 663, 693, 694, 4 L. Ed. 629; Aspinwall *v.* Commissioners, 22 How. 364, 378, 16 L. Ed. 296.

A municipality being a mere agent of the state, stands in its governmental or public character in no contract relation with its sovereign, at whose pleasure its charter may be amended, changed or revoked, without the impairment of any constitutional obligation, while with respect to its private or proprietary rights and interests it may be entitled to the constitutional protection. New Orleans *v.* New Orleans Waterworks Co., 142 U. S. 79, 91, 35 L. Ed. 943, approved in Worcester *v.* Worcester Consol. St. R. Co., 196 U. S. 539, 551, 49 L. Ed. 591.

"Municipal corporations are mere instrumentalities of the state for the more convenient administration of local government. Their powers are such as the legislature may confer, and these may be enlarged, abridged, or entirely withdrawn at its pleasure. This is common learning, found in all adjudications on the subject of municipal bodies and repeated by textwriters. There is no contract between the state and the public that the charter of a city shall not be at all times subject to legislative control." Meriwether *v.* Garrett, 102 U. S. 472, 511, 26 L. Ed. 197.

As to municipal corporations, they may be controlled, and their constitution altered and amended by the governor in such manner as the public interest may require. Such legislative interferences cannot be said to impair the contract by which the corporation was formed, because, in reality, there is but one party to it. Opinion of Washington, J., in Dartmouth College *v.* Woodward, 4 Wheat. 518, 661, 4 L. Ed. 629, approved in East Hartford *v.* Hartford Bridge Co., 10 How. 511, 536, 13 L. Ed. 518.

"All persons who deal with such bodies are conclusively presumed to act upon knowledge of the power of the legislature. There is no such thing as a vested right held by any individual in the grant of legislative power to them. United States *v.* Railroad Co., 17 Wall. 322, 21 L. Ed. 597; Board of Comm'rs *v.* Lucas, 93 U. S. 108, 23 L. Ed. 822." Meriwether *v.* Garrett, 102 U. S. 472, 511, 26 L. Ed. 197.

Municipal corporations are incorporated for public, and not private objects; they are allowed to hold privileges or property only for public purposes. The members are not shareholders, nor joint partners in any corporate estate, which they can sell or devise to others, or which can be attached and levied on for their debts. Hence, generally, the doings between them and the legislature are in the nature of legislation rather than compact, and therefore are not to be considered as violated by subsequent legislative changes; being mere organizations for public purposes, they are liable to have their public purposes, rights and duties modified or abolished at any moment by the legislature. East Hartford *v.* Hartford Bridge Co., 10 How. 511, 534, 13 L. Ed. 518. Accord: Dartmouth College *v.* Wodward (Opinion of Washington, J.), 4 Wheat. 518, 659, 661, 663, 4 L. Ed. 629.

Chancellor Kent, in his Commentaries, says: "In respect to public or municipal corporations, which exist only for public purposes, as counties, cities and towns, the legislature, under proper limitations, has a right to change, modify, enlarge, restrain or destroy them; securing, however, the property for the uses of those for whom it was purchased. A public corporation, instituted for purposes connected with the administration of the government, may be controlled by the legislature, because such a corporation is not a contract within the purview of the constitution of the United States. In those public corporations there is, in reality, but one party, and the trustees or governors of the corporation are merely trustees for the public." 2 Kent's Com., 12th Ed., p. 303. Covington *v.* Kentucky, 173 U. S. 231, 242, 43 L. Ed. 679, citing New Orleans *v.* New Orleans Waterworks Co., 142 U. S. 79, 35 L. Ed. 943.

Judicial interpretation of an existing contract between a municipality and a waterworks company does not strip the legislature of the power to pass any laws changing this contract, so far as the rights of the city thereunder are concerned, as its contracts are subject to the will of the legislature. New Orleans *v.* New Orleans Waterworks Co., 142 U. S. 79, 91, 35 L. Ed. 943.

Grant of franchises to cities and towns.—In every legislative grant to a town or other municipality of some public privilege (as, for example, to maintain a ferry across a public navigable river), there must be implied a condition, that the power still remains or was reserved to the legislature to modify or discontinue the privilege in future as the public interest from time to time appear to require. East Hartford *v.* Hartford Bridge Co., 10 How. 511, 536, 13 L. Ed. 518.

48. Concessions to municipalities not contracts.—Mount Pleasant *v.* Beckwith, 100 U. S. 514, 533, 25 L. Ed. 699.

regard to the paving and repairing of its streets, and provide another and a different method for the paving and repairing of its streets through which the tracks of the railroad company are laid.[49]

2. Limitations of General Rule.—But a municipal corporation, in respect to its private or proprietary rights and interests, may be entitled to constitutional protection.[50] In other words, the power of the state to alter or destroy its county or municipal corporations is not greater than the power of the state to repeal its legislation. Exercise of the latter power has been repeatedly held to be ineffectual to impair the obligation of a contract.[51]

3. What Are Governmental Agencies.—An involuntary quasi public corporation such as a public road board, created to construct a public work and authorized to procure the means to accomplish the improvement upon private property, is purely a governmental agency, existing wholly for public purposes, and whose interests belong exclusively to the public; therefore, the power of the legislature over it is plenary.[52]

4. Power with Respect to Division of Towns and Alteration of Boundaries—a. *As Affecting Rights of Creditors.*—Text-writers concede almost unlimited power to the state legislatures in respect to the division of towns and the alteration of their boundaries, but they all agree that in the exercise of these powers they cannot defeat the rights of creditors nor impair the obligation of a valid contract.[53] And though state control over the division of the territory of the state into cities, towns, and districts, unless restricted by some constitutional limitation, is supreme, yet it cannot be exercised to annul another

49. Control of city over street railway companies. — Worcester *v.* Worcester Consol. St. R. Co., 196 U. S. 539, 49 L. Ed. 591.

In the contract between a city and a Massachusetts railway corporation, the latter is bound to do certain paving and repairing in the streets used, which requirement is changed by subsequent state legislation. Held, that since the city is but a creature of the state, such change does not impair the obligation of the contract where railway consents, although it might otherwise have had that effect as to the railway. Worcester *v.* Worcester Consol. St. R. Co., 196 U. S. 539, 49 L. Ed. 591. See the title STREET RAILWAYS.

50. When the contract clause protects a municipal corporation.—New Orleans *v.* New Orleans Waterworks Co., 142 U. S. 79, 35 L. Ed. 943; Worcester *v.* Worcester Consol. St. R. Co., 196 U. S. 539, 49 L. Ed. 591.

51. Graham *v.* Folsom, 200 U. S. 248, 253, 50 L. Ed. 464.

52. What are governmental agencies.—Essex Public Road Board *v.* Skinkle, 140 U. S. 334, 35 L. Ed. 446.

Public road board of New Jersey.—A New Jersey statute approved March 31, 1869, created the Essex public road board, the object of which act was to create a body charging it with the duty of constructing and maintaining a better class of public roads. The statute amongst other things provides for an assessment upon the abutting property holders, and further provides that where the assessments are not paid, the board shall have authority to sell such lands to any person who will take the same for the shortest period of time, not exceeding fifty years. But by a supplement to that act it was provided that such lands as were not bid off, when offered at the original sale, or at a resale, should be struck off to the road board by its corporate name, to be held by such board with all the rights and privileges of a purchaser at such sale. It was held that a subsequent act which provides a mode by which the assessment might be compounded, compromised, and discharged, and that this might be done when the real estate had not been sold to a bona fide purchaser other than the public road board, did not impair the obligation of a contract alleged to exist between the state and the road board, because it held no real estate in a proprietary or private sense. Its purchase was merely in perpetuation of the lien, and in aid of collection. The entire transaction was matter of law, and not of contract, and, as such, open to no constitutional objection. Essex Public Road Board *v.* Skinkle, 140 U. S. 334, 35 L. Ed. 446, citing Maryland *v.* Baltimore, etc., R. Co., 3 How. 534, 11 L. Ed. 714; Board of Comm'rs *v.* Lucas, 93 U. S. 108, 23 L. Ed. 822; Newton *v.* Commissioners, 100 U. S. 548, 25 L. Ed. 710, approved in New Orleans *v.* New Orleans Waterworks Co., 142 U. S. 79, 90, 35 L. Ed. 943.

53. Power of legislature with respect to boundaries.—Mount Pleasant *v.* Beckwith, 100 U. S. 514, 533, 25 L. Ed. 699, citing 1 Dillon on Municipal Corporations, § 128.

regulation of the constitution.[54] Therefore, the courts will not permit the obligation of a contract to be impaired by the abolition or change of the boundaries of a municipality.[55]

b. *Alteration of School Districts.*—The power of the state legislature to create and alter school districts is unquestioned, and there can be no impairing of the obligation of contract by a law redividing such districts, since no contract rights were obtained by virtue of prior legislation upon the subject.[56]

5. MUNICIPAL DEBTS—a. *In General.*—While the power of the legislature to alter or repeal an act chartering a municipal corporation is undoubted, yet this power cannot be exercised to the injury of creditors of the corporation or of persons holding contracts with it, especially when fully performed on their part so as to entitle them to the compensation provided for in the contract, but such repealing act must be considered in reference to the provisions of the constitution of the United States forbidding the states to pass laws impairing the obligation of contracts, because the same obligation to perform its contracts rests upon a municipal corporation as upon a natural person.[57]

54. Limitation on right to alter boundaries.—Mount Pleasant *v.* Beckwith, 100 U. S. 514, 533, 25 L. Ed. 699.

Institutions of the kind, whether called counties or towns, are the auxiliaries of the state in the important business of municipal rule, and cannot have the least pretension to sustain their privileges or their existence upon anything like a contract between them and the legislature of the state, because there is not and cannot be any reciprocity of stipulation, and their objects and duties are utterly incompatible with everything of the nature of compact. Instead of that, the constant practice is to divide large counties and towns, and to consolidate small ones, to meet the wishes of the residents, or to promote the public interests as understood by those who control the action of the legislature. Opposition is sometimes manifested but it is everywhere acknowledged that the legislature possesses the power to divide counties and towns at their pleasure and to apportion the common property and the common burdens in such manner as to them may seem reasonable and equitable. Commissioners *v.* Commissioners, 92 U. S. 307, 23 L. Ed. 552, quoted with approval in New Orleans *v.* New Orleans Waterworks Co., 142 U. S. 79, 90, 35 L. Ed. 943; Attorney General *v.* Lowrey, 199 U. S. 233, 240, 50 L. Ed. 167.

55. Abolition of township or change of boundaries as affecting bond holders.—The power of the state to alter or destroy its municipal corporations is not greater than the power of the state to repeal its legislation. Exercise of the latter power has been repeatedly held to be ineffectual to impair the obligation of a contract. The repeal of a law may be more readily undertaken than the abolition of townships or the change of their boundaries or the boundaries of counties. The latter may put on the form of a different purpose than the violation of a contract. But courts cannot permit themselves to be deceived. They will not inquire too closely into the motives of the state, but they will not ignore the effect of its action. Graham *v.* Folsom, 200 U. S. 248, 253, 50 L. Ed. 464.

Where a township issued bonds to aid a certain railroad which bonds have been declared valid obligations of the township, and the act authorizing their issuance provides for the levy of a tax and the manner of collecting it, etc., but subsequently the state destroys the corporate existence of the township and forms other territory out, it was held that the obligation of these contracts could not be impaired by the abolition of the township or a change of its boundaries, and that the proper state officers would be ordered to levy a tax to pay the bonds. Graham *v.* Folsom, 200 U. S. 248, 50 L. Ed. 464, following Mount Pleasant *v.* Beckwith, 100 U. S. 514, 25 L. Ed. 699; Mobile *v.* Watson, 116 U. S. 289, 29 L. Ed. 620, and distinguishing Heine *v.* Levee Comm'rs, 19 Wall. 655, 22 L. Ed. 223; Meriwether *v.* Garrett, 102 U. S. 472, 26 L. Ed. 197.

56. Right of legislature to alter school districts.—Attorney General *v.* Lowrey, 199 U. S. 233, 50 L. Ed. 167, citing Commissioners *v.* Commissioners, 92 U. S. 307, 23 L. Ed. 552. See the title SCHOOLS.

57. Charters of municipalities cannot be altered so as to injure creditors.—Mount Pleasant *v.* Beckwith, 100 U. S. 514, 25 L. Ed. 699; Mobile *v.* Watson, 116 U. S. 289, 304, 29 L. Ed. 620; Shapleigh *v.* San Angelo, 167 U. S. 646, 42 L. Ed. 310; Graham *v.* Folsom, 200 U. S. 248, 50 L. Ed. 464.

While the charter of a municipal corporation may be repealed at the pleasure of the legislature, where there is no inhibition to its action in the constitution of the state, the lawful contracts of the corporation, made whilst it was in existence, may be subsequently enforced against property held by it in its own right at the time of the repeal. In this respect its position is not materially different from that of a private individual, whose property must, upon his decease,

b. *Municipal Aid Bonds.*—When cities, towns or townships are empowered to take stock in or otherwise aid a railroad company, and they issue their bonds in payment of the stock taken, or to carry out any other authorized contract in aid of the railroad company, they are to that extent to be deemed private corporations, and their obligations are secured by all the guarantees which protect the engagements of private individuals.[58]

c. *Where Charter Is Repealed and Old Municipality Is Annexed.*—Although extensive powers are doubtless possessed by a state legislature to provide for the payment of the debts of a city which is legislated out of existence and annexed to another city, yet under the contract clause the legislature, in the exercise of any such power, cannot pass a valid law impairing the right of existing creditors of the old municipality.[59] So a change in the charter of a municipal corporation, in whole or part, by an amendment of its provisions, or the substitution of a new charter in place of the old one, should not be deemed, in the absence of express legislative declaration otherwise, to affect the identity of the corporation, or to relieve it from its previous liabilities.[60]

go to the satisfaction of his debts before those who succeed to his rights can share in its distribution. Meriwether *v.* Garrett, 102 U. S. 472, 511, 26 L. Ed. 197; Broughton *v.* Pensacola, 93 U. S. 266, 268, 23 L. Ed. 896.

It is well settled that the rights of antecedent contract creditors of a municipal corporation are protected by the constitution of the United States from an impairment of their contract by a constitutional provision subsequently adopted by the state. Shreveport *v.* Cole, 129 U. S. 36, 32 L. Ed. 589, citing Von Hoffman *v.* Quincy, 4 Wall. 535, 18 L. Ed. 403.

Cannot destroy existing securities.—Bonds having been issued and used by a city for purchasing land for a park, which was pledged for the payment of the bonds, held, that a subsequent act of the legislature authorizing a sale of a portion of the park, free of all liens existing by virtue of the original act, was in violation of the federal constitution, as impairing the obligation of contracts. Mount Pleasant *v.* Beckwith, 100 U. S. 514, 533, 25 L. Ed. 699.

Right of general creditors to exclusive use of taxes to pay their debts.—A state law which provides that a municipal corporation may compromise certain classes of its indebtedness at fifty cents on the dollar, and issue new securities in exchange for the old at that rate, and that the acceptance of the new securities shall operate to assign to the city all claims which those creditors had on back taxes due the city, and that all funds derived from the collection of said back taxes shall be applied to the liquidation of the new securities, does not impair the obligation of the city's contract with its general and unpreferred creditors having no lien upon back taxes owing to the city, nor deprive them of any vested right. Amy *v.* Shelby County Taxing Dist., 114 U. S. 387, 29 L. Ed. 172.

58. Municipal aid bonds cannot be impaired.—Broughton *v.* Pensacola, 93 U. S. 266, 23 L. Ed. 896; Mount Pleasant *v.* Beckwith, 100 U. S. 514, 25 L. Ed. 699; Mobile *v.* Watson, 116 U. S. 289, 304, 305, 29 L. Ed. 620; Shapleigh *v.* San Angelo, 167 U. S. 646, 42 L. Ed. 310; Graham *v.* Folsom, 200 U. S. 248, 50 L. Ed. 464. See the title MUNICIPAL, COUNTY, STATE AND FEDERAL AID.

Therefore the remedies for the enforcement of such obligations assumed by a municipal corporation, which existed when the contract was made, must be left unimpaired by the legislature, or, if they are changed, a substantial equivalent must be provided. It follows from this proposition that the remedies necessary to the collection of his debt, which the law gave the creditor of the city of Mobile, remain in force against the port of Mobile. Mobile *v.* Watson, 116 U. S. 289, 305, 29 L. Ed. 620.

59. Debts of city or town destroyed and annexed.—Mount Pleasant *v.* Beckwith, 100 U. S. 514, 25 L. Ed. 699, citing 1 Dillon on Mun. Corp. (2d Ed.), § 41; Von Hoffman *v.* Quincy, 4 Wall. 535, 554, 18 L. Ed. 403; Lee County *v.* Rogers, 7 Wall. 181, 184, 19 L. Ed. 160; Furman *v.* Nichol, 8 Wall. 44, 62, 19 L. Ed. 370; Butz *v.* Muscatine, 8 Wall. 575, 583, 19 L. Ed. 490; Mount Pleasant *v.* Beckwith, 100 U. S. 514, 25 L. Ed. 699; Mobile *v.* Watson, 116 U. S. 289, 29 L. Ed. 620; Graham *v.* Folsom, 200 U. S. 248, 50 L. Ed. 464.

60. Reorganization of municipal corporations.—Broughton *v.* Pensacola, 93 U. S. 266, 270, 23 L. Ed. 896.

The inhibition of the constitution, which preserves against the interference of a state the sacredness of contracts, applies to the liabilities of municipal corporations created by its permission; and although the repeal or modification of the charter of a corporation of that kind is not within the inhibition, yet it will not be admitted, where its legislation is susceptible of another construction, that the state has in this way sanctioned an evasion of or escape from liabilities, the creation of which it authorized. When, therefore, a new form is given to an old municipal

d. *Limiting Taxing Power of Municipalities*—(1) *In General.*—The power of taxation belongs exclusively to the legislative department of the government, and the extent to which it shall be delegated to a municipal body is a matter of discretion, and may be limited or revoked at the pleasure of the legislature.[61] But as the usual mode by which municipal bodies obtain the funds to meet their pecuniary engagements is taxation, when a contract is made upon the faith that taxes will be levied, legislation repealing or modifying the taxing power of the corporation, so as to deprive the holder of the contract of all adequate and efficacious remedy, is within the constitutional inhibition.[62] A statute, however, which merely provides that people residing within the territory recently annexed to a city, should not be taxed to pay any debts contracted by the city prior to the act authorizing the annexation, does not infringe the contract clause of the federal constitution, because "it was wholly prospective in its operation when it was passed. It furnished a rule only for the future, and it interfered with no vested

corporation, or such a corporation is reorganized under a new charter, taking in its new organization the place of the old one, embracing substantially the same corporators and the same territory, it will be presumed that the legislature intended a continued existence of the same corporation, although different powers are possessed under the new charter, and different officers administer its affairs; and, in the absence of express provision for their payment otherwise, it will also be presumed in such case that the legislature intended that the liabilities as well as the rights of property of the corporation in its old form should accompany the corporation in its reorganization. Broughton *v.* Pensacola, 93 U. S. 266, 269, 23 L. Ed. 896.

61. Limiting taxing power of municipalities.—Wolff *v.* New Orleans, 103 U. S. 358, 26 L. Ed. 395; Louisiana *v.* Pilsbury, 105 U. S. 278, 26 L. Ed. 1090; Louisiana *v.* New Orleans, 109 U. S. 285, 290, 27 L. Ed. 936.

A grant of the power of taxation, by the legislature of a state to a municipal corporation, does not form such a contract between the state and the township as is within the protection of the provision of the constitution of the United States which forbids the passage by a state of a law impairing the obligation of contracts. The conferring of such right of taxation is an exercise by the legislature of a public and governmental power. It is the imparting to the township of a portion of the power belonging to the state, which it can lawfully impart to a subordinate municipal corporation. But, from the very character of the power, it cannot be imparted in perpetuity, and is always subject to revocation, modification and control by the legislative authority of the state. The authorities to this effect are uniform. 1 Dillon on Mun. Corp., 3d Ed., §§ 61, 63, and cases there cited; Cooley on Const. Lim., 3d Ed. 192, 193, 237, and cases there cited; East Hartford *v.* Hartford Bridge Co., 10 How. 511, 534, 13 L. Ed. 518; State Bank *v.* Knoop, 16 How. 369, 380, 14 L. Ed. 977; United States *v.* Railroad Co., 17 Wall. 322, 329, 21 L. Ed. 597; Williamson *v.* New Jersey, 130 U. S. 189, 199, 32 L. Ed. 915, approved in New Orleans *v.* New Orleans Waterworks Co., 142 U. S. 79, 90, 35 L. Ed. 943.

Exemptions from taxation.—Where a state gave a township the right to tax a poor farm located within its limits, such provision did not become, by reason of a subsequent conveyance of the poor farm to a city corporation, a contract between that corporation and the township, the obligation of which was impaired by a statute exempting the property of all charitable institutions. Williamson *v.* New Jersey, 130 U. S. 189, 32 L. Ed. 915.

Where a state legislature authorizes a city to borrow money, issue bonds and tax all the property in the city to pay it, this is not a contract with the bond holders, that the state shall not afterwards exercise her power to modify the taxation, or exempt portions of the property from taxation. Gilman *v.* Sheboygan, 2 Black 510, 17 L. Ed. 305.

If such a contract existed and if a subsequent law exempted some portion of the property, it does not lie in the mouth of a property holder in the city to complain of it on the score of bad faith to the bond holders, if the bond holders themselves are silent. Gilman *v.* Sheboygan, 2 Black 510, 17 L. Ed. 305.

The fact that a state, by an act of her legislature, has stripped herself of any portion of her sovereignty, is not to be assumed unless the language used is too clear to admit of doubt. Gilman *v.* Sheboygan, 2 Black 510, 17 L. Ed. 305.

62. Limitation on right to abridge city's taxing power.—Louisiana *v.* Police Jury, 111 U. S. 716, 721, 28 L. Ed. 574.

Creditors cannot be delayed and hindered by infringing city's taxing power.—Wolff *v.* New Orleans, 103 U. S. 358, 26 L. Ed. 395; Fisk *v.* Jefferson Police Jury, 116 U. S. 131, 135, 29 L. Ed. 587; Cape Girardeau County Court *v.* Hill, 118 U. S. 68, 30 L. Ed. 73; Board of Liquidation *v.* Louisiana, 179 U. S. 622, 45 L. Ed. 347.

But legislation revoking the power of a municipal corporation to tax is subject to this qualification, which attends all state

rights, or with the obligation of any contract,"[63] although in the absence of such enactment, they would have been on an exact equality with all other owners of

legislation, that it "shall not conflict with the prohibitions of the constitution of the United States, and, among other things, shall not operate directly upon contracts of the corporation, so as to impair their obligation by abrogating or lessening the means of their enforcement. Legislation producing this latter result, not indirectly as a consequence of legitimate measure taken, as will sometimes happen, but directly by operating upon those means, is prohibited by the constitution, and must be disregarded—treated as if never enacted—by all courts recognizing the constitution as the paramount law of the land. This doctrine has been repeatedly asserted by this court when attempts have been made to limit the power of taxation of a municipal body, upon the faith of which contracts have been made, and by means of which alone they could be performed. * * * However great the control of the legislature over the corporation while it is in existence, it must be exercised in subordination to the principle which secures the inviolability of contracts." Louisiana *v.* Pilsbury, 105 U. S. 278, 300, 301, 26 L. Ed. 1090, citing Wolff *v.* New Orleans, 103 U. S. 358, 26 L. Ed. 395.

When a state has authorized a municipal corporation to contract, and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied. The state, and the corporation, in such cases, are equally bound. Von Hoffman *v.* Quincy, 4 Wall. 535, 554, 18 L. Ed. 403; Riggs *v.* Johnson County, 6 Wall. 166, 194, 18 L. Ed. 768; Weber *v.* Lee Co., 6 Wall. 210, 18 L. Ed. 781; Wolff *v.* New Orleans, 103 U. S. 358, 26 L. Ed. 395; Louisiana *v.* Pilsbury, 105 U. S. 278, 301, 26 L. Ed. 1090; Graham *v.* Folsom, 200 U. S. 248, 252, 50 L. Ed. 464.

Issue of negotiable securities.—"When authority is granted by the legislative branch of the government to a municipality, or a subdivision of a state, to contract an extraordinary debt by the issue of negotiable securities the power to levy taxes sufficient to meet, at maturity, the obligation to be incurred, is conclusively implied, unless the law which confers the authority, or some general law in force at the time, clearly manifests a contrary legislative intention. The power to tax is necessarily an ingredient of such a power to contract;" and cannot subsequently be repealed to the prejudice of the holders of such securities. Scotland County Court *v.* United States, 140 U. S. 41, 46, 35 L. Ed. 351, citing Ralls County Court *v.* United States, 105 U. S. 733, 735, 26 L. Ed. 1220; Loan Ass'n *v.* Topeka, 20 Wall. 655, 22 L. Ed. 455; United States *v.* New Orleans, 98 U. S. 381, 25 L. Ed. 225; United States *v.* County of Macon, 99 U. S. 582, 25 L. Ed. 331.

"It follows from this that all laws of the state which have been passed since the bonds in question were issued, purporting to take away from the county courts the power to levy taxes necessary to meet the payments, are invalid, and that, under the well-settled rule of decision in this court, the circuit court has authority by mandamus to require the county court to do all the law, when the bonds were issued, required it to do to raise the means to pay the judgment, or something substantially equivalent." Ralls County Court *v.* United States, 105 U. S. 733, 738, 26 L. Ed. 1220.

Distinguished from exemption from taxation.—The restraint upon the legislature by the contract clause of the constitution, against revoking or limiting the power of taxation delegated by it to municipal bodies as the means of carrying out the purposes of their incorporation or purposes designed for their benefit, is a different matter from that of exempting property from taxation; and even in the latter case it has been adjudged in repeated instances that one legislature can bind its successors. The restraint in no respect impairs the taxing power of the existing legislature or of its successors, or removes any property from its reach. Wolff *v.* New Orleans, 103 U. S. 358, 368, 26 L. Ed. 395.

63. Statutes exempting inhabitants of annexed territory are valid.—In March and July, 1867, A. entered into contracts with the city of Memphis to pave certain streets. Most of the work was done after the passage of an act of the legislature of Tennessee of December 3, 1867, by which contiguous territory was annexed, and designated as the ninth and tenth wards of the city, but none of it was done in them. An act of the legislature of December 1, 1869, declared that the people residing within the limits of them should not be taxed to pay any part of the city debt contracted prior to the passage of said act of 1867. In March, 1875, A., in whose favor a decree against the city for the money due him for work done under his contracts had been rendered, obtained a mandamus commanding the city to levy a tax for its satisfaction. Held: 1. That the debt which the decree represents was contracted in March and July, 1867. 2. That the purpose of the act of 1869 was to relieve that territory from municipal obligations previously incurred for objects in which it had no interest when the obligations were assumed, and in regard to which it had no voice. 3. That no contract relation ever existed between A. and the people of that territory. 4. That the

property in the city, equally entitled with them to all municipal rights and privileges, and equally subject to all municipal burdens and charges.[64]

(2) *Withdrawal of Right to Tax to Discharge Municipal Securities.*—Where a statute has authorized a municipal corporation to issue bonds and to exercise the power of local taxation in order to pay them, and persons have bought and paid value for bonds issued accordingly, the power of taxation thus given is a contract within the meaning of the constitution, and cannot be withdrawn until the contract is satisfied. The state and the corporation in such a case are equally bound.[65] This rule has been invoked most frequently in the case of bonds issued by cities and towns to aid in the construction of railroads.[66]

(3) *Withdrawal of Right to Tax to Liquidate the Public Debt.*—A funding act which pledges a levying of an annual tax to pay principal and interest of the bonds supposed to be issued thereunder, becomes, as to such provision, a contract between the state and all persons accepting the bonds issued pursuant thereto. A subsequent act discontinuing the tax is an impairment of the obligation of the contract with the bondholders.[67]

act of 1869 interfered, therefore, with no vested rights, impaired the obligation of no contract, and violated no provision of the constitution of that state in regard to taxation. United States *v.* Memphis, 97 U. S. 284, 24 L. Ed. 937.

64. United States *v.* Memphis, 97 U. S. 284, 24 L. Ed. 937, citing Dillon on Municipal Corporations. See the title MUNICIPAL CORPORATIONS.

65. Withdrawal of right to tax to discharge municipal securities.—Von Hoffman *v.* Quincy, 4 Wall. 535, 18 L. Ed. 403, approved in White *v.* Hart, 13 Wall. 646, 653, 20 L. Ed. 685; Rees *v.* Watertown, 19 Wall. 107, 120, 22 L. Ed. 72; Wolff *v.* New Orleans, 103 U. S. 358, 26 L. Ed. 395; Louisiana *v.* Pilsbury, 105 U. S. 278, 301, 26 L. Ed. 1090; Shreveport *v.* Cole, 129 U. S. 36, 32 L. Ed. 589; Graham *v.* Folsom, 200 U. S. 248, 252, 50 L. Ed. 464. See, generally, the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.

Where the resource for the payment of the bonds of a municipal corporation is the power of taxation existing when the bonds were issued, any law which withdraws or limits the taxing power and leaves no adequate means for the payment of the bonds is forbidden by the constitution of the United States, and is null and void. Von Hoffman *v.* Quincy, 4 Wall. 535, 18 L. Ed. 403; Edwards *v.* Kearzey, 96 U. S. 595, 24 L. Ed. 793; Louisiana *v.* Pilsbury, 105 U. S. 278, 26 L. Ed. 1090; Ralls County Court *v.* United States, 105 U. S. 733, 26 L. Ed. 1220; Louisiana *v.* New Orleans, 109 U. S. 285, 27 L. Ed. 936; Mobile *v.* Watson, 116 U. S. 289, 305, 29 L. Ed. 620; Graham *v.* Folsom, 200 U. S. 248, 50 L. Ed. 464.

A subsequently passed statute which repeals or restricts the power of taxation so previously given, is, in so far as it affects bonds bought and held under the circumstances mentioned, a nullity. Von Hoffman *v.* Quincy, 4 Wall. 535, 18 L. Ed. 403.

Whenever the charter of a city, at the time of the issue of bonds, made it the duty of the city authorities to levy and collect the amount, when reduced to judgment, like other city charges, a subsequent act of the legislature prohibiting the city from levying such a tax would be repugnant to the constitution. Mount Pleasant *v.* Beckwith, 100 U. S. 514, 533, 25 L. Ed. 699; Soutter *v.* City of Madison, 15 Wis. 30.

The contract by which, under authority of the legislature, the city of Mobile agreed to levy a special tax for the payment of the principal and interest of the class of bonds to which those held by the plaintiff belong is still in force, and its obligation rests upon its legal successor, the port of Mobile. All laws passed since the making of the contract, whose purpose or effect is to take from the city of Mobile, or its successor, the power to levy the tax and pay the bonds, are invalid and ineffectual, and will be disregarded. Mobile *v.* Watson, 116 U. S. 289, 305, 29 L. Ed. 620, citing Wolff *v.* New Orleans, 103 U. S. 358, 368, 26 L. Ed. 395; Ralls County Court *v.* United States, 105 U. S. 733, 738, 26 L. Ed. 1220, approved in Graham *v.* Folsom, 200 U. S. 248, 252, 50 L. Ed. 464.

66. Municipal aid bonds.—Von Hoffman *v.* Quincy, 4 Wall. 535, 18 L. Ed. 403; Wolff *v.* New Orleans, 103 U. S. 358, 26 L. Ed. 395; Cape Girardeau County Court *v.* Hill, 118 U. S. 68, 30 L. Ed. 73. See the title MUNICIPAL, COUNTY, STATE AND FEDERAL AID.

67. Withdrawal of right to tax to pay public debt.—Louisiana *v.* Pilsbury, 105 U. S. 278, 26 L. Ed. 1090; Board of Liquidation *v.* Louisiana, 179 U. S. 622, 45 L. Ed. 347. See ante, "Funding State Debts," III. D, 3, a.

The state of Louisiana having provided for the funding of the debt of the consolidated city of New Orleans and pledged the levying of an annual tax for the purpose of paying the principal and interest of the bonds, a subsequent statute repealing the tax and providing for

(4) *Mandamus.*—If a city or town, after incurring indebtedness, refuses to levy a tax to discharge such indebtedness, any creditor may sue out a writ of mandamus directing a levy to pay the debt.[68] And if such remedy is taken away by a subsequent statute, leaving the creditor with no other complete and adequate remedy, this constitutes an impairment of the contract.[69]

e. *Change in Subjects of Taxation.*—But there is no contract between the state and a city or township, that will prevent the legislature in its discretion, after a debt has been incurred by such city or town, from changing or enlarging the subjects of taxation. It is competent for the legislature at any time to make provision for such obligation to be met by taxation upon any kind of property within the township or city that is subject to taxation for public purposes.[70]

f. *Rule Where Municipal Corporation Is Abolished or Destroyed by Statute* —(1) *In General.*—Where a municipal corporation has incurred indebtedness, and afterwards its municipal organization is destroyed and its territory added to other municipalities or counties, the court will find some means of levying a tax to discharge the debt, although under the constitution and laws of the state, the

the issuance of "premium bonds" to be paid at a time to be determined by chance in a lottery, is unconstitutional and void. Louisiana *v.* Pilsbury, 105 U. S. 278, 26 L. Ed. 1090.

That the bondholders have for some years acquiesced without objection in the raising of the stipulated interest by other means is also immaterial and does not justify the state in repealing the special tax provision. Louisiana *v.* Pilsbury, 105 U. S. 278, 26 L. Ed. 1090.

The special tax which the state pledges itself to levy, or to cause to be levied, and upon the faith of which the bonds are issued, is a security possessed by the bond holders which cannot afterwards be severed from their contract without violating its stipulations any more than a mortgage executed as security for a loan could be repudiated as forming no part of the transaction. Louisiana *v.* Pilsbury, 105 U. S. 278, 288, 26 L. Ed. 1090.

That the special tax pledged was to be levied upon the slaves and real estate, and that the slaves have been freed, is immaterial and does not justify the repeal of the tax. Louisiana *v.* Pilsbury, 105 U. S. 278, 26 L. Ed. 1090.

68. Mandamus to compel levy of tax.—Von Hoffman *v.* Quincy, 4 Wall. 535, 18 L. Ed. 403; Wolff *v.* New Orleans, 103 U. S. 358, 26 L. Ed. 395; Louisiana *v.* Police Jury, 111 U. S. 716, 28 L. Ed. 574; Cape Girardeau County Court *v.* Hill, 118 U. S. 68, 30 L. Ed. 73. See the title MANDAMUS.

It is the duty of the corporation to impose and collect the taxes in all respects as if the second statute had not been passed. Von Hoffman *v.* Quincy, 4 Wall. 535, 18 L. Ed. 403, approved in Louisiana *v.* Pilsbury, 105 U. S. 278, 301, 26 L. Ed. 1090.

If it does not perform this duty, a mandamus will lie to compel it. Von Hoffman *v.* Quincy, 4 Wall. 535, 18 L. Ed. 403.

69. If at the time when bonds are issued by a city, a writ of mandamus was the usual and only effective means to compel the city authorities to levy a tax for the payment of interest and principal on such bonds, in case of their failure to provide in other ways the required funds, and there is no other complete and adequate remedy, a statute prohibiting the state courts to issue a mandamus for the levy of a tax for the payment of interest or principal of any bonds except those issued under the premium-bond plan, is a clear impairment of the means for the enforcement of the contract with the holders of the bond. "The only ground on which a change of remedy existing when a contract was made is permissible without impairment of the contract, is that a new and adequate and efficacious remedy be substituted for that which is superseded. Here no remedy whatever is substituted for that of mandamus. The holders are denied all remedy. Louisiana *v.* New Orleans, 102 U. S. 203, 207, 26 L. Ed. 132." Louisiana *v.* Pilsbury, 105 U. S. 278, 301, 26 L. Ed. 1090.

70. Subjects of taxation.—Where at the time a city is authorized to issue bonds to facilitate the construction of a railroad, the state statute only required a tax to be levied on real estate, it was not beyond the power of the legislature by subsequent enactment, after the bonds were issued, to subject any property other than real estate to taxation for the purpose of meeting this liability of the township. Accordingly, legislation which authorizes a tax to be made on personal property also, is not in violation of the contract clause of the federal constitution. The township being a part of the civil government of the state to establish for public purposes, the powers conferred upon it were at all times subject to legislative control or modification; at least, to such as were not inconsistent with the contract rights of a third party. Cape Girardeau County Court *v.* Hill, 118 U. S. 68, 73, 30 L. Ed. 73.

tax can be levied and assessed only by the corporate authorities of the city or town.[71]

(2) *Liability of Reorganized Corporation for Debts of Old.*—The state's plenary power over its municipal corporations to change their organization, to modify their method of internal government, or to abolish them altogether, is not restricted by contracts entered into by the municipality with its creditors or with private parties. An absolute repeal of a municipal charter is therefore effectual so far as it abolishes the old corporate organization; but when the same or substantially the same inhabitants are erected into a new corporation, whether with extended or restricted territorial limits, such new corporation is treated as in law the successor of the old one, entitled to its property rights, and subject to its liabilities.[72] Hence, if at the time debts are created by a municipality a new corporation formed by reincorporation of the old one would have been liable for the debts of the old without any vote of the taxpayers in favor of assuming the debt of the old corporation before the new can be held therefor, but a subsequent act with regard to the reincorporation of cities and towns is construed as requiring such vote, this will be regarded as impairing the obligation of pre-existing contracts.[73]

6. MUNICIPAL PROPERTY—a. *In General.*—It is true a municipal corporation can own private property, not of a public or governmental nature, which may be entitled to constitutional protection. Property which is held by these corporations upon conditions or terms contained in a grant and for a special use, may not be diverted by the legislature.[74] But such protection will not be accorded to the mere right of a city to compel a street railroad company to continue to pave and repair between its tracks,[75] nor to the right of a city to continue to hold its public property exempt from taxation.[76] In like manner, it

71. Rule where debtor city is abolished and annexed to another political subdivision.—Graham *v.* Folsom, 200 U. S. 248, 50 L. Ed. 464, citing and approving Mount Pleasant *v.* Beckwith, 100 U. S. 514, 25 L. Ed. 699; Mobile *v.* Watson, 116 U. S. 289, 29 L. Ed. 620; Shapleigh *v.* San Angelo, 167 U. S. 646, 42 L. Ed. 310. But see Meriwether *v.* Garrett, 102 U. S. 472, 26 L. Ed. 197, and the attempts to distinguish it in Wolff *v.* New Orleans, 103 U. S. 358, 368, 26 L. Ed. 395, and Graham *v.* Folsom, 200 U. S. 248, 50 L. Ed. 464.

Where township is destroyed and annexed to other towns or counties.—The power of a state to alter or destroy its corporations is not greater than the power of a state to repeal its legislation, the exercise of which latter power has been repeatedly held ineffectual to impair the obligation of contract. Hence, where a municipality has been destroyed, but a tax has been provided for the payment of a debt, and there are state officers to collect it, the courts will compel its collection and payment. Graham *v.* Folsom, 200 U. S. 248, 50 L. Ed. 464, approving Von Hoffman *v.* Quincy, 4 Wall. 535, 18 L. Ed. 403; Galena *v.* Amy, 5 Wall. 705, 18 L. Ed. 560; Mobile *v.* Watson, 116 U. S. 289, 29 L. Ed. 620; Seibert *v.* Lewis, 122 U. S. 284, 30 L. Ed. 1161; Mount Pleasant *v.* Beckwith, 100 U. S. 514, 25 L. Ed. 699, but distinguishing Heine *v.* Levee Comm'rs, 19 Wall. 655, 22 L. Ed. 223; Meriwether *v.* Garrett, 102 U. S. 472, 26 L. Ed. 197.

72. Liability of reorganized corporation for debts of old.—Shapleigh *v.* San Angelo, 167 U. S. 646, 654, 42 L. Ed. 310, citing Broughton *v.* Pensacola, 93 U. S. 266, 23 L. Ed. 896; Mount Pleasant *v.* Beckwith, 100 U. S. 514, 25 L. Ed. 699; Mobile *v.* Watson, 116 U. S. 289, 29 L. Ed. 620, cited and approved in Graham *v.* Folsom, 200 U. S. 248, 254, 50 L. Ed. 464.

73. New corporation formed by reincorporation of old.—Shapleigh *v.* San Angelo, 167 U. S. 646, 42 L. Ed. 310, approved in Graham *v.* Folsom, 200 U. S. 248, 254, 50 L. Ed. 464.

74. How far municipal property protected.—Worcester *v.* Worcester Consol. St. R. Co., 196 U. S. 539, 49 L. Ed. 591, citing Board of Comm'rs *v.* Lucas, 93 U. S. 108, 23 L. Ed. 822. See, generally, the title MUNICIPAL CORPORATIONS.

75. Duty of street railroads to repair and pave.—A right asserted by a municipal corporation to demand the continuance of the obligation of a street railroad company to pave and repair its streets, as contained in the orders or decrees of its council or board of aldermen, does not amount to property held by the corporation, which the legislature is unable to touch, either by way of limitation or extinguishment. Worcester *v.* Worcester Consol. St. R. Co., 196 U. S. 539, 49 L. Ed. 591. See the title STREET RAILWAYS.

76. Exemption of public property from taxation.—A municipal corporation is a

has been held that the grant of a right to a city to maintain a ferry may be repealed by subsequent legislative enactment.[77] Nor does a statute which revokes the right of a city to erect and maintain wharves within its limits and to collect wharfage, granting such right to another, violate the contract clause of the federal constitution, if no property rights of the municipality acquired from the legislature are thereby impaired or destroyed.[78] So, also, a grant by the legislature to a county of a sum forfeited may be dispensed with by the legislature afterwards, as it is made for public, not private purposes, and to a public

public instrumentality established to aid in the administration of the affairs of the state. Neither its charter nor any legislative act regulating the use of property held by it for governmental or public purposes, is a contract within the meaning of the constitution of the United States. If the legislature choose to subject to taxation public property held by a municipal corporation of the state for public purposes, the validity of such legislation, so far as the national constitution is concerned, could not be questioned. Covington *v.* Kentucky, 173 U. S. 231, 241, 43 L. Ed. 679.

An act of a state legislature which provides that the waterworks of a city shall be and remain forever exempt from state, county and city tax, does not tie the hands of the legislature so that it cannot by legislation withdraw such exemption and subject the property in question to taxation, when there is a pre-existing statute reserving to the legislature the right to amend or repeal at will a statute, unless the contrary intent shall be therein plainly expressed. Covington *v.* Kentucky, 173 U. S. 231, 43 L. Ed. 679.

77. Revocation of ferry franchise.—East Hartford *v.* Hartford Bridge Co., 10 How. 511, 13 L. Ed. 518, approved in Worcester *v.* Worcester Consol. St. R. Co., 196 U. S. 539, 549, 49 L. Ed. 591. See the title FERRIES, ante, p. 274.

The right or privilege conferred upon a municipal corporation to establish and maintain a ferry across a public navigable river is not to be considered as a contract between legislation and the corporation. The act of the legislature establishing the ferry must be considered rather as a public law than as a contract, such acts relate to public interests, and are subject to be changed as the public interest demanded. "The grantees, likewise, the towns, being mere organizations for public purposes, were liable to have their public powers, rights and duties modified or abolished at any moment by the legislature." East Hartford *v.* Hartford Bridge Co., 10 How. 511, 534, 13 L. Ed. 518.

And where, in such case, the legislature has reserved the right to revoke the franchise, or where the right to maintain the ferry is granted only during the pleasure of the legislature, there can, of course, be no violation of a contract by the legislative revocation thereof. East Hartford *v.* Hartford Bridge Co., 10 How. 511, 534, 13 L. Ed. 518.

From the year 1681 to 1783 the franchise in the ferry over the Connecticut River belonged to the town of Hartford, situated on the west bank of the river. In 1783, the legislature incorporated the town of East Hartford and granted to it one-half of the ferry during the pleasure of the general assembly. Held, that there was no contract between the state and the town of East Hartford, by which the latter could claim a permanent right to the ferry; that the nature of the subject matter of the grant, and the character of the parties to it, both show that it is not such a contract as is beyond the interference of the legislature; and that an act of the legislature discontinuing the ferry is not an impairment of the obligation of contract. Besides, the town of East Hartford only held the ferry during the pleasure of the general assembly. East Hartford *v.* Hartford Bridge Co., 10 How. 511, 13 L. Ed. 518, approved in Newton *v.* Commissioners, 100 U. S. 548, 588, 52 L. Ed. 710.

78. Right of city to erect and maintain wharves.—In Railroad Co. *v.* Ellerman, 105 U. S. 166, 172, 26 L. Ed. 1015, which involved the right of the city of New Orleans to erect and maintain wharves within its limits and to collect wharfage under its charter and the statutes of Louisiana, it was held that no right of the city was infringed by a subsequent enactment of the general assembly of that state granting to a railroad company the authority to enclose and occupy for its purposes and uses a specifically described portion of the levee and batture and maintain the wharf it had therefore erected upon its property within those limits, and exempting it from the supervision and control which the municipal authorities exercised in a matter of public wharves. And Mr. Justice Matthews, delivering the opinion of the court, said: "Neither would this be in derogation of any vested right of the city. Whatever power the municipal body rightfully enjoys over the subject is derived from the legislature. They are merely administrative and may be revoked at any time, not touching, of course, any property of the city actually acquired in the course of administration." Followed in Essex Public Road Board *v.* Skinkle, 140 U. S. 334, 342, 35 L. Ed. 446; New Orleans Waterworks Co. *v.* Louisiana Sugar Ref. Co., 125 U. S. 18, 32, 31 L. Ed. 607. See the title WHARVES AND WHARFINGERS.

body.[79] But a distinction exists between regulation and appropriation, and the legislative power is not so transcendent that it may at its will do that which amounts to an arbitrary divestiture of the private property of a municipal corporation.[80]

b. *Restitution of Taxes to Taxpayers.*—Unless restrained by provisions of its constitution, the legislature of a state possesses the power to direct a restitution to taxpayers of a county, or other municipal corporation, of property exacted from them by taxation, into whatever form the property may be changed, so long as it remains in possession of the municipality. The exercise of this power infringes upon no provision of the federal constitution.[81]

7. CHANGE OF GOVERNMENTAL AGENCIES.—Where a legislative act merely changed the mode of paying municipal warrants and certificates and vested that power in another branch of the government, this does not impair the obligation of any contract between the holders of such securities and the city.[82]

VII. Remedies.[83]

A. In General.—In placing the obligation of contracts under the protection of the constitution, its framers looked to the essentials of the contract more than to the forms and modes of proceeding by which it was to be carried into execution; annulling all state legislation which impaired the obligation, it was

79. Grants of forfeited money to counties.—Maryland *v.* Baltimore, etc., R. Co., 3 How. 534, 551, 11 L. Ed. 714, followed and approved in East Hartford *v.* Hartford Bridge Co., 10 How. 511, 535, 13 L. Ed. 518; Essex Public Road Board *v.* Skinkle, 140 U. S. 334, 35 L. Ed. 446. See the title COUNTIES, vol. 4, p. 825.

80. Distinction between regulation and appropriation.—Essex Public Road Board *v.* Skinkle, 140 U. S. 334, 35 L. Ed. 446.

81. Restitution of taxes to taxpayers.—Board of Comm'rs *v.* Lucas, 93 U. S. 108, 23 L. Ed. 822, cited and approved in Essex Public Road Board *v.* Skinkle, 140 U. S. 334, 343, 35 L. Ed. 446.

Right to swap ownership of property.—"Any attempt by the legislature to take private property from its grantee, and restore it to its grantor, would be in conflict with the constitutional inhibition against impairing the obligation of contracts." Board of Comm'rs *v.* Lucas, 93 U. S. 108, 114, 23 L. Ed. 822.

"But between the state and municipal corporations, such as cities, counties, and towns, the relation is different from that between the state and the individual. Municipal corporations are mere instrumentalities of the state, for the convenient administration of government; and their powers may be qualified, enlarged or withdrawn, at the pleasure of the legislature. Their tenure of property, derived from the state for specific public purposes, or obtained for such purposes through means which the state alone can authorize—that is, taxation—is so far subject to the control of the legislature, that the property may be applied to other public uses of the municipality than those originally designated. This follows from the nature of such bodies, and the dependent characters of their existence." Board of Comm'rs *v.* Lucas, 93 U. S. 108, 114, 23 L. Ed. 822.

"But property, derived by them from other sources, is often held, by the terms of its grant, for special uses, from which it cannot be diverted by the legislature. In such cases, the property is protected by all the guards against legislative interference possessed by individuals and private corporations for their property." Board of Comm'rs *v.* Lucas, 93 U. S. 108, 115, 23 L. Ed. 822.

Municipal aid.—Thus, where a county or other subdivision, acting under legislative authority, has subscribed to stock in aid of a railroad company, it is competent for the legislature by subsequent statute to direct the stock to be issued to the individual taxpayers in exchange for receipts which they received upon payment of the tax levied to pay such subscription. Board of Comm'rs *v.* Lucas, 93 U. S. 108, 23 L. Ed. 822.

82. Change of governmental agencies.—No one has a vested right in a rule of law. The act of the state of Louisiana, abolishing the police organization established in 1868, and vesting in the city of New Orleans the function of maintaining its own police force, was essentially a mere change of an instrumentality of municipal government. In making the change no obligation rested upon the state to create an independent successor of the police board or to provide for the payment of its debts—existing laws were ample for this purpose. This legislation was in the exercise of the state's power and is not in contravention of the constitution of the United States. New Orleans *v.* Benjamin, 153 U. S. 411, 38 L. Ed. 764.

83. See the title CONSTITUTIONAL LAW, vol. 4, p. 442.

left to the states to prescribe and shape the remedy to enforce it.[84] Accordingly, the rule is well settled that the forms of action and modes of proceeding for the enforcement of a contract existing at the time of making the contract, are so far within the control of the state, that they may be changed, modified, or abrogated altogether without impairing the obligation of the contract, provided another and equally adequate and efficacious remedy for the enforcement of the obligation remains, or is substituted for the one taken away.[85] And although a new remedy may be deemed less convenient than the old one, and may in some

84. Remedy may be shaped by the states.—McCracken *v.* Hayward, 2 How. 608, 612, 11 L. Ed. 397.

85. Statutes changing, modifying or abrogating remedies generally valid.—Young *v.* Bank, 4 Cranch 384, 2 L. Ed. 655; Sturges *v.* Crowninshield, 4 Wheat. 122, 200, 4 L. Ed. 529; Bank *v.* Okely, 4 Wheat. 235, 245, 4 L. Ed. 559; Green *v.* Biddle, 8 Wheat. 1, 85, 5 L. Ed. 547; Mason *v.* Haile, 12 Wheat. 370, 6 L. Ed. 660; Hawkins *v.* Barney, 5 Pet. 457, 8 L. Ed. 190; Briscoe *v.* Bank, 11 Pet. 257, 328o, 9 L. Ed. 709; Bronson *v.* Kinzie, 1 How. 311, 317, 11 L. Ed. 143; McCracken *v.* Hayward, 2 How. 608, 11 L. Ed. 397; Gantly *v.* Ewing, 3 How. 707, 717, 11 L. Ed. 794; Planters' Bank *v.* Sharp, 6 How. 301, 331, 12 L. Ed. 447, following Jackson *v.* Lamphire, 3 Pet. 280, 7 L. Ed. 679; Bank *v.* Dalton, 9 How. 522, 13 L. Ed. 242; Von Hoffman *v.* Quincy, 4 Wall. 535, 553, 18 L. Ed. 403; Drehman *v.* Stifle, 8 Wall. 595, 19 L. Ed. 508; Gunn *v.* Barry, 15 Wall. 610, 611, 21 L. Ed. 212; Walker *v.* Whitehead, 16 Wall. 314, 317, 21 L. Ed. 357; Munn *v.* Illinois, 94 U. S. 113, 24 L. Ed. 77; Railroad Co. *v.* Hecht, 95 U. S. 168, 170, 24 L. Ed. 423; Terry *v.* Anderson, 95 U. S. 628, 633, 24 L. Ed. 365; Ten-432, 438, 24 L. Ed. 760; Edwards *v.* Kearzey, 96 U. S. 595, 601, 24 L. Ed. 793; Brine *v.* Insurance Co., 96 U. S. 627, 637, 24 L. Ed. 858; Memphis *v.* United States, 97 U. nessee *v.* Sneed, 96 U. S. 69, 73, 74, 24 L. Ed. 610; Murray *v.* Charleston, 96 U. S. S. 293, 24 L. Ed. 920; South Carolina *v.* Gaillard, 101 U. S. 433, 437, 25 L. Ed. 937; Penniman's Case, 103 U. S. 714, 720, 26 L. Ed. 602; Louisiana *v.* Pilsbury, 105 U. S. 278, 26 L. Ed. 1090; Antoni *v.* Greenhow, 107 U. S. 769, 775, 27 L. Ed. 468; Connecticut, etc., Ins. Co. *v.* Cushman, 108 U. S. 51, 64, 27 L. Ed. 648; Vance *v.* Vance, 108 U. S. 514, 518, 27 L. Ed. 808; Fourth Nat. Bank *v.* Francklyn, 120 U. S. 747, 755, 30 L. Ed. 825; Seibert *v.* Lewis, 122 U. S. 284, 295, 30 L. Ed. 1161; Hill *v.* Merchants' Mut. Ins. Co., 134 U. S. 515, 527, 33 L. Ed. 994; McGahey *v.* Virginia, 135 U. S. 662, 685, 693, 34 L. Ed. 304; New Orleans, etc., R. Co. *v.* Louisiana, 157 U. S. 219, 224, 39 L. Ed. 679; Barnitz *v.* Beverly, 163 U. S. 118, 123, 41 L. Ed. 93, citing Bronson *v.* Kinzie, 1 How. 311, 11 L. Ed. 143; McCullough *v.* Virginia, 172 U. S. 102, 104, 43 L. Ed. 382; Wilson *v.* Standefer, 184 U. S. 399, 46 L. Ed. 612; Oshkosh Waterworks Co. *v.* Oshkosh, 187 U. S. 437, 439, 47 L. Ed. 249; Waggoner *v.* Flack, 188 U. S. 595, 603, 47 L. Ed. 609; Bernheimer *v.* Converse, 206 U. S. 516, 530, 51 L. Ed. 1163.

"The state has full power over remedies and procedure in its own courts, and can make any order it pleases in respect thereto, provided that substance of right is secured without unreasonable burden to parties and litigants. Antoni *v.* Greenhow, 107 U. S. 769, 27 L. Ed. 468." York *v.* Texas, 137 U. S. 15, 20, 34 L. Ed. 604; Mexican Cent. R. Co. *v.* Pinkney, 149 U. S. 194, 204, 37 L. Ed. 699.

The rule seems to be that in modes of proceeding and of forms to enforce the contract, the legislature has the control, and may enlarge, limit, or alter them, provided that it does not deny a remedy, or so embarrass it with conditions and restrictions as seriously to impair the value of the right. Bronson *v.* Kinzie, 1 How. 311, 11 L. Ed. 143; Tennessee *v.* Sneed, 96 U. S. 69, 74, 24 L. Ed. 610.

It is true that the remedy for the enforcement of a contract sometimes enters into the contract itself, but that is where an endeavor has been made to so change the existing remedy that there is no effective and enforceable one left, or the remedy is so far impaired that the party desirous of enforcing the contract is left practically without any efficient means of doing so; but in the case of an alteration of a remedy, if one is left or provided which is fairly sufficient, the obligations of a contract are not impaired, although the remedies existing at the time it was entered into are taken away. Waggoner *v.* Flack, 188 U. S. 595, 602, 47 L. Ed. 609.

Changing remedies an act of sovereignty.—The principle was clearly enunciated in Waggoner *v.* Flack, 188 U. S. 595, 603, 47 L. Ed. 609, in which Mr. Justice Peckham, speaking for the court, said: "To enact laws providing remedies for a violation of contracts, to alter or enlarge those remedies from time to time as to the legislature may seem appropriate, is an exercise of sovereignty, and it cannot be supposed that the state, in a case like this, contracts in a public act of its legislature to limit its power in the future, even if it could do so, with or without consideration, unless the language of the act is so absolutely plain and unambiguous as to leave no room for doubt that its true meaning amounts to a contract by it to part with its power to increase the effectiveness of existing remedies." See, also, Wilson *v.* Standefer, 184 U. S. 399,

degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract.[86] Moreover, the court has nothing to do with the motives of the legislature, if what they do is within the scope of their powers under the constitution.[87]

B. Limitations of General Rule.—On the other hand, the rule is well settled that the laws which prescribe the mode of enforcing a contract, which are in existence when it is made, are so far a part of the contract, that if subsequent laws seriously interfere with its enforcement, as by qualifying and restraining the remedy by conditions and restrictions so as to render it useless or impractical to pursue it, and more especially if such laws take away all remedy for enforcing the right, they will be deemed void under the contract clause.[88]

46 S. E. 612; New Orleans, etc., R. Co. *v.* Louisiana, 157 U. S. 219, 39 L. Ed. 679; Bernheimer *v.* Converse, 206 U. S. 516, 530, 51 L. Ed. 1163.

This principle was stated by Mr. Chief Justice Marshall in Sturges *v.* Crowninshield, 4 Wheat. 122, 4 L. Ed. 529, as follows: "The distinction between the obligation of a contract and a remedy given by the legislature to enforce that obligation exists in the nature of things, and, without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation may direct." Approved in Bernheimer *v.* Converse, 206 U. S. 516, 530, 51 L. Ed. 1163; Wilson *v.* Standefer, 184 U. S. 399, 416, 46 L. Ed. 612.

86. That the new remedy is less convenient no test.—Bronson *v.* Kinzie, 1 How. 311, 316, 11 L. Ed. 143.

87. Motives of legislature immaterial.—Antoni *v.* Greenhow, 107 U. S. 769, 775, 27 L. Ed. 468.

88. Statutes operating on the remedy may impair its obligation.—Green *v.* Biddle, 8 Wheat. 1, 75, 5 L. Ed. 547; Ogden *v.* Saunders, 12 Wheat. 213, 217, 327, 6 L. Ed. 606; Jackson *v.* Lamphire, 3 Pet. 280, 290, 7 L. Ed. 679; Bronson *v.* Kinzie, 1 How. 311, 317, 11 L. Ed. 143; McCracken *v.* Hayward, 2 How. 608, 612, 11 L. Ed. 397, approved in Barnitz *v.* Beverly, 163 U. S. 118, 123, 41 L. Ed. 93; Maryland *v.* Baltimore, etc., R. Co., 3 How. 534, 549, 11 L. Ed. 714; Planters' Bank *v.* Sharp, 6 How. 301, 12 L. Ed. 447, citing Bronson *v.* Kinzie, 1 How. 311, 11 L. Ed. 143; Green *v.* Biddle, 8 Wheat. 1, 76, 5 L. Ed. 547; Curran *v.* Arkansas, 15 How. 304, 319, 14 L. Ed. 705; Von Hoffman *v.* Quincy, 4 Wall. 535, 552, 18 L. Ed. 403; Clark *v.* Reyburn, 8 Wall. 318, 19 L. Ed. 354, approved in Barnitz *v.* Beverly, 163 U. S. 118, 126, 41 L. Ed. 93; Butz *v.* Muscatine, 8 Wall. 575, 583, 19 L. Ed. 490, followed in United States *v.* Burlington, 154 U. S., appx., 568, 19 L. Ed. 495; White *v.* Hart, 13 Wall. 646, 653, 20 L. Ed. 685; Gunn *v.* Barry, 15 Wall. 610, 622, 623, 21 L. Ed. 212; Walker *v.* Whitehead, 16 Wall. 314, 317, 318, 21 L. Ed. 357; Munn *v.* Illinois, 94 U. S. 113, 143, 24 L. Ed. 77; Edwards *v.* Kearzey, 96 U. S. 595, 607, 24 L. Ed. 793; Brine *v.* Insurance Co., 96 U. S. 627, 637, 24 L. Ed. 858; Louisiana *v.* New Orleans, 102 U. S. 203, 26 L. Ed. 132; Wolff *v.* New Orleans, 103 U. S. 358, 26 L. Ed. 395; Louisiana *v.* Pilsbury, 105 U. S. 278, 26 L. Ed. 1090; Kring *v.* Missouri, 107 U. S. 221, 27 L. Ed. 506; Virginia Coupon Cases, 114 U. S. 269, 303, 29 L. Ed. 185; Seibert *v.* Lewis, 122 U. S. 284, 294, 30 L. Ed. 1161; United States *v.* Burlington, 154 U. S., appx., 568, 19 L. Ed. 495; Barnitz *v.* Beverly, 163 U. S. 118, 123, 41 L. Ed. 93, citing Bronson *v.* Kinzie, 1 How. 311, 11 L. Ed. 143; 2 Madison Papers, 1239, 1581.

The obligation of a contract, without an effective remedy to enforce it would be a "name," and not a "thing;" the word obligation would be an "empty sound" and the protection of the constitution a solemn mockery. Opinion of Baldwin, J., in Briscoe *v.* Bank, 11 Pet. 257, 328p, 9 L. Ed. 709.

"The decisions of this court are numerous in which it has been held that the laws which prescribe the mode of enforcing a contract, which are in existence when it is made, are so far a part of the contract that no changes in these laws which seriously interfere with that enforcement are valid, because they impair its obligation within the meaning of the constitution of the United States." Barnitz *v.* Beverly, 163 U. S. 118, 122, 41 L. Ed. 93.

Statutes which so change the nature and extent of existing remedies as to materially impair the rights and interests of the owner of property, are just as much a violation of his rights under a contract as if they overturned his rights and interests. Green *v.* Biddle, 8 Wheat. 1, 17, 92, 5 L. Ed. 547, approved in Barnitz *v.* Beverly, 163 U. S. 118, 123, 41 L. Ed. 93; Bronson *v.* Kinzie, 1 How. 311, 315, 11 L. Ed. 143; Von Hoffman *v.* Quincy, 4 Wall. 535, 551, 18 L. Ed. 403; Edwards *v.* Kearzey, 96 U. S. 595, 601, 24 L. Ed. 793.

It is an acknowledged principle that a creditor by contract has a vested right to the remedies for the recovery of the debt which existed at law when the contract was made, and that the legislature of a

In all such cases the question becomes, therefore, one of reasonableness, and of

state cannot take them away without impairing the obligation of the contract, though it may modify them, and even substitute others, if a sufficient remedy be left, or another sufficient one be provided. The law is in effect a part of the contract. Memphis *v.* United States, 97 U. S. 293, 295, 24 L. Ed. 920.

"It is also settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge and enforcement." Von Hoffman *v.* Quincy, 4 Wall. 535, 550, 18 L. Ed. 403, followed in Edwards *v.* Kearzey, 96 U. S. 595, 601, 24 L. Ed. 793; White *v.* Hart, 13 Wall. 646, 653, 20 L. Ed. 685; Walker *v.* Whitehead, 16 Wall. 314, 317, 21 L. Ed. 357.

The existing law defines the rights and duties of the parties to a contract, and compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force. If, therefore, any subsequent law operates to diminish the duty or to impair the right, it necessarily bears on the obligation of the contract in favor of one party, to the injury of the other; hence, any law, which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the constitution. McCracken *v.* Hayward, 2 How. 608, 612, 11 L. Ed. 397, following Bronson *v.* Kinzie, 1 How. 311, 11 L. Ed. 143, approved in Hooker *v.* Burr, 194 U. S. 415, 423, 48 L. Ed. 1046.

"The obligation of a contract is impaired in the sense of the constituion, by any act which prevents its enforcement, or which materially abridges the remedy for enforcing it, which existed at the time it was contracted, and does not supply an alternative remedy equally adequate and efficacious." Bronson *v.* Kinzie, 1 How. 311, 11 L. Ed. 143; Woodruff *v.* Trapnall, 10 How. 190, 13 L. Ed. 383; Howard *v.* Bugbee, 24 How. 461, 16 L. Ed. 753; Von Hoffman *v.* Quincy, 4 Wall. 535, 18 L. Ed. 403; Furman *v.* Nichol, 8 Wall. 44, 19 L. Ed. 370; Walker *v.* Whitehead, 16 Wall. 314, 21 L. Ed. 357; Tennessee *v.* Sneed, 96 U. S. 69, 24 L. Ed. 610; Memphis *v.* United States, 97 U. S. 293, 24 L. Ed. 920; Memphis *v.* Brown, 97 U. S. 300, 24 L. Ed. 924; McGahey *v.* Virginia, 135 U. S. 662, 693, 34 L. Ed. 304.

"Illustrations of this proposition are found, in the obligation of the debtor to pay interest after the maturity of the debt, where the contract is silent; in the liability of the drawer of a protested bill to pay exchange and damages, and in the right of the drawer and indorser to require proof of demand and notice. These are as much incidents and conditions of the contract as if they rested upon the basis of a distinct agreement." Von Hoffman *v.* Quincy, 4 Wall. 535, 550, 18 L. Ed. 403.

It is difficult, perhaps, to draw a line that would be applicable in all cases between legitimate alterations of the remedy and provisions which, in the form of remedy, impair the right. But it is manifest that the obligation of the contract, and the rights of a party under it, may, in effect, be destroyed by denying a remedy altogether; or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing. Bronson *v.* Kinzie, 1 How. 311, 317, 11 L. Ed. 143, approved in Seibert *v.* Lewis, 122 U. S. 284, 294, 30 L. Ed. 1161.

Entire scheme of statute looked to.—"When we are asked to put this case within the rule of those cases in which we have held that it is competent for the states to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired, we are bound to consider the entire scheme of the new statute, and to have regard to its probable effect on the rights of the parties." Barnitz *v.* Beverly, 163 U. S. 118, 131, 41 L. Ed. 93.

Imposing or dispensing with conditions.—"The obligation of a contract depends upon its terms and the means which the law in existence at the time affords for its enforcement. A law which alters the terms of a contract by imposing new conditions, or dispensing with those expressed, is a law which impairs its obligation, for, as stated on another occasion, such a law relieves the parties from the moral duty of performing the original stipulations of the contract, and it prevents their legal enforcement." Case of the State Tax on Foreign-Held Bonds, 15 Wall. 300, 320, 21 L. Ed. 179.

Statutes lessening efficacy of remedy.—"The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced—by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means, impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened." Seibert *v.* Lewis, 122 U. S. 284, 295, 30 L. Ed. 1161; Louisiana *v.* New Orleans, 102 U. S. 203, 206, 26 L. Ed. 132; Antoni *v.* Greenhow, 107 U. S. 769, 798, 27 L. Ed. 468.

The only ground on which a change of remedy existing when a contract was made is permissible without impairment of the contract is that a new and adequate and efficacious remedy be substituted for

that the legislature is primarily the judge.[89] And the test is not the extent of the violation of the contract, but the fact that in truth its obligation is lessened, in however small a particular, and not merely altering or regulating the remedy alone.[90] Since legislation of a state thus impairing the obligation of contracts is null and void, the courts in enforcing the contracts will pursue the same course and apply the same remedies as though such invalid legislation had never existed.[91]

Statutes Operating Prospectively.—But a creditor must take notice of statutes which are in existence at the time the debt is contracted, and if all the remedies are preserved to him which were in existence at that time, he has no cause of complaint.[92] And when a new remedy is authorized after a contract has been made, that remedy may be wholly taken away by the legislature, before any vested rights have been acquired under it. In such a case the parties did not contract with reference to it, and it did not enter into their agreement. It had nothing to do with the obligations they assumed.[93]

C. Right to Take Away Remedy by Judicial Decisions.—When the remedy is taken away not by a subsequent repeal but by subsequent judicial decisions, the effect upon the contract is the same as if the provisions of the Code had been repealed, and this is so even though there has been no previous decision upon the subject.[94]

D. Additional Remedies.—A law simply giving an additional remedy to the party entitled to performance, without impairing any substantial right of the other party, does not impair the obligation of the contract sought to be enforced.[95]

that which is superseded. Louisiana *v.* Pilsbury, 105 U. S. 278, 301, 26 L. Ed. 1090.

Legislation of a state thus impairing the obligation of contracts made under its authority is null and void, and the courts in enforcing the contracts will pursue the same course and apply the same remedies as though such invalid legislation had never existed. Louisiana *v.* Pilsbury, 105 U. S. 278, 302, 26 L. Ed. 1090.

The remedies for the collection of a debt are essential parts of the contract of indebtedness, and those in existence at the time it is incurred must be substantially preserved to the creditor. Thus a statute prohibiting the exercise of its taxing power by the city to raise money for the payment of these bonds would be void. Von Hoffman *v.* Quincy, 4 Wall. 535, 18 L. Ed. 403. But it is otherwise of statutes which are in existence at the time the debt is contracted. Of these the creditor must take notice, and if all the remedies are preserved to him which were in existence when his debt was contracted he has no cause of complaint. Cooley, Constitutional Limitations, 285, 287. Rees *v.* Watertown, 19 Wall. 107, 120, 22 L. Ed. 72.

89. Reasonableness of change is test.—Jackson *v.* Lamphire, 3 Pet. 280, 7 L. Ed. 679; Terry *v.* Anderson, 95 U. S. 628, 24 L. Ed. 365; Antoni *v.* Greenhow, 107 U. S. 769, 775, 27 L. Ed. 468.

90. The test is not the extent of violation.—Green *v.* Biddle, 8 Wheat. 1, 5 L. Ed. 547; McCracken *v.* Hayward, 2 How. 608, 612, 11 L. Ed. 397; Planters' Bank *v.* Sharp, 6 How. 301, 330, 12 L. Ed. 447.

91. Method to be pursued by the courts in such cases.—Louisiana *v.* Pilsbury, 105 U. S. 278, 26 L. Ed. 1090.

92. Statutes operating prospectively on the remedy.—Rees *v.* Watertown, 19 Wall. 107, 22 L. Ed. 72.

93. Rule where no rights have vested under the contract.—Memphis *v.* United States, 97 U. S. 293, 295, 24 L. Ed. 920.

94. Remedy cannot be impaired by judicial decisions.—Butz *v.* Muscatine, 8 Wall. 575, 584, 19 L. Ed. 490; United States *v.* Burlington, 154 U. S., appx., 568, 19 L. Ed. 495, approved in Pine Grove Tp. *v.* Talcott, 19 Wall. 666, 678, 22 L. Ed. 227. See ante, "Judicial Decisions," II, F.

Mandamus to compel levy of tax.—Where under the statute in force when a contract between a municipal corporation and its bond holders is made, the bond holders were entitled to a remedy by mandamus to compel the levy of a tax sufficient to pay the judgment recovered upon the bonds, such right can no more be taken away by subsequent judicial decisions than by subsequent legislation. It is as much within the sphere of the power of the United States supreme court to protect the contract from the former as from the latter, and it is no more concluded by one than by the other. Butz *v.* Muscatine, 8 Wall. 575, 584, 19 L. Ed. 490; United States *v.* Burlington, 154 U. S., appx., 568, 19 L. Ed. 495.

95. Statutes giving additional remedies are valid.—New Orleans, etc., R. Co. *v.* Louisiana, 157 U. S. 219, 225, 39 L. Ed. 679; Red River Valley Bank *v.* Craig, 181 U. S. 548, 45 L. Ed. 994.

"Much more may the state give an addi-

E. Defenses—1. USURY.—A statute which repeals existing usury laws, and destroys defenses to existing contracts on the ground of usury, does not deprive parties of vested rights nor impair the obligation of contracts.[96]

2. SET-OFFS.—When the rights of third persons do not interfere, a state legislature may provide even as to existing contracts, that mutual obligations may be set off one against another, because this involves a mere change in the form of the remedy,[97] and such a statute is not invalid because one of such ex-

tional and more efficacious remedy for the enforcement of contracts in the performance of which the public health and the public safety are involved; provided always, that the new remedy is consistent with the nature of the obligation to be enforced, and does not impair any substantial right given by the contract. One who engages by contract to do a certain thing cannot claim that the obligation he has assumed is impaired by legislation that is designed only to enforce performance of his obligation." New Orleans, etc., R. Co. *v.* Louisiana, 157 U. S. 219, 224, 39 L. Ed. 679.

Additional remedies to municipalities.—The Louisiana act of July 12, 1888, providing a remedy by way of mandamus to compel corporations to fulfill their contracts with municipal corporation with reference to the paving, grading, repairing and care of streets, highways, bridges, culverts, levees, canals, etc., simply gave an additional remedy to the party entitled to the performance without impairing any substantial right of the other party, and did not impair the obligation of the contracts sought to be enforced. New Orleans, etc., R. Co. *v.* Louisiana, 157 U. S. 219, 225, 39 L. Ed. 679.

96. Laws abolishing defense of usury—Penalties and forfeitures, etc.—"The effect of the usury statute of Texas was to enable the party sued to resist a recovery against him of the interest which he had contracted to pay, and it was, in its nature, a penal statute inflicting upon the lender a loss and forfeiture to that extent. Such has been the general, if not uniform, construction placed upon such statutes. And it has been quite as generally decided that the repeal of such laws, without a saving clause, operated retrospectively, so as to cut off the defense for the future, even in actions upon contracts previously made. And such laws, operating with that effect, have been upheld, as against all objections on the ground that they deprived parties of vested rights, or impaired the obligation of contracts." Ewell *v.* Daggs, 108 U. S. 143, 150, 27 L. Ed. 682.

"The right of a defendant to avoid his contract is given to him by statute, for purposes of its own, and not because it affects the merits of his obligation; and * * * whatever the statute gives, under such circumstances, as long as it remains in fieri, and not realized by having passed into a completed transaction, may, by a subsequent statute, be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere in the contract. The benefit which he has received as the consideration of the contract, which, contrary to law, he actually made, is just ground for imposing upon him, by subsequent legislation, the liability which he intended to incur." Ewell *v.* Daggs, 108 U. S. 143, 151, 27 L. Ed. 682; Read *v.* Plattsmouth, 107 U. S. 568, 27 L. Ed. 414; Satterlee *v.* Matthewson, 2 Pet. 380, 7 L. Ed. 458; Watson *v.* Mercer, 8 Pet. 88, 8 L. Ed. 876; Gross *v.* United States Mortgage Co., 108 U. S. 477, 489, 27 L. Ed. 795. See the title USURY.

97. Right of set-off may be changed at will of legislature.—Blount *v.* Windley, 95 U. S. 173, 24 L. Ed. 424. See the title SET-OFF, RECOUPMENT AND COUNTERCLAIM.

"The legal and equitable right in a general way of a debtor to procure the obligations of his creditor and use them as a set-off for his own debt, will hardly be denied when the law of the state authorizes it, and such a law can be liable to no impeachment as divesting vested rights or impairing the obligation of contracts. Blount *v.* Windley, 95 U. S. 173, 24 L. Ed. 424." Amy *v.* Shelby County Taxing Dist., 114 U. S. 387, 393, 29 L. Ed. 172.

Set-off against claim of city for back taxes.—A state law which authorizes persons indebted to a municipal corporation for back taxes to procure certain classes of its outstanding obligations and set them off against the claim of the municipality against him for such taxes, does not impair the contract rights of the general creditors of the city who have no lien upon such taxes, nor deprive them of any vested right. Amy *v.* Shelby County Taxing Dist., 114 U. S. 387, 29 L. Ed. 172.

Set-off by municipality of taxes against debts due by it.—The right of a municipal corporation to pay for its water supply in taxes, that is, by using its demand against the company for taxes as an offset against the demand of the company for water dues, if property at all, is not such a vested right as to be beyond the control of the legislature. New Orleans *v.* New Orleans Waterworks Co., 142 U. S. 79, 90, 35 L. Ed. 943.

Set-off by holder of public land grants.—Where certificates which a railroad company has located upon public lands are void because the state legislature was constitutionally forbidden to grant the lands

isting obligations happens to be a judgment which, otherwise, would be collectible in coin or currency.[98] But the rule is different when, as in many cases of equitable set-off, the right inheres in the transaction, or arises out of the relations of the parties; and it may in any case be made the subject of contract between the parties. When this is done, it stands upon the footing of every other lawful contract upon a valuable consideration, the obligation of which cannot be impaired by subsequent legislation.[99]

3. Defenses to Actions on Insurance Policies.—It has never yet been decided whether a statute, depriving an insurance company of the right to set up the defense of suicide to an action on a policy of insurance, would be objectionable as impairing the obligation of pre-existing contracts.[1]

F. Various Particular Remedies Considered—1. Remedies for Enforcement of Judgments.—The remedies for the enforcement of a judgment, existing at the time it was recovered, cannot be taken away either by direct legislation, or indirectly, by repealing the law which gave those remedies. Whether the judgment be considered as a contract of record or not, it confers vested rights which are secure against legislative invasion.[2] And that the remedy did not exist at the time of the execution of the contract, but was created by statute between the time of the execution of the contract and the recovery of the judgment, is immaterial.[3]

2. Remedies of Holders of Municipal and State Securities—a. *In General.*—It has been uniformly held that remedies given by statutes prescribing the means whereby bond holders are entitled to enforce their claims in the event of default by the city of state, are within the protection of the constitution of the United States, and that any state law which substantially impairs them is as

and issue the certificates, the company is not deprived of any vested right because, in a suit by the state to recover the lands so located, it is denied the right to use other valid certificates by way of counterclaim or set-off, and which it cannot locate upon other lands by reason of the public lands within the state having become exhausted. Galveston, etc., R. Co. *v.* Texas, 170 U. S. 226, 242, 42 L. Ed. 1017.

98. Effect where obligation is a judgment.—A statute, therefore, as that of North Carolina, passed after the bank or its commissioner had obtained a judgment, which authorizes the defendant to set off against it the circulating notes of the bank which he procured after the judgment, is, as between him and the bank or its commissioner, valid, and does not impair the obligation of the contract sued on, or of the judgment. Blount *v.* Windley, 95 U. S. 173, 24 L. E. 424.

But if the rights of either creditors of the bank, or other parties interested in the judgment, were such that they could exact payment of the judgment in lawful money, the case would be different. Blount *v.* Windley, 95 U. S. 173, 24 L. Ed. 424.

99. When the right of set-off is not subject to legislative change.—"Ordinarily, it is true, the right to set off mutual independent debts, by way of compensation and satisfaction, is dependent on the general law, does not enter into the contract, although it may be the lex loci contractus, and is dependent for its enforcement upon the lex fori, when suit is brought, and consequently may be changed by the legislature without impairing vested rights. But in such cases the right is entirely dependent upon the general law, and changes with it. It is different, when, as in many cases of equitable set-off, it inheres in the transaction, or arises out of the relations of the parties; and it may in any case, as it was in this, be made the subject of contract between parties. When this is done, it stands upon the footing of every other lawful contract, upon valuable consideration, the obligation of which cannot be impaired by sebsequent legislation." Virginia Coupon Cases, 114 U. S. 269, 29 L. Ed. 185.

1. Statute taking away defense of suicide to action on policy.—The Missouri statute providing that in all suits upon policies of life insurance hereafter issued by any company, suicide shall be no defense, was held to apply only to policies thereafter issued. The court refused to express an opinion whether, if the act were plainly applicable upon its face to antecedent policies, it would be open to the imputation of impairing the obligation of contracts previously entered into between the insurance company and their insured. Knights Templars', etc., Indemnity Co. *v.* Jarman, 187 U. S. 197, 47 L. Ed. 139. See the title INSURANCE.

2. Remedies to enforce judgments cannot be taken away.—Memphis *v.* United States, 97 U. S. 293, 296, 24 L. Ed. 920. See the title JUDGMENTS AND DECREES.

3. Time when remedy to enforce judgment created immaterial.—Memphis *v.*

much prohibited by that instrument as legislation which impairs otherwise the obligation of the contract.[4]

b. *Levy and Collection of Taxes.*—Hence laws for the collection of the requisite taxes, existing when the bonds were issued, but subsequently repealed, still subsist for the purposes of the contract, and a writ of mandamus may issue from the circuit court to enforce them.[5]

United States, 97 U. S. 293, 296, 24 L. Ed. 924.

Thus, where, between the time of the entering into a paving contract by a municipal corporation and the recovery of a judgment thereon, the legislature provided for the levy of a special tax for the payment of the indebtedness so incurred, which statute was in force when judgment was recovered upon such contract, the subsequent repeal of the act was invalid and inoperative as against the judgment creditor. Memphis *v.* United States, 97 U. S. 293, 296, 24 L. Ed. 920.

4. **Remedies of purchasers of municipal bonds.**—McCracken *v.* Hayward, 2 How. 608, 11 L. Ed. 397; Butz *v.* Muscatine, 8 Wall. 575, 19 L. Ed. 490; Seibert *v.* Lewis, 122 U. S. 284, 30 L. Ed. 1161; United States *v.* Burlington, 154 U. S., appx., 568, 19 L. Ed. 495, citing Bronson *v.* Kinzie, 1 How. 311, 11 L. Ed. 143; Barnitz *v.* Beverly, 163 U. S. 118, 41 L. Ed. 93; Shapleigh *v.* San Angelo, 167 U. S. 646, 42 L. Ed. 310, citing Bronson *v.* Kinzie, 1 How. 311, 11 L. Ed. 143. See the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.

State statutes in force at the time of the issuance of municipal securities and providing a remedy for their enforcement by compulsory taxation for their payment, enter into and form a part of the obligation of the contract of the parties. They prescribe the remedy to which the bond holders are entitled to in the event of the default of the city; and neither by subsequent appeal nor by judicial construction can the bond holders be deprived of such remedy. Butz *v.* Muscatine, 8 Wall. 575, 583, 19 L. Ed. 490, followed in United States *v.* Burlington, 154 U. S., appx., 568, 19 L. Ed. 495; Von Hoffman *v.* Quincy, 4 Wall. 535, 555, 18 L. Ed. 403.

The Iowa act of 1862, and the provisions of the code which were in force at that time, respecting the duty of municipal authorities to levy taxes sufficient to pay judgments recovered against the city enters into and form a part of the contract of the parties. They prescribe one of the remedies to which the bond holders were entitled in the event of the default by the city. Butz *v.* Muscatine, 8 Wall. 575, 19 L. Ed. 490; United States *v.* Burlington, 154 U. S., appx., 568, 19 L. Ed. 495.

A statute providing a special tax for the payment of township bonds, enacted after the bonds were issued, is subject to repeal or alteration at any time before judgment recovered upon the bonds; but if judgment be recovered while the act remains in force, the judgment plaintiff thereby acquires a vested right to have the tax levied pursuant to the statute, which right cannot be affected by a subsequent repeal of the statute. Seibert *v.* Lewis, 122 U. S. 284, 291, 30 L. Ed. 1161; Cape Girardeau County Court *v.* Hill, 118 U. S. 68, 30 L. Ed. 73.

Virginia coupon cases—Provisions requiring payment in money and action to recover same, not equivalent remedy.—The receivability feature of the Virginia funding act of March 30, 1871, whereby coupons issued under that act were made receivable and a legal tender in payment of all debts, taxes and demands due the state, was designed to provide, and did provide in the hands of the holders of these coupons, a remedy whereby they were unable to collect the same, or to enforce payment thereof, without legal process. The remedy provided by the act of January 14, 1882, and the amendment of March 13, 1884, namely, to pay the taxes in money and thus prosecute an action for its recovery, was not substantially equivalent to this remedy. These acts were unconstitutional therefore as impairing the obligation of the contract between the state and the holders of the coupons. Virginia Coupon Cases, 114 U. S. 269, 29 L. Ed. 185.

5. **Laws for collection of taxes.**—Von Hoffman *v.* Quincy, 4 Wall. 535, 555, 18 L. Ed. 403; Butz *v.* Muscatine, 8 Wall. 575, 584, 19 L. Ed. 490; United States *v.* Burlington, 154 U. S., appx., 568, 19 L. Ed. 495.

By the second section of the Missouri act of March 23, 1868, under which the municipal obligations of the relator which had passed into judgment were issued, it was provided that to pay the interest and principal on any bond which might be issued under the authority thereof, the county court should from time to time levy and cause to be collected, in the same manner as county taxes, a special tax upon all real estate lying within the township issuing the bonds, for the purpose of paying the principal and interest, etc. Held, that this statute entered into and became a material part of the plaintiff's contract; that this provision did not entitle the plaintiff to have a special tax for his benefit collected in the same manner in which county taxes were collectible at the date of his contract, but that it gave him the right to have a special tax levied and collected in the same manner in which county taxes were levied and collected

c. *Mandamus.*—If, when the contract was made, mandamus was the usual and effective remedy to coerce the city authorities to do their duty, it is an impairment of the means of enforcement possessed by the bond holders to take it away.[6] But a statute which merely attaches conditions and restrictions to the issuance of the writ, as in the Virginia coupon cases, by requiring the holders of the securities to prove the genuineness of the coupons offered for taxes, does not impair the obligation of any contract.[7]

at the time when he applied for payment; that his contract not only required that he should have as good a remedy as that provided by the terms of the contract when made, but that his remedy should be by means of a tax, to be levied and collected after the manner provided by the state for the benefit of its counties, without discrimination against him. Held, further, that a subsequent statute, which provided, in substance, that the special tax should be levied only after the county court, being satisfied of the necessity therefor, had requested the county attorney to petition the circuit court of the county or the judge thereof, for an order to levy and collect the same, and that court being satisfied of the necessity for such special tax, and that it would not be in conflict with the constitution and laws of the state, had ordered the same to be levied and collected, does not provide a remedy as efficacious or equivalent as that provided by the statute of 1868 under which the bonds were issued; that it impaired the obligation of the relator's contract and was void; and that as to his contract the former act continued in full force for the purpose of levying and collecting the special tax necessary to pay the judgment entered upon the bond. Seibert *v.* Lewis, 122 U. S. 284, 295, 298, 300, 30 L. Ed. 1161.

6. **Mandamus to compel levy of tax.**—"The inhibition upon the courts of the state to issue a mandamus for the levy of a tax for the payment of interest or principal of any bonds except those issued under the premium-bond plan was a clear impairment of the means for the enforcement of the contract with the holders of the consolidated bonds. When the contract was made, the writ was the usual and the only effective means to compel the city authorities to do their duty in the premises, in case of their failure to provide in other ways the required funds. There was no other complete and adequate remedy." Louisiana *v.* Pilsbury, 105 U. S. 278, 301, 26 L. Ed. 1090, citing Louisiana *v.* New Orleans, 102 U. S. 203, 26 L. Ed. 132.

7. **Virginia coupon cases.**—On the 30th day of March, 1871, the general assembly of Virginia enacted a statute providing for the funding and payment of the public debt by which two-thirds of the amount due on the old bonds might be funded in new bonds with interest coupons attached "receivable at and after maturity for all taxes, debts, dues, and demands due the state." Under the law of the state as construed by the highest state court at and after the enactment of this statute, the holders of the coupons, upon the failure of the tax collectors to accept coupons when offered in payment of taxes, were entitled to a writ of mandamus to compel acceptance. Bonds and coupons having been extensively counterfeited and money of spurious bonds and coupons being in circulation, the general assembly on the 14th of January, 1882, enacted the statute wherein it was provided, among other things, that when a mandamus was asked to compel a collection to receive coupons in payment of taxes, he was required by the law to make a return of the alternative writ that he was ready to receive state coupons as soon as they have been legally ascertained to be genuine. Upon this return having been made, the court was required to decree that the petitioner paid his taxes, which being done the coupons which had been tendered were forwarded to the county court of the county or the hustings court of the city where the taxes were payable, with directions to that court to frame an issue between the petitioner as plaintiff and the commissioners as defendant as to whether the coupons were the genuine coupons legally receivable for taxes. Upon this issue the holder of the coupons was required to prove their genuineness, and both parties were entitled to take exceptions and carry the case on appeal to the circuit court and to the supreme court of appeals. If the decision was in favor of the petition a mandamus was to issue compelling the acceptance of the coupons and the money he had paid was to be returned to him out of the first money in the treasury in preference to all other claims. It was held that the remedy provided by this act was substantially equivalent to the remedy possessed by the holders of coupons under the law as it stood at the time of the enactment of the act of March 30th, 1871, and the issuance of the bonds; that these provisions of the act of January 14th, 1882, did not operate to impair the obligation of the contract between the state and the holders of the coupons. Antoni *v.* Greenhow, 107 U. S. 769, 27 L. Ed. 468.

Subsequently on the 7th day of April, 1882, the general assembly passed another statute which the plaintiff claimed took away all remedy by mandamus to compel acceptance of coupons. Without deciding whether or not the provisions of the act

3. Remedies for Mesne Profits and Improvements.—If owners of lands, granted without conditions or restrictions, are deprived by the legislature of their usual remedy for mesne profits, or compelled to pay for certain kinds of improvements for which they were not otherwise liable, this is an impairment of the obligation of a contract.[8]

4. Remedy for Resisting Illegal Taxes.—An act of a state legislature which merely alters the mode of resisting the collection of an alleged illegal tax, is unobjectionable, provided it does not deny a remedy, or so embarrass it with conditions and restrictions as seriously to impair the value of the right.[9]

5. Mandamus.—In accordance with the general rule that the legislature may change modes of proceeding and forms of enforcing contracts provided it does not deny a remedy, or so embarrass it with conditions and restrictions as seriously

of January 14th, 1882, provided for a mandamus to compel acceptance of the coupons after their genuineness had been established as therein prescribed, was repealed by the act of April 7th, 1882, the court held that even such were the case, the remedy provided in §§ 1, 2, and 3 of the first act, and which, confessedly, were not repealed by the second act, was fully equivalent to the remedy by mandamus as it existed when the bonds were issued, and therefore there was no impairment of the obligations of the state contract. By these sections (1, 2 and 3), of act of January 14, 1882, it was provided in substance that the collector should take coupons tendered in payment, and receipt for them for the purpose of identification and verification. He was then to require payment of the taxes in money, and, after marking the coupons with the initials of the name of the owner, deliver them to the judge of the county court of the county or hustings court of the city where the taxes were payable. The taxpayer might then file his petition in the county or hustings court against the commonwealth to have a jury impaneled to determine the genuineness of the coupons. The commonwealth might be brought into court by service of a summons on the commonwealth's attorney, and a trial by jury with ample privileges to all parties of exception and appeal. If the suit was finally determined in favor of the taxpayer he was to have the amount paid by him for the taxes refunded out of the first money in the treasury, in preference to all other claims. As stated it was held that this remedy was fully equivalent to the remedy by mandamus existing when the bonds were issued. Antoni *v.* Greenhow, 107 U. S. 769, 780, 27 L. Ed. 468.

There is a distinction between the provision of a statute to provide a remedy equivalent to the remedy by mandamus to compel the acceptance of the coupons when tendered, and the provision which takes away the remedy, which taxpayer had at the time of the contract for the wrongful seizure of his property after a tender had been made and refused. In the first case the coupon holder was the actor seeking to compel the acceptance of the coupons, and the remedy provided by the statute being fairly equivalent to the remedy by mandamus, there was no impairment of the obligation. In the second case the coupon holder was acting upon the defense. Under his contract a tender of the coupons was equivalent to a tender in money, and entitled him to go hence without molestation from a taxing officer either in his person or estate, and, in the event that he was so molested, to maintain an action of detinue, trespass, or trespass on the case against the officer so acting without authority of law. The remedy provided for this case by the acts of 1882 and the amendment of 1884, namely, to pay the tax in money and prosecute an action for the recovery thereof, was not equivalent to the former remedy by action of detinue, trespass or trespass on the case, and therefore impair the obligation of the contract between the state and the holder of the coupons. Virginia Coupon Cases, 114 U. S. 269, 29 L. Ed. 185.

8. Right to mesne profits and improvements cannot be impaired.—Planters' Bank *v.* Sharp, 6 How. 301, 12 L. Ed. 447; Green *v.* Biddle, 8 Wheat. 1, 5 L. Ed. 547. See the titles EJECTMENT, vol. 5, p. 717; IMPROVEMENTS.

9. Remedy by which to resist collection of illegal tax.—The act of the legislature of Tennessee, providing that there shall be no other remedy in any case of the collection of revenue, or attempt to collect revenue illegally, or attempt to collect revenue in funds only receivable by a collector of taxes under the law, the same being other or different funds than such as the taxpayer may tender or claim the right to pay, than by paying the tax under protest, and within thirty days thereafter suing the collector to recover it, the judgment, if for the taxpayer, to be paid in preference to other claims on the treasury, does not leave a party without an adequate remedy for asserting his right to pay his state taxes in certain bills, made receivable therefor under the charter granted to the Bank of Tennessee in the year 1838, but which bills the collector refused to accept. Tennessee *v.* Sneed, 96 U. S. 69, 24 L. Ed. 610.

to impair the value of the right, it is held that a suit at law to recover money unlawfully exacted may be substituted for a pre-existing remedy by mandamus, especially as the former remedy is more simple and equally as effective as the latter.[10]

6. Statutes Barring Actions Ex Delicto.—A provision in a state constitution that nobody shall be liable in a civil action for acts done by virtue of military authority during the late Civil War, is not unconstitutional as depriving a party of a remedy and thus impairing the obligation of a contract, on the ground that it bars an action of forcible entry and detainer, because such remedy does not enter into a contract between the lessor and lessee, but stands on the same footing with any other action ex delicto.[11]

7. Remedies for Review in Appellate Courts.—The grant of a new remedy by way of review has been often sustained under particular circumstances.[12]

G. Changing Rules of Evidence.—Mere rules of evidence do not form a part of contracts entered into while they are in force, and it is competent for the legislature from time to time, to change the rules of evidence, and to make such change applicable to existing causes of action.[13] Thus, a statute which merely prescribes a new method of authenticating or proving the genuineness of bank bills tendered in payment of taxes, does not impair any contract obligations. It only provides a new way of enforcing an old one.[14]

10. Action at law may be substituted for mandamus.—Tennessee *v.* Sneed, 96 U. S. 69, 24 L. Ed. 610. See the title MANDAMUS.

11. Statutes affecting actions ex delicto.—Section 4 of the constitution of Missouri ordains that "no person shall be prosecuted in any civil action for or on account of any act by him done, performed or executed, after the 1st of January, 1861, by virtue of military authority vested in him by the government of the United States, or that of this state, to do such act, or in pursuance to orders received by him from any person vested with such authority; and if any action or proceeding shall have heretofore been, or shall hereafter be, instituted against any person for the doing of any such act, the defendant may plead this section in bar thereof." It was held that this section did not impair the obligation of a contract, within the meaning of the constitution, because, in the case of a contract relating to real property (as, for example, a landlord's covenant that he will keep his tenant in possession) its effect is to prevent a determination under particular state statutes of a party's mere right of possession, irrespective of the merits of title, and where the same result might have confessedly been lawfully brought about by the state legislature, by a repeal of the particular statute and without impairing the obligation of a contract. Drehman *v.* Stifle, 8 Wall. 595, 19 L. Ed. 508.

12. Remedies for appellate review.—Stephens *v.* Cherokee Nation, 174 U. S. 445, 43 L. Ed. 1041, citing Calder *v.* Bull, 3 Dall. 386, 1 L. Ed. 648; Sampeyreac *v.* United States, 7 Pet. 222, 8 L. Ed. 665; Freeborn *v.* Smith, 2 Wall. 160, 17 L. Ed. 922; Garrison *v.* New York, 21 Wall. 196, 22 L. Ed. 612; Freeland *v.* Williams, 131 U. S. 405, 33 L. Ed. 193; Essex Public Road Board *v.* Skinkle, 140 U. S. 334, 35 L. Ed. 446.

13. Changing rules of evidence.—Marx *v.* Hanthorn, 148 U. S. 172, 181, 37 L. Ed. 410. See the title CONSTITUTIONAL LAW, vol. 4, p. 448. See ante, "Virginia Coupon Cases," III, D, 3, a, (2).

14. Proof of genuineness of bank bills offered to pay taxes.—Where under the charter of a bank its bills are receivable for taxes, a subsequent statute enacted after all of its bills so receivable are outstanding, and providing a new mode of proving the bills of the bank when tendered for taxes, creates no contract between the state and bill holders and gives them no vested right in such remedy, they not having received the bills in reliance thereon. Moreover, even if it were otherwise, all remedies being under the control of the state, it would have been competent for the legislature to have changed or modified it at its pleasure, so long as it left or provided other substantial and fairly equivalent means of enforcement. South Carolina *v.* Gaillard, 101 U. S. 433, 25 L. Ed. 937.

The act of the general assembly of South Carolina, passed June 9, 1877, entitled: "An act to provide the mode of proving bills of the bank of the state tendered for taxes, and the rules of evidence applicable thereto," created no new contract between the state and the taxpayer or bill holder, but merely provided a new remedy which formed no part of the contract created by the charter of the bank. After that act was repealed, a party could not institute a proceeding to avail himself of the remedy which it furnished, and all suits then pending thereunder terminated, there being no saving clause as to them. South Carolina *v.* Gaillard, 101 U. S. 433, 25 L. Ed. 937.

H. Exemptions from Execution—1. In General.—Statutes limiting the right of the creditor to enforce his claims against the property of the debtor, which are in existence at the time the contracts are made, are not void, but are within the legislative power of the states where the property and the debtor are to be found.[15] But state statutes which exempt any material portion of a debtor's property from execution will be held to impair the obligation of pre-existing contracts.[16] It is to be understood, however, that the encroachment thus

See the title DOCUMENTARY EVIDENCE, vol. 5, p. 464.

15. Exemption laws valid as to future contracts.—Denny *v.* Bennett, 128 U. S. 489, 494, 32 L. Ed. 491. See ante, "Pre-existing Statutes Unobjectionable," II, J. See the titles EXECUTIONS, ante, p. 84; HOMESTEAD EXEMPTIONS, ante, p. 693.

"The established construction of the constitution of the United States against impairing the obligation of contracts requires that statutes of this class shall be construed to be parts of all contracts made when they are in existence, and therefore cannot be held to impair their obligation." Denny *v.* Bennett, 128 U. S. 489, 495, 32 L. Ed. 491.

It is believed that every state in the Union has passed statutes by which a part of the property of the debtor is exempt from seizure on execution or other process of the courts; in short, is not by law liable to the payment of his debts. This exemption varies in its extent and nature in the different states. In some it extends only to the merest implements of household necessity; in others it includes the library of the professional man, however extensive, and the tools of the mechanic; and in many it embraces the homestead in which the family resides. This has come to be considered in this country as a wise, as it certainly may be called a settled, policy in all the states. To property so exempted the creditor has no right to look, and does not look, as a means of payment when his debt is created; and while this court has steadily held, under the constitutional provision against impairing the obligations of contracts by state laws, that such exemption laws, when first enacted, were invalid as to debts then in existence, it has always held, that, as to contracts made thereafter, the exemptions were valid. Nichols *v.* Eaton, 91 U. S. 716, 726, 24 L. Ed. 254.

16. Exemption laws held void as to pre-existing contracts.—Edwards *v.* Kearzey, 96 U. S. 595, 24 L. Ed. 793, approving Gunn *v.* Barry, 15 Wall. 610, 622, 21 L. Ed. 212.

A statute forbidding the sale of any of the debtor's property, under a judgment upon a contract, would relate to the remedy, and there can be no doubt that such a law passed by a state would be declared void as impairing the obligation of pre-existing contracts. Von Hoffman *v.* Quincy, 4 Wall. 535, 552, 18 L. Ed. 403; Edwards *v.* Kearzey, 96 U. S. 595, 24 L. Ed. 793.

State insolvent laws which exempt future acquisitions of property from the debts of the owner and extend to discharge the debt or contract itself, must not apply to past contracts, or they will be unconstitutional as impairing their obligations. Congress alone can do this as to prior contracts by means of an express permission in the constitution to pass uniform laws upon the subject of bankruptcy. Planters' Bank *v.* Sharp, 6 How. 301, 328, 12 L. Ed. 447, citing Cook *v.* Moffat, 5 How. 295, 316, 12 L. Ed. 159; Ogden *v.* Saunders, 12 Wheat. 213, 6 L. Ed. 606; Sturges *v.* Crowninshield, 4 Wheat. 122, 4 L. Ed. 529.

Homestead exemptions.—A state law, whether in the form of a statute or embodied in the state constitution, which materially increases the homestead or other exemptions which a debtor may claim, is unconstitutional in so far as it is sought to be applied retrospectively to existing contracts. Edwards *v.* Kearzey, 96 U. S. 595, 604, 24 L. Ed. 793.

An exemption law of Georgia, passed several years ago, exempted from execution in favor of each head of a family, "fifty acres of land, and five additional ones for each of his children under the age of 16 years, the land to include the dwelling house and improvements if the same do not exceed $200," and exempted many other things, chiefly household furniture, wearing apparel, books, family portraits, etc.; the value of which was not limited, and which might vary with different debtors and their families. With that law in force A obtained a judgment for $531 against B, who had 272½ acres of land, worth $1,300, and had no other property but land worth $100, from which the judgment could be satisfied. In this state of things Georgia having passed an "ordinance of secession," withdrew her senators and representatives from the congress of the United States, and went into the rebellion. The rebellion being suppressed, but Georgia not being allowed by congress yet to send senators and representatives to its sessions, congress passed what was known as the reconstruction act. This act reciting that "no legal state government or adequate protection for life or property now existed in the rebel state of Georgia," authorized the said state to make a constitution, which being

denounced must be material. If it be not material, it will be regarded as of no account.[17]

2. Continuing Exemptions to Converted Property.—Where by existing statutes the property of a municipality was not subject to sale for enforcement of the contract, a subsequent statute authorizing the property to be converted into shares of stock, and continuing the exemption in favor of such stock, does not impair the obligation of existing contracts.[18]

submitted to congress and approved by it, the state was to be entitled to representation. The people of the state did accordingly make a new constitution and submit it to congress. This new constitution provided that "each head of a family should be entitled to a homestead of realty to the value of $2,000 in specie, and personal property to the value of $1,000 in specie, to be valued at the time they are set apart;" and ordained further that: "No court or ministerial officer in the state shall ever have jurisdiction or authority to enforce any judgment, decree, or execution against said property so set apart, including such improvement as may be made thereon from time to time, except for taxes, money borrowed or expended in the improvement of the homestead, or for the purchase money of the same, and for labor done thereon, or material furnished therefor, or removal of encumbrances thereon." The constitution with this exemption and these provisions in it was submitted to congress, which approved part of it and disapproved of other parts; enacting only that after certain changes were made the state should be entitled to representation. No objection was made to the clauses of exemption or the provisions above quoted. The state of Georgia complied with the requirements of congress, and a constitution satisfactory to that body being made —these clauses of exemption and the accompanying provisions, being in it—the state was declared entitled to representation. Held, that as respected a creditor who has obtained by his judgment a lien on the land which the old exemption secured to him while the new one destroyed it, the law creating the new exemption impaired the obligation of a contract, and was unconstitutional and void. Gunn *v.* Barry, 15 Wall. 610, 21 L. Ed. 212, cited in Fink *v.* O'Neil, 106 U. S. 272, 276, 27 L. Ed. 196, and criticised in Morley *v.* Lake Shore, etc., R. Co., 146 U. S. 162, 170, 36 L. Ed. 925.

The fact that the constitution had been made under the special circumstances and in the special way above mentioned; and under the eye of congress, did not change the case. Gunn *v.* Barry, 15 Wall. 610, 21 L. Ed. 212, distinguished in Morley *v.* Lake Shore, etc., R. Co., 146 U. S. 162, 170, 36 L. Ed. 925.

Exemption of real property of bank.—A law which withdraws from the reach of legal process the real property of a bank which at the time of the execution of the contract, was liable to be subjected to the satisfaction of such contract, and which provided no substitute remedy, thereby reducing the creditors of the bank to a condition in which their rights "live but in grace, and their remedy is entreaty only," impairs the obligation of their contracts, and is therefore invalid. Curran *v.* Arkansas, 15 How. 304, 320, 14 L. Ed. 705, reaffirmed in Hawthorne *v.* Calef, 2 Wall. 10, 21, 17 L. Ed. 776.

Dangerous dictum.—"The state may, if it thinks proper, direct that the necessary implements of agriculture, or the tools of the mechanic, or articles of necessity in household furniture, shall, like wearing apparel, not be liable to execution on judgments. Regulations of this description have always been considered, in every civilized community, as properly belonging to the remedy, to be exercised or not by every sovereignty, according to its own views of policy and humanity." Bronson *v.* Kinzie, 1 How. 311, 315, 11 L. Ed. 143. This dictum is criticised in Edwards *v.* Kearzey, 96 U. S. 595, 603, 24 L. Ed. 793, and the court said that the chief justice seems to have had in his mind the maxim "de minimis," etc. Upon no other ground can any exemption be justified. Policy and humanity are dangerous guides in the discussion of a legal proposition.

The states may also exempt from sale, under execution, the necessary implements of agriculture, the tools of a mechanic, and articles of necessity in household furniture. "Regulations of this description have always been considered in every civilized community as properly belonging to the remedy, to be exercised by every sovereignty according to its own views of policy and humanity." Von Hoffman *v.* Quincy, 4 Wall. 535, 553, 18 L. Ed. 403. (Obiter dicta.)

17. **Exemption must be material to avoid the law.**—Edwards *v.* Kearzey, 96 U. S. 595, 24 L. Ed. 793.

18. **Statute authorizing a change in the form of property previously exempted from execution at the hands of municipal creditors.**—A legislative enactment which authorizes a municipal corporation to change the form of its investment in public property and which declares that the property in its changed form, or that property received in exchange therefor, shall not be liable to execution for the city's indebtedness, does not impair the obligation of the contract between the city and its

I. Insolvency Laws[19]—1. STATUTES REGULATING PRIORITY BETWEEN CREDITORS.—The question which classes of creditors are entitled to priority in payment of debts on the distribution of funds, forms no part of the contract itself. It is extrinsic, and is rather a personal privilege, dependent on the law of the place where the property lies, and where the court sits which is to decide the case.[20]

2. STATUTES DEALING WITH ASSIGNMENTS FOR CREDITORS.—A statute allowing a debtor to make an assignment of all his property for the equal benefit of all his creditors, and thereafter to be fully discharged from all further liability upon his debts, does not impair the obligation of any contract entered into subsequent to its enactment.[21] Nor is it any impairment of the obligation of contracts entered into after the enactment of the statute, that the statute provides that, upon the debtor's making an assignment of all his property for the benefit of his creditors, any surplus left, after paying in full those creditors entering into the composition, shall be paid over to the debtor free from the demands of those of his creditors who did not enter into the composition.[22]

3. STATUTES ABOLISHING IMPRISONMENT FOR DEBT.—It is well settled by repeated decisions of the federal supreme court that the abolition of imprisonment for debt by the statute of a state is not of itself such a change in the remedy as impairs the obligation either of pre-existing or future contracts. And this for the reason that imprisonment is no part of the contract; and simply to release the prisoner does not impair its obligation.[23]

creditors. New Orleans *v.* Morris, 105 U. S. 600, 26 L. Ed. 1184.

Thus municipal waterworks are not subject to be taken on execution for the satisfaction of the city's indebtedness. The statute of Louisiana, therefore, which authorized the city of New Orleans to sell its waterworks, and which provided that the bonds and stock received by the city in exchange therefor should not be subject to execution at the hands of the city's creditors, was not invalid as impairing the obligation of the contract. New Orleans *v.* Morris, 105 U. S. 600, 26 L. Ed. 1184.

Cases distinguished.—In New Orleans *v.* Morris, 105 U. S. 600, 603, 26 L. Ed. 1184, Mr. Justice Miller delivering the opinion of the court distinguished Green *v.* Biddle, 8 Wheat. 1, 5 L. Ed. 547; Bronson *v.* Kinzie, 1 How. 311, 11 L. Ed. 143; McCracken *v.* Hayward, 2 How. 608, 11 L. Ed. 397, in the following language: "They simply hold that an act of the legislature, passed after a contract is made, which withdraws property then liable to be seized and sold, in enforcement of that contract, from the power of the courts to seize and sell it, impairs the obligation of the contract. But it has never been held, so far as we are advised, that a statute dealing with property not subject to sale for enforcement of the contract, cannot, in providing for a change of the form of the title by which the debtor holds it, continue the exemption from forced sale of that which represents in the hands of the same owner the property so exempt. That is the case before us."

19. See the titles BANKRUPTCY, vol. 2, pp. 804, 806; CONFLICT OF LAWS, vol. 3, p. 1082; INSOLVENCY.

20. Statutes providing for priorities between creditors.—Harrison *v.* Sterry, 5 Cranch 289, 298, 3 L. Ed. 104, distinguished in Planters' Bank *v.* Sharp, 6 How. 301, 330, 12 L. Ed. 447; Jackson *v.* Lamphire, 3 Pet. 280, 7 L. Ed. 679.

21. While a state may not discharge a debt as against a citizen of another state than that where the court is sitting, who does not appear and is not otherwise brought within the jurisdiction of the court, yet the power of the state to regulate remedies as to property within the state, so far as it does not impair the obligation of contracts, is conceded; and a Minnesota statute which allows a voluntary assignment after attachment, does not work such impairment merely because the attaching creditor happens to be a citizen of another state. Denny *v.* Bennett, 128 U. S. 489, 32 L. Ed. 491. See Knox *v.* Exchange Bank, 12 Wall. 379, 382, 20 L. Ed. 414. See the title INSOLVENCY.

22. Provisions as to surplus money.—Denny *v.* Bennett, 128 U. S. 489, 496, 32 L. Ed. 491.

23. Statutes abolishing imprisonment for debt are valid.—Sturges *v.* Crowninshield, 4 Wheat. 122, 4 L. Ed. 529; Beers *v.* Haughton, 9 Pet. 329, 9 L. Ed. 145; Mason *v.* Haile, 12 Wheat. 370, 6 L. Ed. 660; Duncan *v.* Darst, 1 How. 301, 11 L. Ed. 139; Von Hoffman *v.* Quincy, 4 Wall. 535, 553, 18 L. Ed. 403; Tennessee *v.* Sneed, 96 U. S. 69, 24 L. Ed. 610; Edwards *v.* Kearzey, 96 U. S. 595, 602, 24 L. Ed. 793; Penniman's Case, 103 U. S. 714, 26 L. Ed. 602. See, generally, the title IMPRISONMENT FOR DEBT.

"The right to imprison for debt is not a part of the contract. It is regarded as penal rather than remedial. The states

The reason for this rule was given as follows by Mr. Justice Swayne in Edwards *v.* Kearzey, 96 U. S. 595, 24 L. Ed. 793: "Imprisonment for debt is a relic of ancient barbarism. Cooper's Justinian, 658; 12 Tables, Tab. 3. It has descended with the stream of time. It is a punishment rather than a remedy. It is right for fraud, but wrong for misfortune. It breaks the spirit of the honest debtor, destroys his credit, which is a form of capital, and dooms him, while it lasts, to helpless idleness. Where there is no fraud, it is the opposite of a remedy. Every right-minded man must rejoice when such a blot is removed from the statute book." But a statute which not only provides for the liberation of persons in prison for debt, but also discharges the person so liberated from all liability for previously contracted debts, is a direct impairment of the obligation, and is unconstitutional and void.[24]

4. ARRANGEMENTS BETWEEN CORPORATE BOND HOLDERS.—In the United States, statutory provisions binding the minority bond holders in a corporation in a reasonable way by the will of the majority, would come within the inhibition of the contract clause as to existing obligations. But in the Dominion of Canada

may abolish it whenever they think proper." Sturges *v.* Crowninshield, 4 Wheat. 122, 200, 4 L. Ed. 529; Ogden *v.* Saunders, 12 Wheat. 213, 230, 6 L. Ed. 606; Mason *v.* Haile, 12 Wheat. 370, 373, 6 L. Ed. 660; Von Hoffman *v.* Quincy, 4 Wall. 535, 553, 18 L. Ed. 403, citing Beers *v.* Haughton, 9 Pet. 329, 359, 9 L. Ed. 145.

Imprisonment for debt constitutes no part of the obligation of a contract, and a statute providing therefor may be repealed at any time, regardless of whether the contract was entered into or the judgment recovered before or after the enactment of the repealing act. Penniman's Case, 103 U. S. 714, 26 L. Ed. 602; Sturges *v.* Crowninshield, 4 Wheat. 122, 200, 4 L. Ed. 529; Beers *v.* Haughton, 9 Pet. 329, 9 L. Ed. 145.

The states have a right to legislate or abolish imprisonment for debt, as a part of the remedy for enforcing the performance of contracts, and to make such laws apply to existing contracts, and to the cases of persons already imprisoned. Such laws act merely upon the remedies, and they are part only. They do not take away the entire remedy but only so far as imprisonment forms a part of such remedy. Mason *v.* Haile, 12 Wheat. 370, 6 L. Ed. 660, following Sturges *v.* Crowninshield, 4 Wheat. 122, 200, 4 L. Ed. 529.

Confinement of the debtor may be a punishment for not performing his contract, or may be allowed as a means of inducing him to perform it. But the state may refuse to inflict this punishment, or may withhold this means and leave the contract in full force. Imprisonment is no part of the contract, and simply to release the prisoner, does not impair its obligation. Sturges *v.* Crowninshield, 4 Wheat. 122, 200, 201, 4 L. Ed. 529, approved in Mason *v.* Haile, 12 Wheat. 370, 6 L. Ed. 660.

A doubt expressed.—But upon the power of a state, even in this class of cases, see the strong dissenting opinion of Mr. Justice Washington, in Mason *v.* Haile, 12 Wheat. 370, 6 L. Ed. 660; Edwards *v.* Kearzey, 96 U. S. 595, 602, 24 L. Ed. 793.

Illustrative cases.—Where the condition of a bond for the jail limits, in Rhode Island, required the party to remain a true prisoner, in the custody of the keeper of the prison, and within the limits of the prison, "until he shall be lawfully discharged, without committing any manner of escape or escapes during the time of restrains, then this obligation to be void, or else to remain in full force and virtue;" held, that a discharge, under the insolvent laws of the state, obtained from the proper court, in pursuance of a resolution of the legislature, and discharging the party from all his debts, etc., "from all imprisonment, arrest and restraint of his person therefor"—was a lawful discharge, and that his going at large under it, was no breach of the condition of the bond. Mason *v.* Haile, 12 Wheat. 370, 6 L. Ed. 660.

In the absence of constitutional prohibitions the state may by special statute apply the remedy to individual cases. Mason *v.* Haile, 12 Wheat. 370, 378, 6 L. Ed. 660.

A statute of a state, enacted to define and limit the mode of enforcing the liability of stockholders for the debts of corporations, which provides that no person shall hereafter be imprisoned, or be continued in prison, nor shall the property of any such person be attached, upon an execution issued upon a judgment obtained against a corporation of which such person is or was a stockholder, is constitutional and valid even as applied to debts contracted by the corporation before its enactment. Fourth Nat. Bank *v.* Francklyn, 120 U. S. 747, 30 L. Ed. 825, citing Ogden *v.* Saunders, 12 Wheat. 213, 6 L. Ed. 606; Webb *v.* Den, 17 How. 576, 15 L. Ed. 35; Hawthorne *v.* Calef, 2 Wall. 10, 17 L. Ed. 776; Curtis *v.* Whitney, 13 Wall. 68, 20 L. Ed. 513; Tennessee *v.* Sneed, 96 U. S. 69, 24 L. Ed. 610; Penniman's Case, 103 U. S. 714, 26 L. Ed. 602.

24. When statutes abolishing imprisonment for debt are void.—Sturges *v.*

such a provision may be passed in respect to existing as well as prospective obligations.[25] On the other hand, where a railroad company has become pecuniarily embarrassed, and seeks to devise a plan for the settlement of its affairs and liabilities, a statute passed in furtherance of this plan, which makes the failure of a bond holder of the company to signify his refusal to concur in the agreement of settlement within a specified time, equivalent to an express assent in writing, does not impair the obligation of his contract.[26]

J. Right to Sue—1. In General.—The mere right to sue without any means of enforcing judgments recovered is not such a remedy as forms a part of the obligation of a contract. Such a right or remedy may, therefore, be repealed at the pleasure of the state. A right to petition, or entreat, is not a means of enforcement, and where the sole remedy extended to judgment creditors against the state is the right to petition the legislature to satisfy the judgment recovered, such creditor cannot be said to have a remedy which is within the protection of the contract clause of the constitution.[27]

2. Right to Sue the State.—A law providing that the state may be sued is not a contract, but an ordinary act of the legislature prescribing the conditions upon which the state consents to waive the privilege of sovereignty. Accordingly, such law may be repealed altogether, either by putting an end to the jurisdiction of their courts in suits against the state, or by prescribing new conditions upon which the suits might still be allowed to proceed; and in exercising this power, the state violates no contract with the parties.[28]

Crowninshield, 4 Wheat. 122, 4 L. Ed. 529.

25. Arrangements between railroad bondholders.—Canada Southern R. Co. *v.* Gebhard, 109 U. S. 527, 27 L. Ed. 1020. See the title RAILROADS.

26. Settlement of embarrassed railroad corporations.—Gilfillan *v.* Union Canal Co., 109 U. S. 401, 27 L. Ed. 977.

27. Mere right to sue may be withdrawn.—Railroad Co. *v.* Tennessee, 101 U. S. 337, 25 L. Ed. 960; Railroad Co. *v.* Alabama, 101 U. S. 832, 25 L. Ed. 973; both these cases approved in Baltzer *v.* North Carolina, No. 1, 161 U. S. 240, 40 L. Ed. 684.

"The remedy, which is protected by the contract clause of the constitution, is something more than the privilege of having a claim adjudicated. Mere judicial inquiry into the rights of parties is not enough. There must be the power to enforce the results of such an inquiry before there can be said to be a remedy which the constitution deems part of a contract. Inquiry is one thing; remedy another. Adjudication is of no value as a remedy unless enforcement follows. It is of no practical importance that a right has been established if the right is no more available afterwards than before. The constitution preserves only such remedies as are required to enforce a contract." Railroad Co. *v.* Tennessee, 101 U. S. 337, 339, 25 L. Ed. 960, approved in Baltzer *v.* North Carolina, No. 1, 161 U. S. 240, 40 L. Ed. 684.

Thus where the state provides a method for suing upon claims against the state, but leaves the satisfaction of any judgment recovered to the discretion of the legislature and without any means to the plaintiff of compelling satisfaction, such remedy is not a part of the obligation of a contract, and may be repealed at pleasure. Railroad Co. *v.* Tennessee, 101 U. S. 337, 25 L. Ed. 960; Railroad Co. *v.* Alabama, 101 U. S. 832, 25 L. Ed. 973, approved in Baltzer *v.* North Carolina, No. 1, 161 U. S. 240, 40 L. Ed. 684.

28. Statute permitting suits against state not a contract.—A statute permitting suits against the state is not a contract between the state and persons holding claims against the state. Such statute may be repealed at the will of the legislature. Railroad Co. *v.* Tennessee, 101 U. S. 337, 339, 25 L. Ed. 960; Railroad Co. *v.* Alabama, 101 U. S. 832, 25 L. Ed 973; In re Ayers, 123 U. S. 443, 505, 31 L. Ed. 216; Hans *v.* Louisiana, 134 U. S. 1, 17, 33 L. Ed. 842, approved in Baltzer *v.* North Carolina, 161 U. S. 240, 40 L. Ed 684. See Bank No. 1 *v.* Arkansas, 20 How 530, 15 L. Ed. 993. See the title STATES

Privilege of suing state not a contract —Under the constitution of the state of Arkansas, the legislature passed a law allowing the state to be sued. According to this law, a suit was brought upon some of the state bonds; and whilst the suit was going on, the legislature passed another law, requiring the bonds to be filed in court, or the suit to be dismissed. The suitor refusing to file his bonds, the suit was dismissed; and the case was carried to the supreme court of the state, where the judgment was affirmed. The case being brought to the federal supreme court under the twenty-fifth section of the judiciary act, must be dismissed for want of jurisdiction. The permission to bring the suit was not a contract whose obligations were impaired by the passage

3. Annexing Conditions to Right to Sue.—A statute passed after a contract has been made and entered into, prescribing conditions to its enforcement of such a nature that substantial rights secured thereby are impaired, is to that extent void. The states are no more permitted to impair the efficacy of a contract in this way than to attack its validity in any other manner.[29] But the requirement that a claim or demand against a city should be presented to the common council and be disallowed, in whole or in part, before the city can be subjected to suit upon it, and that failure to act upon it for sixty days shall be deemed a disallowance thereof, is a reasonable regulation for the protection of the city against the cost of unnecessary litigation, and works no impairment as to existing contracts.[30]

K. Statutory Liabilities—1. In General.—A statutory liability is as much the subject of remedial legislation as a liability by contract, unless the remedy enters into and forms a part of the obligation which the statute creates.[31]

2. Liability of Stockholders—a. *In General.*—The obligation of the contract existing between the stockholder and the state is not violated by a change in the character and nature of the remedy against him.[32]

of the subsequent law. Beers *v.* Arkansas, 20 How. 527, 15 L. Ed. 991.

Where the statute of Alabama subjecting her to suit in her courts was in force at the time when a contract with her was made, and a suit thereon brought, but their functions were essentially those of a board of audit, and the plaintiff had no means of enforcing the payment of a judgment or a decree in his favor, held, that the repeal of the statute deprives the court of jurisdiction to proceed, and is not in violation of the contract clause of the constitution of the United States. Railroad Co. *v.* Alabama, 101 U. S. 832, 25 L. Ed. 973, approved in Baltzer *v.* North Carolina, No. 1, 161 U. S. 240, 40 L. Ed. 684.

The constitution of Tennessee, in force in 1838, declares that "suits may be brought against the state in such manner and in such courts as the legislature may by law direct." The statute of 1855 providing that actions might be instituted against the state under the same rules and regulations that govern those between private citizens, but conferring no power on the courts to execute their judgments, was repealed in 1865. No other law was enacted prescribing the manner or the courts in which the state could be sued. In a suit subsequently brought by the state in 1872 against the Bank of Tennessee and certain of its creditors, A, who was admitted a defendant, filed a cross bill, setting up that while the first statute was in force the bank became indebted to him, and, praying that under the indemnity clause of its charter a decree be rendered against the state for the amount of the debt. The cross bill was dismissed solely upon the ground that the state could not be sued in her own courts. Held, that the repealing statute of 1865 did not impair the obligation of a contract, within the meaning of the contract clause of the constitution of the United States. Railroad Co. *v.* Tennessee, 101 U. S. 337, 25 L. Ed. 960, approved in Baltzer *v.* North Carolina, No. 1, 161 U. S. 240, 40 L. Ed. 684; Railroad Co. *v.* Alabama, 101 U. S. 832, 834, 25 L. Ed. 973.

29. **Requiring payment of taxes as condition precedent to action.**—Held, accordingly, when, on the 1st of January, 1870, suit was brought on a promissory note given in March, 1864, payable in March, 1865, that a law passed in October, 1870, which enacted (by one section) that in all suits pending on any contract made before June 1st, 1865, it should not be lawful for the plaintiff to have a verdict unless he made it appear that all taxes chargeable by law on the same had "been duly paid for each year since the making of the same;" and enacted (by another section) that it should be a condition precedent to such recovery that "the said debt has been regularly given in for taxes and the taxes paid," and (by other sections) made other retrospective enactments, impaired the obligation of a contract, and was accordingly unconstitutional. Walker *v.* Whitehead, 16 Wall. 314, 21 L. Ed. 357.

30. **Conditions may be annexed to right to sue.**—Oshkosh Waterworks Co. *v.* Oshkosh, 187 U. S. 437, 47 L. Ed. 249.

31. **Statutory liability may be regulated.**—Terry *v.* Anderson, 95 U. S. 628, 24 L. Ed. 365.

32. **Character and nature of remedy against stockholders may be changed.**—Bernheimer *v.* Converse, 206 U. S. 516, 51 L. Ed. 1163. See the title STOCK AND STOCKHOLDERS.

A statute of a state, enacted to define and limit the mode of enforcing the liability of stockholders for the debts of the corporation, which provides that all proceedings to enforce the liability of a stockholder for the debts of the corporation shall be either by suit in equity, conducted according to the practice and

So also, the legislature may give additional remedies to make the obligation of the stockholder effectual, so long as his original undertaking is not enlarged.[33] Therefore, a statute which provides for a new method of collecting unpaid stock, in addition to and in lieu of that specially provided for in the company's charter, does not violate the obligation of any contract existing between the state and corporation, where the statute restricts any judgment against him to the amount he originally assumed to pay.[34] But a statute which repeals a former statute, by which the stock and stockholders in a chartered company were liable for the corporation's debts, is, as respects creditors of the corporation existing at the time of the repeal, a law impairing the obligation of contracts, and void, since it not only modifies the remedy afforded by such security, but wholly

course of equity, or by an action of debt upon a judgment obtained against such corporation, and in any such suit or action, such stockholder may contest the validity of the claim upon which the judgment against such corporation was obtained, upon any ground upon which such corporation could have contested the same in the action in which such judgment was recovered, since it does not undertake to annul the liability of the stockholders for the debts of the corporation, but only modifies the form of remedy and the rules of evidence, it is not doubted that it is a constitutional exercise of the power of the legislature, even as applied to debts contracted by the corporation before its enactment. Fourth Nat. Bank *v.* Francklyn, 120 U. S. 747, 30 L. Ed. 825, citing Ogden *v.* Saunders, 12 Wheat. 213, 6 L. Ed. 606; Webb *v.* Den, 17 How. 576, 15 L. Ed. 35; Hawthorne *v.* Calef, 2 Wall. 10, 17 L. Ed. 776; Curtis *v.* Whitney, 13 Wall. 68, 20 L. Ed. 513; Tennessee *v.* Sneed, 96 U. S. 69, 24 L. Ed. 610; Penniman's Case, 103 U. S. 714, 26 L. Ed. 602.

Statute giving direct remedy against individual stockholder.—The unpaid balance due upon stock subscription may be recovered by a bill in equity at the suit of the corporation or of its creditors. But a stockholder has no vested right to be sued for such unpaid balance in this form of action and no other. It is competent, therefore, for the legislature to provide that a judgment creditor of the corporation may, upon the return of an execution unsatisfied, cause to be issued against a stockholder an execution to be levied upon his property to the extent of the unpaid balance due on the stock by him or her owned. Hill *v.* Merchants' Mut. Ins. Co., 134 U. S. 515, 525, 33 L. Ed. 994, approved in Bernheimer *v.* Converse, 206 U. S. 516, 530, 51 L. Ed. 1163.

33. Additional remedies against stockholders may be given.—Bernheimer *v.* Converse, 206 U. S. 516, 51 L. Ed. 1163. See ante, "Additional Remedies," VII, D.

Under a constitutional provision as to single liability of stockholders, the obligation of a stockholder's contract binds him to pay to the creditors of a corporation an amount sufficient to pay its debts, not exceeding the amount of the stock held by him. Hence a Minnesota act of 1899, doing away with personal service in the court's discretion, and including in assessments upon stockholders the expenses of collection, does not impair any contract. "There is a broad distinction between laws impairing the obligation of contracts and those which simply undertake to give a more efficient remedy to enforce a contract already made." Sturges *v.* Crowninshield, 4 Wheat. 122, 4 L. Ed. 529; Hill *v.* Merchants' Mut. Ins. Co., 134 U. S. 515, 33 L. Ed. 994. Bernheimer *v.* Converse, 206 U. S. 516, 51 L. Ed. 1163.

"The obligation of this contract binds the stockholder to pay to the creditors of the corporation an amount sufficient to pay the debts of the corporation which its assets will not pay, up to an amount equal to the stock held by each shareholder. That is his contract, and the duty which the statute imposes, and that is his obligation. Any statute which took away the benefit of such contract or obligation would be void as to the creditor, and any attempt to increase the obligation beyond that incurred by the stockholder would fall within the prohibition of the constitution. But there was nothing in the laws of Minnesota undertaking to make effectual the constitutional provision to which we have referred, to preventing the legislature from giving additional remedies to make the obligation of the stockholder effectual, so long as his original undertaking was not enlarged." Bernheimer *v.* Converse, 206 U. S. 516, 530, 51 L. Ed. 1163.

34. New method of collecting unpaid stock.—Hill *v.* Merchants' Mut. Ins. Co., 134 U. S. 515, 33 L. Ed. 994.

Although under the original charter of a corporation, the liability of a stockholder could only be enforced by a suit in equity, yet a statute subsequently passed which gives power to a judgment creditor of a corporation, when execution on a judgment against a corporation was returned unsatisfied, to summon in a stockholder who has not fully paid the subscription to his stock and upon judgment have execution against him for the amount so paid, does not violate the obligation of any contract that may exist between the state and the corporation and its stockholders, because neither the company or its stockholders has any vested

abolishes it.[35] And this is so, even though the liability of the stock is in some respects conditional only; and though the stockholder was not made, by the statute repealed, liable, in any way, in his person or property generally, for the corporation's debts.[36]

b. *Stockholders of Foreign Corporations.*—When a corporation is formed in one state, and by the express terms of the charter it is created for doing business in another state, and business is done in that state, the law existing in the latter state with regard to the individual liability of stockholders to creditors will be applied, rather than the law of the state in which the company was incorporated.[37]

L. Right to Grant New Trials and Make New Tribunals.—A state may grant new trials, and make new tribunals to review, in order to detect fraudulent grants or reverse fraudulent judgments, without impairing the obligation of any contract.[38]

M. Stay Laws.—Stay laws change a term of the contract by postponing the time of payment. This impairs its obligation by making it less valuable to the creditor. Such laws are therefore unconstitutional as applied to existing contracts.[39]

N. Forfeiture of Land for Nonpayment of Purchase Money.—A statute of a state which provides for the forfeiture of a contract of purchase, in event of default in the payment of annual interest without judicial ascertainment or proceedings, does not violate the obligation of a contract which was

right in that particular remedy. Hill *v.* Merchants' Mut. Ins. Co., 134 U. S. 515, 33 L. Ed. 994.

35. Liability of stock for corporate debts constitutes a contract.—Hawthorne *v.* Calef, 2 Wall. 23, 17 L. Ed. 776, citing Bronson *v.* Kinzie, 1 How. 311, 11 L. Ed. 143; Woodruff *v.* Trapnall, 10 How. 190, 13 L. Ed. 383; Curran *v.* Arkansas, 15 How. 304, 14 L. Ed. 705.

36. Hawthorne *v.* Calef, 2 Wall. 10, 17 L. Ed. 776.

37. What law determines such liability in case of foreign corporations.—Pinney *v.* Nelson, 183 U. S. 144, 46 L. Ed. 125.

38. Statutes granting new trials are valid.—League *v.* De Young, 11 How. 185, 203, 13 L. Ed. 657; Herman *v.* Phalen, 14 How. 79, 14 L. Ed. 334. See the title NEW TRIALS.

Right to set aside inquisition and order a new one.—The state of Maryland granted a charter to a railroad company, in which provision was made for the condemnation of land to the following effect; namely, that a jury should be summoned to assess the damages, which award should be confirmed by the county court, unless cause to the contrary was shown. The charter further provided that the payment, or tender of payment, of such valuation should entitle the company to the estate as fully as if it had been conveyed. In 1836, there was an inquisition by a jury, condemning certain lands, which was ratified and confirmed by the county court. In 1841, the legislature passed an act directing the county court to set aside the inquisition and order a new one. On the 18th of April, 1844, the railroad company tendered the amount of the damages with interest, to the owner of the land, which offer was refused; and on the 26th of April, 1844, the owner applied to the county court to set aside the inquisition, and order a new one, which the court directed to be done. The law of 1841 was not a law impairing the obligation of a contract. It neither changed the contract between the company and the state, nor did it divest the company of a vested title to the land. The charter provided, that, upon tendering the damages to the owner, the title to the land should become vested in the company. There having been no such tender when the act of 1841 was passed, five years after the inquisition, that act only left the parties in the situation where the charter placed them, and no title was divested out of the company, because they had acquired none. The states have a right to direct a rehearing of cases decided in their own courts. Baltimore, etc., R. Co. *v.* Nesbit, 10 How. 395, 13 L. Ed. 469, approved in Essex Public Road Board *v.* Skinkle, 140 U. S. 334, 35 L. Ed. 446.

39. Stay laws impair the obligation of the contract.—Edwards *v.* Kearzey, 96 U. S. 595, 601, 24 L. Ed. 793.

Statute staying executions and sales under trust deeds.—The Virginia statute of April 13, 1861, suspending the enforcement of executions and prohibiting sales under deeds of trusts without the consent of the parties interested, upon the debtor's executing bonds with security to pay the debt, interest and costs, or where no such bond was given, requiring the return of the property without lien where it would not sell for its appraised value, was clearly in conflict with the contract clause of the federal constitution and was therefore invalid. Daniels *v.* Tearney, 102 U.

made and entered into at the time the statute required a judicial proceeding.[40] Nor does a law subsequently passed, which provides for the forfeiture of public lands for the nonpayment of installments due from purchasers, violate the contract clause of the federal constitution, although at the time the contract was entered into the state had no such right under the existing statutes.[41]

O. Laws Relating to the Process[42]—1. KINDS OF PROCESS.—It has been said that laws which relate only to the kind of process do not violate the obligation of a contract, because such laws only relate to the modes of proceeding in courts.[43]

2. MANNER OF SERVING PROCESS.—Nor does a statute which prescribes a mode of serving process upon railroad companies different from that provided for in a charter previously granted to a particular company, impair the obligation of the contract between such company and the state.[44]

P. Statutes Changing the Rules as to Parties to Actions.—Statutes changing the rules as to the parties in whose name an action should be brought, are valid as to prior as well as subsequent contracts.[45]

S. 415, 419, 26 L. Ed. 187, citing Bronson *v.* Kinzie, 1 How. 311, 11 L. Ed. 143; McCracken *v.* Hayward, 2 How. 608, 11 L. Ed. 397; Edwards *v.* Kearzey, 96 U. S. 595, 24 L. Ed. 793.

40. Forfeiture of contracts of purchase for nonpayment of purchase money.—The Texas act of July 8, 1879, § 12, provided for the forfeiture of contracts of purchase, in event of default in payment of annual interest, by a judicial proceeding. The act of March 25, 1897, authorizes the commissioner of the general land office, when any portion of the interest due by purchasers has not been paid, to declare a forfeiture without judicial aid, but gives such purchasers the right, at any time within six months of such forfeiture, to institute a suit contesting the same. Held, that no contract rights of a purchaser under the act of 1879 were impaired by the provisions of the subsequent act of 1897; that the twelfth section of the act of 1879 was not, in legal contemplation, a stipulation by the state that the only remedy which might be resorted to was the one therein provided for; and that the legislature may prescribe a different remedy without impairing the obligation of a contract. Wilson *v.* Standefer, 184 U. S. 399, 46 L. Ed. 612, cited and approved in Waggoner *v.* Flack, 188 U. S. 595, 603, 47 L. Ed. 609. See the title VENDOR AND PURCHASER.

41. Forfeiture of contract to purchase public lands.—The Texas laws of 1883 provided for the sale of the public lands, and for the payment of installments of principal and interest on maturity. They also provided for forfeiture, without judicial inquiry, for nonpayment; which provision was repealed in 1885, re-enacted in 1887, and amended in 1897 so as to enable the original purchaser to contest such forfeiture before the courts within six months. Held; that there was no contract on the part of the state not to enlarge or change the remedy; and that there was no impairment of the obligation of contract as to a purchaser during the period when there was no forfeiture clause, but whose land was forfeited by virtue of such subsequent legislation. Waggoner *v.* Flack, 188 U. S. 595, 47 L. Ed. 609, following Wilson *v.* Standefer, 184 U. S. 399, 46 L. Ed. 612.

"We cannot see any difference in principle between a case where an act was in existence when a contract was made, providing a certain remedy for a violation of the contract, and then after the contract is entered into, the legislature passes another act, giving an altogether different remedy, and a case where an act which denied the remedy of forfeiture when the contract was made, was repealed by a subsequent enactment which provided a forfeiture as a remedy. In both cases there is a plain alteration of remedy, while in neither is there any contract springing from the passage of the first act that no other remedy more effective should be given as against one who purchased land during the existence of the statute." Waggoner *v.* Flack, 188 U. S. 595, 604, 47 L. Ed. 609, citing Wilson *v.* Standefer, 184 U. S. 399, 46 L. Ed. 612. See the title PUBLIC LANDS.

42. See the title SUMMONS AND PROCESS.

43. Laws relating to the kind of process are valid.—Planters' Bank *v.* Sharp, 6 How. 301, 330, 12 L. Ed. 447; distinguishing United States *v.* Robeson, 9 Pet. 319, 9 L. Ed. 142; United States Bank *v.* Halstead, 10 Wheat. 51, 6 L. Ed. 264.

44. Statutes prescribing different modes of serving process.—Railroad Co. *v.* Hecht, 95 U. S. 168, 24 L. Ed. 423.

45. Statutes changing rules as to parties.—A statute of the state of Alabama, directing that promissory notes given to the cashier of a bank may be sued and collected in the name of the bank, is a law which affects the remedy only, and, although passed after the note was executed, does not impair the obligation of the contract. "The law is strictly remedial. It in no respect affects the obligation of the contract. Neither the manner

Q. Statutes Interfering with Liens and Other Securities—1. DIVESTING OR POSTPONING EXISTING LIENS.—An existing lien or other security for the enforcement of a right, cannot be divested or postponed by a subsequent act of a state legislature.[46]

2. CHANGE OF SECURITY.—But a state statute, which merely changes the security and does not take it away, is unobjectionable.[47]

3. MORTGAGES[48]—a. *In General.*—The law existing when a mortgage is made enters into and becomes a part of the contract.[49] But where it is claimed that a law subsequently passed by a state legislature has impaired the obligation of the contract between the mortgagor and the mortgagee, it must appear that its value has been diminished. The laws with reference to which the parties must be assumed to have contracted when the mortgage was executed, are those which in their direct and necessary legal operation control or affect the obligation of such contract.[50]

b. *Redemption*—(1) *Right of Redemption.*—A statute which authorizes the redemption of property sold upon foreclosure of a mortgage, where no right of redemption previously existed, cannot constitutionally apply to a sale under a mortgage executed before its passage.[51] And the mere fact that the right to redeem granted by the new statute only operates on the purchaser and not on the mortgagee as such, will not save its constitutionality.[52] So, also, the right

nor the time of payment is changed. The bank, being the holder of the note, and having the beneficial interest in it, is authorized by the statute to sue in its own name. This is nothing more than carrying out the contract according to its original intendment." Crawford *v.* Branch Bank, 7 How. 279, 282, 12 L. Ed. 700. See, generally, the title PARTIES.

46. Statute postponing or divesting mortgage lien.—Where the legislature of a state authorized commissioners to borrow money to be used in making a canal, and for the redemption of the loan pledged the canal itself, its tolls, rents and lands, the lien of a lender under such act cannot be divested or postponed by a subsequent act of the legislature. Wabash, etc., Canal Co. *v.* Beers, 2 Black 448, 17 L. Ed. 327, cited with approval in French *v.* Gapen, 105 U. S. 509, 522, 26 L. Ed. 951.

Statute postponing or divesting mortgage lien.—The holder of bonds given for money advanced under such a law has a security for his debt which is protected by that provision in the constitution of the United States which forbids a state to pass any law impairing the obligation of a contract. Wabash, etc., Canal Co. *v.* Beers, 2 Black 448, 17 L. Ed. 327.

47. Change in security.—Although by the general law of Louisiana a father's guardianship of his minor children imports a mortgage on his immovable property in their favor, yet this mortgage does not make such a contract between the guardian and the minor as that the legislature may not, by special statute, authorize the father to sell his property divested of the tacit mortgage, especially where the proceeds are still preserved to the minors by an investment which the statute prescribes. Lobrano *v.* Nelligan, 9 Wall. 295, 19 L. Ed. 694. See the title MORTGAGES AND DEEDS OF TRUST.

48. See the title MORTGAGES AND DEEDS OF TRUST.

49. Validity of subsequent laws affecting mortgages.—Bronson *v.* Kinzie, 1 How. 311, 11 L. Ed. 143; McCracken *v.* Hayward, 2 How. 608, 11 L. Ed. 397; Gantly *v.* Ewing, 3 How. 707, 11 L. Ed. 794; Howard *v.* Bugbee, 24 How. 461, 16 L. Ed. 753; Hooker *v.* Burr, 194 U. S. 415, 420, 48 L. Ed. 1046, following Connecticut, etc., Ins. Co. *v.* Cushman, 108 U. S. 51, 27 L. Ed. 648, and distinguishing Barnitz *v.* Beverly, 163 U. S. 118, 41 L. Ed. 93.

The right, and a remedy substantially in accordance with the right, are equally parts of the contract, secured by the laws of the state where it was made; and a change of these laws, imposing conditions and restrictions on the mortgagee, in the enforcement of his contract, and which affect its substance, impair the obligation, and cannot prevail; as an act directly prohibited, could not be done indirectly. Gantly *v.* Ewing, 3 How. 707, 717, 11 L. Ed. 794, citing Bronson *v.* Kinzie, 1 How. 311, 319, 11 L. Ed. 143.

50. Subsequent law must have diminished value of mortgage.—Connecticut, etc., Ins. Co. *v.* Cushman, 108 U. S. 51, 27 L. Ed. 648, followed in Hooker *v.* Burr, 194 U. S. 415, 420, 426, 48 L. Ed. 1046; and commented on in Bradley *v.* Lightcap, 195 U. S. 1, 21, 49 L. Ed. 65, and distinguished in Barnitz *v.* Beverly, 163 U. S. 118, 128, 41 L. Ed. 93.

51. Giving right of redemption when no right existed before.—Barnitz *v.* Beverly, 163 U. S. 118, 129, 41 L. Ed. 93.

52. Barnitz *v.* Beverly, 163 U. S. 118, 41 L. Ed. 93, following Bronson *v.* Kinzie, 1 How. 311, 11 L. Ed. 143.

of a mortgagor to redeem after a sale under a decree of foreclosure, guaranteed by the law as it existed at the time of the execution of the mortgage, is a right of which the mortgagor cannot be deprived either by subsequent legislation or by the forms of practice prevailing in the federal courts of chancery.[53]

(2) *Extension of Time for Redemption.*—A statute extending the time for redemption beyond that previously accorded impairs the obligation of mortgage contracts executed before its enactment.[54]

c. *Purchasers at Foreclosure Sales*—(1) *In General.*—The purchaser at a foreclosure sale must found his rights upon the law as it existed when he purchased. An alteration after he has purchased, to his prejudice, would be a different thing.[55] Thus, where, at the time a mortgage was made and entered into, there was no statute in the state limiting the time within which a deed must be taken out by the purchaser at the foreclosure sale, a statute subsequently passed which provides that if the mortgagee, being in possession, bids in the mortgaged premises at the foreclosure sale for less than the amount due on the mortgage, and the mortgagor does not redeem, the legal title of the mortgagee

53. Taking away pre-existing right of redemption.—Brine *v.* Insurance Co., 96 U. S. 627, 639, 24 L. Ed. 858, approved in Barnitz *v.* Beverly, 163 U. S. 118, 126, 41 L. Ed. 93; Clark *v.* Reyburn, 8 Wall. 318, 322, 19 L. Ed. 354.

Thus the mortgagor's right of redemption upon a sale under a decree of foreclosure, as it existed under the law at the time of the execution of the mortgage, cannot be taken away or impaired by a subsequent act; nor by the mode of procedure prevailing in the chancery practice of the federal courts. Brine *v.* Insurance Co., 96 U. S. 627, 629, 639, 24 L. Ed. 858, approved in Barnitz *v.* Beverly, 163 U. S. 118, 123, 41 L. Ed. 93.

54. Extension of time for redemption.—Barnitz *v.* Beverly, 163 U. S. 118, 41 L. Ed. 93.

A state law, enacted subsequently to the execution of a mortgage which declares that the equitable estate of the mortgagor shall not be extinguished for twelve months after a sale under a decree in chancery, is in violation of the constitutional provisions prohibiting any state from enacting any law impairing the obligation of contracts. Bronson *v.* Kinzie, 1 How. 311, 11 L. Ed. 143, approved in Planters' Bank *v.* Sharp, 6 How. 301, 331, 12 L. Ed. 447; McCracken *v.* Hayward, 2 How. 608, 612, 11 L. Ed. 397; Gantly *v.* Ewing, 3 How. 707, 716, 11 L. Ed. 794, distinguished from Hooker *v.* Burr, 194 U. S. 415, 422, 48 L. Ed. 1046; Munn *v.* Illinois, 94 U. S. 113, 143, 24 L. Ed. 77; Brine *v.* Insurance Co., 96 U. S. 627, 637, 24 L. Ed. 858.

"Bronson *v.* Kinzie, 1 How. 311, 316, 11 L. Ed. 143, holds that a state law, passed subsequently to the execution of a mortgage, which declares that the equitable estate of the mortgagor shall not be extinguished for twelve months after a sale under a decree in chancery, and which prevents any sale unless two-thirds of the amount at which the property has been valued by appraisers shall be bid therefor, is within the clause of the constitution of the United States which prohibits a state from passing a law impairing the obligation of contracts. In this case, the court dealt with the contention, usually made on these occasions and which is relied on by the defendants in error in the present case, that the law was a regulation of the remedy and did not directly affect the contract." Barnitz *v.* Beverly, 163 U. S. 118, 122, 41 L. Ed. 93.

A statute of the state of Alabama, authorizing a redemption of mortgaged property in two years after the sale under a decree by bona fide creditors of the mortgagor, is unconstitutional and void as to sales made under mortgages executed prior to the date of its enactment, as impairing the obligation of the contract. Howard *v.* Bugbee, 24 How. 461, 16 L. Ed. 753, following Bronson *v.* Kinzie, 1 How. 311, 11 L. Ed. 143, approved in Barnitz *v.* Beverly, 163 U. S. 118, 123, 41 L. Ed. 93; Hooker *v.* Burr, 194 U. S. 415, 425, 48 L. Ed. 1046.

"In Howard *v.* Bugbee, 24 How. 461, 16 L. Ed. 753, a statute of the state of Alabama, authorizing a redemption of mortgaged property in two years after the sale under a decree, by bona fide creditors of the mortgagor, was held unconstitutional and void as to sales made under mortgages executed prior to the enactment. It was contended that the law did not affect the mortgage contract, but only enlarged the time at the completion of which the purchaser at the mortgage sale would acquire an indefeasible title, and that the new law only operated as between the purchaser and bona fide creditors of the mortgagor. But this court, through Mr. Justice Nelson, recognized the cases of Bronson *v.* Kinzie, 1 How. 311, 11 L. Ed. 143, and McCracken *v.* Hayward, 2 How. 608, 11 L. Ed. 397, as applicable to and decisive of the case." Barnitz *v.* Beverly, 163 U. S. 118, 126, 41 L. Ed. 93.

55. Rights of purchasers at foreclosure sales.—Hooker *v.* Burr, 194 U. S. 415, 48

and his right of possession shall be forfeited by failure to obtain a deed within the time prescribed to the mortgagor, materially impairs the obligation of pre-existing contracts.[56]

(2) *Conditions Annexed to and Restrictions upon Sale.*—A state statute passed subsequently to the execution of a mortgage, which prohibits any sale of the mortgaged property unless one-half[57] or two-thirds[58] of its appraised value is bid, is unconstitutional and void as to contracts existing at the time of its enactment.

4. STATUTES AFFECTING MEANS OF ENFORCING LIENS.—But a statute creating a new method of foreclosing liens upon real estate, or providing a means of foreclosing such liens where no means of foreclosure previously existed, and making it applicable to existing liens, does not impair the obligation of the contract.[59]

L. Ed. 1046, citing Cooley on Const. Limitations.

56. Time for obtaining deed.—Bradley *v.* Lightcap, 195 U. S. 1, 49 L. Ed. 65, citing and discussing Bronson *v.* Kinzie, 1 How. 311, 11 L. Ed. 143; Brine *v.* Insurance Co., 96 U. S. 627, 24 L. Ed. 858; Connecticut, etc., Ins. Co. *v.* Cushman, 108 U. S. 51, 27 L. Ed. 648; Barnitz *v.* Beverly, 163 U. S. 118, 41 L. Ed. 93; Hooker *v.* Burr, 194 U. S. 415, 48 L. Ed. 1046.

57. Sale restricted to certain amount.—A statute providing that property sold to satisfy a mortgage or other debt, shall not be sold for less than one-half their appraised valuation, is unconstitutional and void in so far as it applies to existing mortgages and contracts. "If the legislature could make this alteration in the contract, and in the decree enforcing it, so it could declare the property should bring its entire value, or that it should not be sold at all; thereby impairing, or defeating the obligation under the disguise of regulating the remedy." Gantly *v.* Ewing, 3 How. 707, 717, 11 L. Ed. 794, cited and approved in Hooker *v.* Burr, 194 U. S. 415, 423, 48 L. Ed. 1046, following Bronson *v.* Kinzie, 1 How. 311, 319, 11 L. Ed. 143.

58. Statute requiring two-thirds value to be bid at sale.—A state law passed subsequently to the execution of a mortgage, and which prevents any sale of the mortgaged property unless two-thirds of the amount at which the property has been valued by appraisers shall be bid therefor, is in violation of the constitutional provision which prohibits a state from passing any law impairing the obligation of contracts. Bronson *v.* Kinzie, 1 How. 311, 11 L. Ed. 143, approved in Barnitz *v.* Beverly, 163 U. S. 118, 122, 41 L. Ed. 93; Planters' Bank *v.* Sharp, 6 How. 301, 331, 12 L. Ed. 447, distinguished from Hooker *v.* Burr, 194 U. S. 415, 422, 48 L. Ed. 1046; Hawthorne *v.* Calef, 2 Wall. 10, 23, 17 L. Ed. 776.

A law of the state of Illinois, providing that a sale shall not be made of property levied on under an execution, unless it will bring two-thirds of its valuation, according to the opinion of three householders, is unconstitutional and void as to contracts existing at the time of its enactment. (Bronson *v.* Kinzie, 1 How. 311, 11 L. Ed. 143, reviewed and confirmed). McCracken *v.* Hayward, 2 How. 608, 11 L. Ed. 397, approved in Barnitz *v.* Beverly, 163 U. S. 118, 123, 41 L. Ed. 93.

In the case of McCracken *v.* Hayward, 2 How. 608, 613, 614, 11 L. Ed. 397, the court says that the right of the plaintiff under the law as it existed at the time of the execution of the contract to recover damages for the breach thereof and to have the property of the defendant sold at a judicial sale for such price as shall be bid for it at a fair public sale with reasonable notice, was as much a part of the obligation of the contract as though it had been expressly incorporated therein; and if any subsequent law which denied, obstructed or impaired this right, by superadding a condition that there shall be no sale for any sum less than the value of the property levied on, to be ascertained by appraisment, or any other mode of valuation than a public sale, impaired the obligation of a contract. Approved in Barnitz *v.* Beverly, 163 U. S. 118, 123, 41 L. Ed. 93, and distinguished from Hooker *v.* Burr, 194 U. S. 415, 423, 48 L. Ed. 1046.

59. Statutes affecting means of enforcing liens.—Livingston *v.* Moore, 7 Pet. 469, 549, 8 L. Ed. 751.

"The lien of a judgment, of a mortgage, or any other lien, is a very different idea from that of the means by which the lien is to be enforced; the one is the right, the other is the remedy; the one constitutes the contract, and the other the remedy afforded by the policy of the country, where it is not provided by the terms of the contract, for enforcing or effecting the execution of it. The first is unchangeable, without a violation of right; the other may be subject to change, at the will of the government." Johnson, J., delivering the opinion in Livingston *v.* Moore, 7 Pet. 469, 550, 8 L. Ed. 751.

Remedy for enforcing mortgage liens.—A state law which does nothing more than change the remedy for the enforcement of contracts, mortgage liens, etc., is open

R. Curative Acts—1. In General.—It is well settled that a retrospective law which gives validity to a void contract cannot be said to impair the obligation of that contract.[60]

2. Acts Curing Defective Conveyances.—Therefore, a statute which merely cures defective conveyances is not void under the contract clause of the federal constitution.[61] Thus, a law which merely makes deeds by femes

to no constitutional objection; or a state may regulate at pleasure the modes of proceedings in its courts in relation to past contracts as well as future ones. Bronson *v.* Kinzie, 1 How. 311, 315, 11 L. Ed. 143.

Lien for arrearages due the state by public officers.—A provision in a statute creating a lien upon lands for arrearages due the state by public officers, that they shall be liens "in the same manner as if judgment had been given in the supreme court," is not a contract that such liens shall be enforced only in the manner in which judgments of the supreme court are enforced; but the state may by special provision provide a special procedure for the foreclosure of such lien. Livingston *v.* Moore, 7 Pet. 469, 549, 8 L. Ed. 751.

The confession of judgment by a public officer for arrearages due the estate does not imply an obligation upon the part of the state that such judgment shall be enforced only by ordinary judicial process. The necessity of resorting to certain means of enforcing the judgment is not an obligation arising out of the contract, but pertains to the remedy, and it is competent for the state to provide a new and specific means of enforcing it. Livingston *v.* Moore, 7 Pet. 469, 550, 8 L. Ed. 751.

J. N., sometime comptroller general of the state of Pennsylvania, having been found upon an accounting to be largely in arrears to the state, and such indebtedness under the laws of Pennsylvania constituting a lien upon all of his real estate, and there being no provision under the law for the enforcement of such lien, it was held that the creation of a commission investing him with the specific power of selling such land for the satisfaction of the indebtedness and a foreclosure of the lien, was not an impairment of the obligation of the original grant of the land to J. N. Livingston *v.* Moore, 7 Pet. 469, 550, 8 L. Ed. 751. See the titles PUBLIC OFFICERS; STATES.

Remedy for enforcing mechanic's lien.—A mortgage was given on real estate to secure the payment of a debt, subject to a mechanic's lien. The old legislative act gave the holder of the lien the right to sell the building and the purchaser the right to remove it. After the foreclosure of the mortgage and sale of the property, a new provision was added to the act, altering and enlarging the remedy for enforcing the mechanic's lien, by permitting the court, for the best interests of all the parties, to sell the land and the improvements together, and distribute the proceeds of the sale so as to secure to the prior mortgage or other lien priority upon the land, and to the mechanic's lien priority upon the building. Held, this provision did not impair the obligation of the contract with the mortgagee or purchaser on foreclosure. Red River Valley Bank *v.* Craig, 181 U. S. 548, 553, 45 L. Ed. 994. See the title MECHANICS' LIENS.

60. **Curative acts do not impair contract obligations.**—Satterlee *v.* Matthewson, 2 Pet. 380, 7 L. Ed. 458; Beloit *v.* Morgan, 7 Wall. 619, 19 L. Ed. 205; Gross *v.* United States Mortgage Co., 108 U. S. 477, 488, 27 L. Ed. 795. See the titles CONSTITUTIONAL LAW, vol. 4, p. 542; DUE PROCESS OF LAW, vol. 5, p. 499.

There is nothing in the constitution of the United States which prohibits the legislature of a state from passing an act which divests rights vested by law, provided its effect be not to impair the obligation of a contract. Contracts are not impaired but confirmed by curative statutes. Randall *v.* Kreiger, 23 Wall. 137, 147, 23 L. Ed. 124, following Satterlee *v.* Matthewson, 2 Pet. 380, 7 L. Ed. 458; Watson *v.* Mercer, 8 Pet. 88, 110, 8 L. Ed. 876.

Railroad aid bonds.—Any irregularity in taking the votes of the electors or otherwise in issuing bonds to aid in the construction of railroads, may be remedied by curative acts. Satterlee *v.* Matthewson, 2 Pet. 380, 7 L. Ed. 458; Baltimore, etc., R. Co. *v.* Nesbit, 10 How. 395, 13 L. Ed. 469; White Water Valley Canal Co. *v.* Vallette, 21 How. 414, 425, 16 L. Ed. 154; Gelpcke *v.* Dubuque, 1 Wall. 175, 17 L. Ed. 520, citing Wilkinson *v.* Leland, 2 Pet. 627, 7 L. Ed. 542; Beloit *v.* Morgan, 7 Wall. 619, 19 L. Ed. 205. See the title MUNICIPAL, COUNTY, STATE AND FEDERAL AID.

Mistakes and irregularities in the proceedings of municipal corporations are of frequent occurrence, and the state legislatures have often had occasion to pass laws to obviate such difficulties. Such laws, when they do not impair any contract, or injuriously affect the rights of third persons, are generally regarded as unobjectionable, and certainly are within the competency of the legislative authority. Bissell *v.* Jeffersonville, 24 How. 287, 295, 16 L. Ed. 664, citing Watson *v.* Mercer, 8 Pet. 88, 111, 8 L. Ed. 876; Wilkinson *v.* Leland, 2 Pet. 627, 661, 7 L. Ed. 542; St. Joseph Tp. *v.* Rogers, 16 Wall. 644, 664, 21 L. Ed. 328.

61. **Acts curing defective conveyances.**—Satterlee *v.* Matthewson, 2 Pet. 380, 7

covert good when bona fide, though not acknowledged in a particular form, does not violate the obligation of any contract either in its terms or its principles; because it confirms rather than impairs their deeds, and carries out the original intent of the parties.[62]

3. Statutes Taking Away the Right to Avoid a Contract.—Where the right which a curative or repealing act takes away is the right in the party to avoid his contract, a naked legal right which it is usually unjust to insist upon,

L. Ed. 458; Watson *v.* Mercer, 8 Pet. 88, 8 L. Ed. 876; Planters' Bank *v.* Sharp, 6 How. 301, 331, 12 L. Ed. 447; Gross *v.* United States Mortgage Co., 108 U. S. 477, 27 L. Ed. 795; McFaddin *v.* Evans-Snider Buel Co., 185 U. S. 505, 46 L. Ed. 1012.

The power of a legislature to pass laws giving validity to past deeds which were before ineffectual is well settled. McFaddin *v.* Evans-Snider Buel Co., 185 U. S. 505, 513, 46 L. Ed. 1012.

S. and M. held land in Luzerne county, Pennsylvania, in common, under a Connecticut title; a division of the land was made between them, and S. became the tenant of M. of his part of the land thus set off in severalty, under a lease, to be terminated on a notice of one year; S. afterwards obtained a Pennsylvania title to the land leased to him by M., and on a trial in an ejectment for the land, brought by M. against S., the court of common pleas of Bradford county, Pennsylvania, held that S., having held the land as tenant of M., could not set up a title against his landlord; upon a writ of error to the supreme court of Pennsylvania, in 1825, it was held that, "the relation between landlord and tenant could not exist between persons holding under a Connecticut title." The legislature of Pennsylvania, on the 8th of April, 1826, passed an act, declaring that "the relation of landlord and tenant should exist and be held as fully and effectually between Connecticut settlers and Pennsylvania claimants, as between citizens of the commonwealth." The case came again before the supreme court of Pennsylvania, and the judgment of the court of common pleas of Bradford county, in favor of M., the landlord, was affirmed; that court having decided, that the act of assembly of the 8th of April, 1826, was a constitutional act, and did not impair the validity of any contract; S. brought a writ of error to this court, claiming that the act of the assembly of Pennsylvania, of the 8th of April, 1826, was unconstitutional. Held, that the act was constitutional. Satterlee *v.* Matthewson, 2 Pet. 380, 7 L. Ed. 458, followed in Watson *v.* Mercer, 8 Pet. 88, 8 L. Ed. 876.

Curative act validating power of attorney.—A. and wife, residents of the state of New York, executed a power of attorney to B. to sell lands in Minnesota territory of which A., the husband, was seized. The power was executed and acknowledged by both parties, the wife undergoing such separate examination as by the laws of New York makes valid the execution of deeds by a feme covert. At the time when this power of attorney was given there was no law of the territory authorizing such an instrument to be executed by the wife or the attorney to convey under it. B., professing to act for the two parties, sold and conveyed a piece of the land, then worth $3,000, with general warranty, to C., for that sum, and A. received the money. The legislature of Minnesota subsequently passed an act by which it was enacted that "all deeds of conveyance of any lands in the territory, whether heretofore or hereafter made, under a joint power of attorney from the husband and wife, shall be as binding and have the same effect as if made by the original parties." The husband and wife afterwards revoked the power. The husband died leaving a large estate composed entirely of personalty, the whole of which he gave to his wife. The wife now brough suit for dower in the land sold by B. as attorney for her husband and herself. Held, that the power of attorney was validated by the curative act, which the court, adverting to the fact that the husband had received the purchase money for the tract, and that it had become part of his estate, and that the whole of it on his death passed to the wife, declares had a strong natural equity at its root, and accomplished that which a court of equity would have failed to decree against the wife, only because it would be prevented by the unbending law as to feme coverts in such cases. Randall *v.* Kreiger, 23 Wall. 137, 23 L. Ed. 124, following Watson *v.* Mercer, 8 Pet. 88, 100, 8 L. Ed. 876. These cases are approved in McFaddin *v.* Evans-Snider Buel Co., 185 U. S. 505, 513, 46 L. Ed. 1012; Williams *v.* Paine, 169 U. S. 55, 79, 42 L. Ed. 658.

62. Acts curing defective acknowledgments by married women.—Watson *v.* Mercer, 8 Pet. 88, 8 L. Ed. 876; Planters' Bank *v.* Sharp, 6 How. 301, 331, 12 L. Ed. 447; Williams *v.* Paine, 169 U. S. 55, 79, 42 L. Ed. 658.

In 1785, M. and wife executed a deed conveying certain lands of the wife to T., who immediately reconveyed them to M.; the object of the conveyance was to vest the lands of the wife in the husband. The deed of M. and wife to T. was not acknowledged according to the forms established by the law of Pennsylvania of February 20th, 1770, to pass the estates of femes covert; and after the death of the

such law does not impair the obligation of a contract, because no constitutional provision was ever designed to protect such a right.[63]

S. Recording Acts[64]—1. In General.—A statute which provides that deeds, mortgages, patents and judgments shall be recorded within a limited time, in order to be valid as against creditors and subsequent purchasers, is not a law impairing the obligation of a contract.[65] For example, statutes requiring judgments[66] deeds[67] and mortgages to be recorded have been held valid as to prior as well as subsequent contracts.[68] And it is immaterial in the latter case that the mortgagee was a minor at the time the statute went into operation, as it is within the constitutional competency of the legislature to make exceptions

wife of M., the land was recovered in an ejectment from the heirs of M., in a suit instituted against him by the heirs of the wife of M. In 1826, after the recovery in ejectment, the legislature of Pennsylvania passed an act, the object of which was to cure all defective acknowledgments of this sort, and to give them the same efficacy as if they had been originally taken in the proper form. The act of 1826 does not violate the obligation of any contract, either in its terms or its principles; it does not even effect to touch any title acquired by a patent or any other grant; it supposes the title of the femes covert to be good, however acquired; and even provides that deeds of conveyance made by them shall not be void, because there is a defective acknowledgment of the deeds, by which they have sought to transfer their title. So far, then, as it has any legal operation, it goes to confirm and not to impair the contract of the femes covert; it gives the very effect to their acts and contracts which they intended to give; and which, from mistake or accident, has not been effected. Watson *v.* Mercer, 8 Pet. 88, 8 L. Ed. 876, following Satterlee *v.* Matthewson, 2 Pet. 380, 7 L. Ed. 458, which fully recognizes this doctrine; cited and approved in McFaddin *v.* Evans-Snider Buel Co., 185 U. S. 505, 513, 46 L. Ed. 1012, and Randall *v.* Kreiger, 23 Wall. 137, 23 L. Ed. 124.

63. Right to avoid contracts.—Satterlee *v.* Matthewson, 2 Pet. 380, 7 L. Ed. 458; Watson *v.* Mercer, 8 Pet. 88, 8 L. Ed. 876; Ewell *v.* Daggs, 108 U. S. 143, 151, 27 L. Ed. 682, citing Cooley, Constitutional Limitations, 378.

64. See the title RECORDING ACTS.

65. Recording acts held valid.—Jackson *v.* Lamphire, 3 Pet. 280, 7 L. Ed. 679; Curtis *v.* Whitney, 13 Wall. 68, 70, 20 L. Ed. 513; Louisiana *v.* New Orleans, 102 U. S. 203, 26 L. Ed. 132; Vance *v.* Vance, 108 U. S. 514, 27 L. Ed. 808.

Somewhat akin to statutes changing the period of limitation of actions are acts which require deeds and mortgages to be recorded within a given time which, under the law as it existed at the time of their execution, were not required to be recorded. Such statutes were, if afforded a reasonable time for recordation usually held to be valid. Vance *v.* Vance, 108 U. S. 514, 27 L. Ed. 808; Jackson *v.* Lamphire, 3 Pet. 280, 7 L. Ed. 679; Curtis *v.* Whitney, 13 Wall. 68, 20 L. Ed. 513.

It has been often decided by the federal supreme court that the prohibition of the constitution now under consideration by which state legislatures are restrained from passing any "law impairing the obligation of contracts," does not extend to all legislation about contracts. They may pass recording acts, by which an elder grantee shall be postponed to a younger, if the prior deed be not recorded within a limited time; and this whether the deed be dated before or after the act. Phalen *v.* Virginia, 8 How. 163, 168, 12 L. Ed. 1030.

66. Statute requiring judgments upon existing contracts against city to be registered before instituting enforcement proceedings.—A statute applicable to judgments recovered upon existing contracts, and which deprives the judgment creditors of a particular municipality in the state of the right to enforce their judgments by fieri facias, and requires them, before resorting to other means of enforcement, to register their judgments with the comptroller or auditing officer of the city and receive from him a warrant for the amount thereof, to be paid out of a certain fund, or out of the next moneys appropriated for such purpose, does not impair the obligation of any contract. Louisiana *v.* New Orleans, 102 U. S. 203, 26 L. Ed. 132, cited and approved in Vance *v.* Vance, 108 U. S. 514, 520, 27 L. Ed. 808.

67. Recordation of deeds.—It is within the undoubted powers of state legislatures to pass recording acts, by which the elder grantee shall be postponed to a younger, if the prior deed be not recorded within a limited time; and the power is the same, whether the deed is dated before or after the recording act; though the effect of such a deed is to render the prior deed fraudulent and void against a subsequent purchaser, it is not a law violating the obligation of contracts. Jackson *v.* Lamphire, 3 Pet. 280, 7 L. Ed. 679, approved in Vance *v.* Vance, 108 U. S. 514, 521, 27 L. Ed. 808; McCracken *v.* Hayward, 2 How. 608, 613, 11 L. Ed. 397; Curtis *v.* Whitney, 13 Wall. 68, 71, 20 L. Ed. 513; Gilfillan *v.* Union Canal Co., 109 U. S. 401, 407, 27 L. Ed. 977.

68. Recordation of mortgages.—Vance *v.* Vance, 108 U. S. 514, 27 L. Ed. 808, ap-

and savings in favor of minors or not, as it may see fit.[69] Nor does a statute which requires county bonds issued to aid railroads to be registered, expressly providing that it shall only apply to contracts thereafter entered into, impair the obligation of the contract between the holder of the bond and the county.[70]

2. CHANGE IN METHOD OF RECORDING.—A state statute which merely changes the mode of recording deeds, does not impair the obligation of a contract.[71]

T. Statutes of Limitation.[72]—1. STATUTES OPERATING PROSPECTIVELY.—Statutes of limitation operating prospectively do not impair vested rights or the obligation of contracts. Reasons of sound policy have led to the adoption of limitation laws, both by congress and the states, and, if not unreasonable in their terms, their validity cannot be questioned.[73]

2. RETROSPECTIVE STATUTES OF LIMITATION—a. *In General.*—But a statute of limitations may undoubtedly have effect upon actions which have already accrued as well as upon actions which accrue after its passage. Whether it does so or not will depend upon the language of the act, and the apparent intent of the legislature to be gathered therefrom.[74]

b. *Statutes Limiting Time for Bringing Suits and Actions*—(1) *Power of States to Enact*—aa. *In General.*—In regard to the states, which are expressly forbidden to impair by legislation the obligation of contracts, it has been repeatedly held that a statute of limitation, which reduces materially the time within which suit may be commenced, though passed after the contract was made, is not void if a reasonable time is left for the enforcement of the contract by suit before the statute bars that right. The sole question in such cases is whether the time is so unreasonably short as to amount to a destruction of the right itself, and so impair the obligation of the contract.[75] And it is the

proved in Gilfillan *v.* Union Canal Co., 109 U. S. 401, 406, 27 L. Ed. 977.

69. Effect where mortgagee is a minor.—Vance *v.* Vance, 108 U. S. 514, 27 L. Ed. 808.

Thus under the statute of Louisiana it was provided that the appointment of a tutor should operate to create a tacit mortgage of all its property in favor of the minor for whom he was appointed. It was held that a subsequent act requiring the recordation of all tacit mortgages did not impair the obligation of the mortgage in favor of the infant; and that it was immaterial that the infant was still a minor when the statute went into operation and that it contained no savings or exceptions in favor of minors. Vance *v.* Vance, 108 U. S. 514, 27 L. Ed. 808.

70. Registration of county aid bonds.—Hoff *v.* Jasper County, 110 U. S. 53, 28 L. Ed. 68, citing Anthony *v.* County of Jasper, 101 U. S. 693, 25 L. Ed. 1005. See the title MUNICIPAL, COUNTY, STATE AND FEDERAL AID.

71. Change in method of recording.—Hawkins *v.* Barney, 5 Pet. 457, 8 L. Ed. 190; Planters' Bank *v.* Sharp, 6 How. 301, 331, 12 L. Ed. 447, following Jackson *v.* Lamphire, 3 Pet. 280, 7 L. Ed. 679.

72. See the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION.

73. Statutes of limitation operating prospectively are valid.—Jackson *v.* Lamphire, 3 Pet. 280, 7 L. Ed. 679; Christmas *v.* Russell, 5 Wall. 290, 300, 18 L. Ed. 475.

Reasons of sound policy have led to the general adoption of laws of this description, and their validity cannot be questioned; the time and manner of their operation, the exceptions to them, and the acts from which the time limited shall begin to run, will generally depend on the sound discretion of the legislature, according to the nature of the titles, the situation of the country, and the emergency which leads to their enactment. Cases may occur where the provisions of a law on these subjects may be so unreasonable as to amount to a denial of a right, and to call for the interposition of the federal supreme court. Jackson *v.* Lamphire, 3 Pet. 280, 7 L. Ed. 679.

74. Statute may operate retrospectively.—Sohn *v.* Waterson, 17 Wall. 596, 599, 21 L. Ed. 737.

75. Reasonableness determines the validity of statutes of limitation.—Sturges *v.* Crowninshield, 4 Wheat. 122, 4 L. Ed. 529; Bell *v.* Morrison, 1 Pet. 351, 7 L. Ed. 174; Jackson *v.* Lamphire, 3 Pet. 280, 7 L. Ed. 679; Hawkins *v.* Barney, 5 Pet. 457, 8 L. Ed. 190; Strother *v.* Lucas, 12 Pet. 410, 448, 9 L. Ed. 1137; Bronson *v.* Kinzie, 1 How. 311, 315, 11 L. Ed. 143; McCracken *v.* Hayward, 2 How. 608, 612, 11 L. Ed. 397; Planters' Bank *v.* Sharp, 6 How. 301, 331, 12 L. Ed. 447; Phalen *v.* Virginia, 8 How. 163, 12 L. Ed. 1030; Leffingwell *v.* Warren, 2 Black 599, 606, 17 L. Ed. 261; Cooley on Limitations, 6th Ed., 44; Christmas *v.* Russell, 5 Wall. 290, 300, 18 L. Ed. 475, citing Bronson *v.* Kinzie, 1 How. 311, 315, 11 L. Ed. 143; Angell on Limitations, 18; Curtis *v.* Whitney, 13 Wall. 68, 20 L. Ed. 513; Sohn *v.* Waterson, 17 Wall. 596, 599, 21 L. Ed. 737;

settled doctrine that the legislature may prescribe a limitation for the bringing of suits where none previously existed, as well as shorten the time in which

Terry *v.* Anderson, 95 U. S. 628, 632, 24 L. Ed. 365; Edwards *v.* Kearzey, 96 U. S. 595, 603, 24 L. Ed. 793; Koshkonong *v.* Burton, 104 U. S. 668, 26 L. Ed. 886; Chapman *v.* Douglas County, 107 U. S. 348, 27 L. Ed. 378; Vance *v.* Vance, 108 U. S. 514, 521, 27 L. Ed. 808; Gilfillan *v.* Union Canal Co., 109 U. S. 401, 404, 27 L. Ed. 977; Mitchell *v.* Clark, 110 U. S. 633, 643, 28 L. Ed. 279; McGahey *v.* Virginia, 135 U. S. 662, 705, 34 L. Ed. 304 (citing Terry *v.* Anderson, 95 U. S. 628, 24 L. Ed. 365; Koshkonong *v.* Burton, 104 U. S. 668, 26 L. Ed. 886); Wheeler *v.* Jackson, 137 U. S. 245, 258, 34 L. Ed. 659; McFarland *v.* Jackson, 137 U. S. 258, 34 L. Ed. 664; Campbell *v.* Haverhill, 155 U. S. 610, 615, 39 L. Ed. 280; Wilson *v.* Iseminger, 185 U. S. 55, 63, 46 L. Ed. 804.

"The exertion of this power is, subject to the fundamental condition that a reasonable time, taking all the circumstances into consideration, be given by the new law for the commencement of an action before the bar takes effect. Terry *v.* Anderson, 95 U. S. 628, 24 L. Ed. 365; Hawkins *v.* Barney, 5 Pet. 457, 8 L. Ed. 190; Jackson *v.* Lamphire, 3 Pet. 280, 7 L. Ed. 679; Sohn *v.* Waterson, 17 Wall. 596, 21 L. Ed. 737; Christmas *v.* Russell, 5 Wall. 290, 18 L. Ed. 475; Sturges *v.* Crowninshield, 4 Wheat. 122, 4 L. Ed. 529." Koshkonong *v.* Burton, 104 U. S. 668, 675, 26 L. Ed. 886, approved in McGahey *v.* Virginia, 135 U. S. 662, 706, 34 L. Ed. 304.

Statutes of limitations relate to the remedies which are furnished in the courts. They rather establish that certain circumstances shall amount to evidence that a contract has been performed, than dispense with its performance. Therefore, a law providing a period of limitation as to the enforcement of existing contracts, does not impair the obligation provided it leaves a remedy with which to enforce the same. Sturges *v.* Crowninshield, 4 Wheat. 122, 207, 4 L. Ed. 529.

"Statutes of limitations are statutes of repose. They are necessary to the welfare of society. The lapse of time constantly carries with it the means of proof. The public as well as individuals are interested in the principle upon which they proceed. They do not impair the remedy, but only require its application within the time specified." Edwards *v.* Kearzey, 96 U. S. 595, 24 L. Ed. 793. See, also, the titles CONSTITUTIONAL LAW, vol. 4, p. 446; DUE PROCESS OF LAW, vol. 5, p. 499.

A statute going into effect July 1st, 1895, and giving the plaintiff until September 22, 1896, in which to bring suit, does not unreasonably shorten the time in which to sue. Davis *v.* Mills, 194 U. S. 451, 456, 48 L. Ed. 1067.

Limiting time for testing genuineness of land certificates.—Judgments as well as grants obtained by fraud or collusion are void, and confer no vested title; and where numerous false, fictitious and forged certificates entitling the holders of grants to public lands have been granted circulation in a state, the state may justly require those who claim that their grants are not of this character to make proof of their genuineness in some proper tribunal within a limited time prescribed by the statute, without impairing the obligation of any contract between the states and the holders of genuine certificates. League *v.* De Young, 11 How. 185, 203, 13 L. Ed. 657; Herman *v.* Phalen, 14 How. 79, 14 L. Ed. 334.

A certificate entitling the holder of a grant to public lands is not in the nature of a judicial decision vesting title in the holder, whether forged or fraudulent. Therefore the statute requiring the holders of such certificates to institute proceedings to test their genuineness, on or before a certain date, is not unconstitutional as impairing the obligation of the contract. League *v.* De Young, 11 How. 185, 202, 13 L. Ed. 657; Herman *v.* Phalen, 14 How. 79, 14 L. Ed. 334.

In 1843 the state of Texas, then an independent republic, enacted a statute requiring the holders of land certificates to institute proceedings to test their genuineness on or before the first day of January, 1844, or otherwise be barred. The 11th article of the state constitution, adopted upon the admission of Texas into the Union in 1845, removed this bar, and allowed the holders of such certificates to institute proceedings to test their genuineness at any time prior to the first day of July, 1847, at the same time declaring that all fictitious, false and forged certificates, and all locations and surveys thereof, should be held null and void from the beginning. Held, that the said 11th article of the Texas constitution annuls no vested rights and impairs the obligation of no contract, but, on the contrary, extends the time within which valid certificates might be established, and confers a right which had been lost and forfeited by the laches of the party. League *v.* De Young, 11 How. 185, 203, 13 L. Ed. 657; Herman *v.* Phalen, 14 How. 79, 14 L. Ed. 334. See the title PUBLIC LANDS.

Charges affecting rights of purchasers at tax sales.—The contract rights of purchasers at sales for taxes, assessments, or water rates, in the city of Brooklyn, were not impaired, nor were such purchasers deprived of their property without due process of law by § 15 of the act of June 6, 1885 (laws of New York 1885, ch. 405, § 15, p. 702), which provided among other things as follows: "No action or special

suits to enforce existing causes of action may be commenced, provided, in each case, a reasonable time, taking all the circumstances into consideration, be given

proceeding shall hereafter be brought or maintained against the city of Brooklyn, or the registrar of arrears of said city, to compel the execution or delivery of a lease upon any sale for taxes, assessments or water rates, made more than eight years prior to the passage of this act, unless such action or special proceeding is commenced within six months after the passage of this act, and notice thereof filed in the office of registrar of arrears, but this provision shall not operate to extend any statute of limitations now applicable in such cases. And after the expiration of six months from the passage of this act, it shall be the duty of the registrar of arrears, to cancel in his office all such sales made more than eight years prior to the passage of this act, upon which no lease shall have been given, and no action commenced, and notice thereof filed as aforesaid, within the period hereinbefore limited therefor, and thereupon the lien of all such certificates of sale shall cease and determine." Wheeler *v.* Jackson, 137 U. S. 245, 252, 34 L. Ed. 659.

A statute of a state which provides that the right of the entry of a party who claims under a treasurer's deed lands sold for the nonpayment of taxes, is barred, if, within five years after the deed has been executed and recorded, he neither sues for nor takes possession of the land, does not impair the obligation of a contract of purchase. Barrett *v.* Holmes, 102 U. S. 651, 26 L. Ed. 291, citing Curtis *v.* Whitney, 13 Wall. 68, 20 L. Ed. 513. See, also, the title CONSTITUTIONAL LAW, vol. 4, p. 447.

Actions to recover land.—Acts of limitation giving peace and confidence to the actual possessor of the soil and refusing the aid of courts of justice in the enforcement of contracts, after a certain time, are not unconstitutional as impairing the obligation of contracts. Such acts may be said to effect a complete divesture, or even transfer of right, yet, as reasons of sound policy have led to their adoption, their validity cannot be questioned. Phalen *v.* Virginia, 8 How. 163, 168, 12 L. Ed. 1030.

Recovery of ground rents.—The Pennsylvania act of April 27, 1855, § 7, provides that in all cases where no payment, claim or demand shall have been made on account of any ground rent, annuity, or other charge upon real estate for twenty-one years, and no acknowledgment made during such period, a release or extinguishment thereof shall be conclusively presumed: which section is not to take effect until three years from the passage of the act. Such an act is a statute of limitation, removing the remedy which would otherwise be furnished by the courts, and is clearly within the legislative power of government. Allowing as it does a reasonable time in which to bring suit upon existing causes of action, it in no wise impairs the obligation of contracts guaranteed by the constitution. Wilson *v.* Iseminger, 185 U. S. 55, 46 L. Ed. 804. See, also, the title CONSTITUTIONAL LAW, vol. 4, p. 447.

Actions on foreign judgments.—It is a settled doctrine in the United States supreme court that the legislation of congress, so far as it has gone, does not prevent a state from passing acts of limitation to bar suits on judgments rendered in another state. Bank *v.* Dalton, 9 How. 522, 528, 13 L. Ed. 242, following McElmoyle *v.* Cohen, 13 Pet. 312, 10 L. Ed. 177. See the title FOREIGN JUDGMENTS, RECORDS AND JUDICIAL PROCEEDINGS, ante, p. 335.

A state law declaring that all judgments which have been obtained in any other state prior to the passage of the law shall be barred unless suit is brought therein within two years after the passage of the act, is within the power of the state, and not inconsistent with the constitution of the United States or any act of congress. Bank *v.* Dalton, 9 How. 522, 13 L. Ed. 242; Dulles *v.* Jones, 9 How. 530, 13 L. Ed. 245.

And this is true although the person against whom the judgment was given removed from the state in which it was rendered and became a citizen of the state in which the said statute was enacted upon the very day on which he was sued. The legislature having made no exception, the courts can make none. Bank *v.* Dalton, 9 How. 522, 13 L. Ed. 242; Dulles *v.* Jones, 9 How. 530, 13 L. Ed. 245.

Time within which license or privilege may be exercised.—An act which prescribes a limitation of the time within which a certain privilege or license, limited in its very nature and purpose, may be exercised, is not void on the ground that it impairs the obligation of contracts. If reasons of sound policy justify legislative interference with contracts of individuals, much more will it justify the limitation of licenses injurious to public morals. Phalen *v.* Virginia, 8 How. 163, 168, 12 L. Ed. 1030.

Limitation of time for lottery drawing.—In 1829, the legislature of Virginia passed an act appointing five commissioners to raise by way of lottery or lotteries the sum of $30,000 for the benefit of the Fauquier and Alexandria Turnpike Road Company. Two of the commissioners declined to act, and the remaining three took no steps to execute the power for a long time. On the 25th of February, 1834, the legislature passed an act for the suppression of lotteries, which prohibited all lotteries and sale of lottery tickets

by the new law for the commencement of suit before the bar takes effect.[76] But a statute of limitations which takes away a present existing right,[77] or makes an unreasonable reduction of the time for bringing suits, is unconstitutional.[78] And a fortiori if the statute so reduces the period of limitation that the time will already have run against the particular cause of action, this will be tantamount to an entire extinguishment of the limitation, and therefore unconstitutional.[79]

bb. *Construction as to Operation of Statute.*—When a statute declares generally that no action, or no action of a certain class, shall be brought, except within a certain limited time after it shall have accrued, the language of the statute would make it apply to past actions as well as to those arising in the

after the 1st of January, 1837, saving, however, contracts already made which were by their terms to extend beyond the 1st of January, 1837, or contracts hereafter to be made under any existing law, which were to extend beyond that day. These were permitted to go on until the 1st of January, 1840. On the 11th of March, 1834, the legislature passed an act appointing two commissioners in the place of the two who had declined to act. On the 19th of December, 1839, these commissioners entered into a contract with certain persons, authorizing these persons to draw as many lotteries as they might think proper, without limitation as to time, upon the payment of a certain sum per annum to the commissioners. Held, that it may be doubted whether the right to draw lotteries under the act of 1829 constituted a contract at all; but that if it was a contract, it was not unlimited as to time; and that the act of 1834, allowing the grant to continue for a certain time, stood upon the same ground as acts of limitation and recording acts, which the federal supreme court has said a state has the right to pass. Phalen *v.* Virginia, 8 How. 163, 12 L. Ed. 1030.

The privilege granted by the act of 1829 had become obsolete from nonuser, and the act of 1834, appointing two commissioners, did not fully revive it, because the two acts of 1834, must be taken together; and the limitation contained in one must apply to the other. Phalen *v.* Virginia, 8 How. 163, 12 L. Ed. 1030.

76. Doctrine applies where no limitation previously existed.—Koshkonong *v.* Burton, 104 U. S. 668, 675, 26 L. Ed. 886; Mitchell *v.* Clark, 110 U. S. 633, 643, 28 L. Ed. 279; McGahey *v.* Virginia, 135 U. S. 662, 701, 705, 706, 707, 34 L. Ed. 304; Wheeler *v.* Jackson, 137 U. S. 245, 255, 34 L. Ed. 659, citing Terry *v.* Anderson, 95 U. S. 628, 632, 24 L. Ed. 365.

The parties to a contract have no more a vested interest in a particular limitation which has been fixed, than they have in an unrestricted right to sue. They have no more a vested interest in the time for the commencement of an action than they have in the form of the action to be commenced; and as to the forms of action or modes of remedy, it is well settled that the legislature may change them at its discretion, provided adequate means of enforcing the right remain. Terry *v.* Anderson, 95 U. S. 628, 633, 24 L. Ed. 365.

77. Jackson *v.* Lamphire, 3 Pet. 280, 7 L. Ed. 679; Webster *v.* Cooper, 14 How. 488, 14 L. Ed. 510.

78. Statute unreasonably reducing time is void.—Sohn *v.* Waterson, 17 Wall. 596, 599, 21 L. Ed. 737; Chapman *v.* Douglas County, 107 U. S. 348, 27 L. Ed. 378. See, also, the title CONSTITUTIONAL LAW, vol. 4, p. 447.

But it is not believed that any court would hold that a state legislature could not, constitutionally, reduce limitation from twenty to six years as to existing causes of action. Koshkonong *v.* Burton, 104 U. S. 668, 26 L. E. 886, distinguished in Metcalf *v.* Watertown, 153 U. S. 671, 683, 38 L. Ed. 861.

Illustrations.—Under the Georgia act approved March 16, 1869, and providing that suits for the enforcement of rights accruing prior to June 1st, 1865, should be brought by the 1st of January, 1870, or be forever barred, parties suing on such claims had nine months and seventeen days in which to bring suit. Held, that, under the circumstances which led to the enactment of this statute, this period was not so short or unreasonable as to render it unconstitutional. Terry *v.* Anderson, 95 U. S. 628, 633, 24 L. Ed. 365, cited in Mills *v.* Scott, 99 U. S. 25, 27, 25 L. Ed. 294; Antoni *v.* Greenhow, 107 U. S. 769, 775, 27 L. Ed. 468; Gilfillan *v.* Union Canal Co., 109 U. S. 401, 404, 27 L. Ed. 977; McFaddin *v.* Evans-Snider Buen Co., 185 U. S. 505, 514, 46 L. Ed. 1012.

Requiring presentment of tax receivable coupons within one year.—A statute of limitations giving to the holders thereof but a single year for the presentation in payment of taxes of the coupons then in their possession, perhaps never severed from the bonds to which they were attached, and comprising all the coupons which had been originally attached thereto, under all the circumstances of the case, and the peculiar condition of the securities in question, was an unreasonable law and materially impairs the obligation of the contract. McGahey *v.* Virginia, 135 U. S. 662, 708, 34 L. Ed. 304.

79. Chapman *v.* Douglas County, 107 U. S. 348, 27 L. Ed. 378.

future. But if an action accrued more than the limited time before the statute was passed, a literal interpretation of the statute would have the effect of absolutely barring such action at once. It will be presumed that such was not the intent of the legislature. Such an intent would be unconstitutional.[80]

cc. *Partial and Total Invalidity.*—Although a statute of limitation subsequently passed may be obnoxious to the objection that it does not allow sufficient time within which to sue before the bar takes effect, and is, therefore, unconstitutional, as impairing the obligation of a contract, yet it does not follow that the entire act would for this reason fall and become inoperative. The result would be that the holders of the contract held to be barred by the unconstitutional statute, would have a reasonable time after its passage within which to sue.[81]

dd. *Determination as to Reasonableness of Time.*—No one rule as to the length of time which will be deemed reasonable can be laid down for the government of all cases alike. Different circumstances will often require a different rule. What would be reasonable in one class of cases would be entirely unreasonable in another.[82] But as statutes of limitation have for their object, and are deemed necessary to, the repose and security of society, the determination of the legislative department should not be interfered with by the courts, unless the time allowed to bring suits upon existing causes of action is, in view of all the circumstances, so short as not to give parties affected by it a reasonable opportunity to protect their rights under the new law.[83] The courts cannot overrule the decision of that department of the government, unless a palpable error has been committed.[84]

(2) *Power of Congress to Enact.*—But it is no answer to the power of congress to enact statutes of limitation to say that it interferes with the validity of contracts, for no provision of the constitution prohibits congress from doing this, as it does the states; and where the question of the power of congress arises, as in the legal tender cases, and in bankruptcy cases, it does not depend upon the incidental effect of its exercise on contracts, but on the existence of the power itself.[85]

c. *Statutes Limiting the Time for Review.*—Statutes regulating the time for

80. **Construction as to operation of statute.**—Sohn *v.* Waterson, 17 Wall. 596, 599, 21 L. Ed. 737.

To avoid holding the statute unconstitutional, and to give it a construction which will enable it to stand, it must, so far as it affects rights of action in existence when it is passed, be held, in the absence of contrary provision, to begin when the existing cause of action is first subjected to its operation; that is to say, if the statute should prescribe a limitation of five years, existing causes of action would not be barred until the expiration of the full five years from the date of the taking effect of the statute, unless the statutes, as to them, find some other reasonable limitation. Sohn *v.* Waterson, 17 Wall. 596, 21 L. Ed. 737, distinguishing Murray *v.* Gibson, 15 How. 421, 14 L. Ed. 755. Accord: Ross *v.* Duval, 13 Pet. 45, 62, 10 L. Ed. 51; Lewis *v.* Lewis, 7 How. 776, 778, 12 L. Ed. 909.

Hence, when a right of action accrued in 1854, and a statute of limitations passed in 1859 barred all actions of its kind not "commenced within two years next after the cause or right of such action shall have accrued," it was held that the cause of action began to run from the date of the statute, and that suit might have been brought at any time within two years from that date, and, accordingly, that the statute had not summarily cut off existing rights, thus making itself unconstitutional. Sohn *v.* Waterson, 17 Wall. 596, 21 L. Ed. 737.

81. **Such a statute may be valid in part.**—Koshkonong *v.* Burton, 104 U. S. 668, 26 L. Ed. 886. See, generally, the title STATUTES.

82. **No one certain rule as to reasonableness.**—McGahey *v.* Virginia, 135 U. S. 662, 707, 34 L. Ed. 304.

83. **Legislature primarily the judge as to reasonableness.**—Wheeler *v.* Jackson, 137 U. S. 245, 256, 34 L. Ed. 659.

84. **Statute invalidated only in clear cases.**—Terry *v.* Anderson, 95 U. S. 628, 24 L. Ed. 365; Turner *v.* New York, 168 U. S. 90, 42 L. Ed. 392; Saranac Land, etc., Co. *v.* Comptroller, 177 U. S. 318, 44 L. Ed. 786; Wilson *v.* Iseminger, 185 U. S. 55, 63, 46 L. Ed. 804.

85. **Statutes limiting time for bringing action; power of congress to enact.**—Mitchell *v.* Clark, 110 U. S. 633, 643, 28 L. Ed. 279. See ante "Laws of Congress," II, D.

taking appeals are valid, if the limitation is reasonable.[86]

VIII. Who May Complain of Impairment.

A. Persons Interested.—The parties to a contract are the ones to complain of a breach, and if they are satisfied with the disposition which has been made of it and of all claims under it, a third party has no right to insist that it has been broken, nor invoke the constitutional provision as to impairment of obligation of contracts.[87] In other words, a person who has no interest in the contract, as by being a party to it, cannot complain of a law alleged to impair its obligation.[88]

B. Complainant Must Show Possibility of Injury.—In accordance with the general rule that one who does not belong to the class that might be injured by a statute cannot raise the question of its invalidity,[89] it is held that a party insisting upon the invalidity of a statute, as violating the contract clause of the federal constitution, must show that he may be injured by the unconstitutional law before the courts will listen to his complaint.[90] If, instead of showing any injury, the plaintiff shows that he cannot possibly be injured, he cannot, of course, ask the interference of the court.[91]

86. Time for taking an appeal.—The clause of a revised charter making the disallowance of a claim, in whole or in part, by the city council, final and conclusive, unless an appeal be taken to the circuit court of the county within twenty days, is a wholesome regulation, and the time reasonable, and such clause does not impair the obligation of existing contracts. Oshkosh Waterworks Co. *v.* Oshkosh, 187 U. S. 437, 47 L. Ed. 249. See the title APPEAL AND ERROR, vol. 2, p. 129.

87. Parties to contracts are proper complainants.—Williams *v.* Eggleston, 170 U. S. 304, 309, 42 L. Ed. 1047.

88. Uninterested parties cannot complain.—Williamson *v.* Suydam, 6 Wall. 723, 18 L. Ed. 967; Hagar *v.* Reclamation Dist., No. 108, 111 U. S. 701, 28 L. Ed. 569; Williams *v.* Eggleston, 170 U. S. 304, 42 L. Ed. 1047.

Impairment of swamp land contract between state and United States.—"The objection that the law of California authorizing an assessment for the reclamation of swamp lands impairs the obligation of a contract created between the United States and the state by the act of congress of September 28th, 1850, commonly known as the Arkansas Swamp Act, is founded upon a misapprehension of its provisions. 9 Stat. 519, ch. 84. It is true the act granted to the state all the swamp and overflowed lands within its limits, on condition that the proceeds of the lands, 'whether from sale or by direct appropriation in kind,' should be applied, as far as necessary, in reclaiming the land by means of levees and drains. Hence, the contention of counsel is that the state is bound to carry out this condition, and apply the proceeds to the reclamation, or provide for their application to that end, and that its legislation imposing an assessment upon other lands to raise the necessary funds for that purpose, is in violation of this contract, and therefore void. The answer to this position is twofold. In the first place, if a contract was created by the Arkansas act, when the state accepted its benefits, it is for the United States to complain of the breach if there be any. The plaintiff is not a party to the contract, and is in no position to invoke its protection. But, in the second place, the appropriation of the proceeds rests solely in the good faith of the state. Its discretion in disposing of them is not controlled by that condition, as neither a contract nor a trust following the lands was thereby created. This was distinctly held after elaborate consideration in the recent case of Mills County *v.* Railroad Companies, 107 U. S. 557, 566, 27 L. Ed. 578." Hagar *v.* Reclamation Dist., No. 108, 111 U. S. 701, 712, 28 L. Ed. 569, approved in United States *v.* Louisiana, 127 U. S. 182, 190, 32 L. Ed. 66.

89. Only persons injured can complain.—Supervisors *v.* Stanley, 105 U. S. 305, 26 L. Ed. 1044; Clark *v.* Kansas City, 176 U. S. 114, 118, 44 L. Ed. 392; Lampasas *v.* Bell, 180 U. S. 276, 283, 45 L. Ed. 527. Red River Valley Bank *v.* Craig, 181 U. S. 548, 558, 45 L. Ed. 994.

90. Tyler *v.* Judges, 179 U. S. 405, 45 L. Ed. 252; Turpin *v.* Lemon, 187 U. S. 51, 60, 47 L. Ed. 70; Hooker *v.* Burr, 194 U. S. 415, 419, 48 L. Ed. 1046.

91. Hooker *v.* Burr, 194 U. S. 415, 419, 48 L. Ed. 1046.

Mortgagee.—"If the mortgage had been foreclosed and the mortgagee had thereby realized his debt, principal and interest in full, upon the sale, there can be no doubt that he would not have been heard to assert the invalidity of the subsequent legislation, nor would an independent purchaser at the sale have been heard to make the same complaint. Of course, this does not include the case of a mortgagee who purchases at the foreclosure sale and bids a price sufficient to pay his mortgage debt in full with interest, and

C. Repeal of Corporate Charters.—But where the legislature of a state has repealed the charter of a street railroad company and transferred its franchise and track to another, and the corporation refuses to seek a remedy in the courts, a stockholder of the company will have a standing in a court of equity who asks an injunction on the ground that the repealing statute impairs the obligation of a contract.[92]

D. Purchasers at Mortgage Foreclosures.—An independent purchaser at a foreclosure sale, having no connection whatever with the mortgage, except as he becomes such purchaser at the foreclosure sale, cannot raise the question in his own behalf in relation to the validity of legislation as to redemption and the rate of interest which existed at the time he made his purchase.[93] But many of the earlier cases declare the invalidity of subsequent laws in regard to redemption of land sold under execution, which altered the law existing when a mortgage was made, and some of them, it would seem, have declared the laws unconstitutional, even at the suit of a purchaser at the sale.[94]

E. Estoppel.—A municipal corporation is estopped to set up the impairment of the obligation of a contract by subsequent legislation, where the city has repudiated its contract and the subsequent legislation is rendered necessary by, or is the natural outgrowth of, such repudiation.[95] For example, a city cannot claim that its contract with a waterworks company has been impaired by subsequent legislation when the city has repudiated its contract by bringing suit against the company, and thereby estopped itself to claim that the obligation of such contract was impaired by subsequent legislation.[96]

an action thereafter is commenced against him to set aside the sale because it was made in violation of legislation subsequent to the mortgage. In such case we suppose there can be no doubt of the right of the mortgagee to assert, as a defense to the action, the unconstitutionality of the subsequent legislation as an impairment of his contract contained in the mortgage. But it may be said that where the legal or equitable rights of a party are not in any way touched and he is in no way injured, he cannot be heard to complain of the impairment of the obligation of his contract, as a mere abstract proposition." Hooker *v.* Burr, 194 U. S. 415, 422, 48 L. Ed. 1046.

92. **Stockholder may complain of repeal of corporate charter.**—Greenwood *v.* Freight Co., 105 U. S. 13, 26 L. Ed. 961. See the title STOCK AND STOCKHOLDERS.

93. **Purchasers at mortgage foreclosures cannot complain.**—Hooker *v.* Burr, 194 U. S. 415, 48 L. Ed. 1046, following Connecticut, etc., Ins. Co. *v.* Cushman, 108 U. S. 51, 27 L. Ed. 648, and distinguishing Barnitz *v.* Beverly, 163 U. S. 118, 41 L. Ed. 93. See, generally, the title MORTGAGES AND DEEDS OF TRUST.

Where it is contended that several alterations of the law as it existed at the time when the mortgage was executed, regarding the time of redemption and the amount of interest payable to the purchaser at the foreclosure sale in order to redeem the land sold, impair the obligation of a contract as to all mortgages in existence before the alterations were made, but neither the mortgagee nor his assignee was the purchaser at the sale, and neither was in any manner injured by the alterations of the law in the respect mentioned, neither can complain of an impairment, even conceding an abstract impairment of the obligation of the contract. "Therefore, if the mortgagee, or his assignee, were himself the plaintiff, and complaining that the obligation of his contract had been impaired by subsequent legislation, it is plain his complaint would be dismissed when it appeared that, notwithstanding the alleged subsequent illegal legislation, he suffered no injury, because he had proceeded with the foreclosure of his mortgage and had been paid the full amount of his contract debt, interest and costs. Under such circumstances the question becomes a moot one, and courts do not sit to decide that character of question." Hooker *v.* Burr, 194 U. S. 415, 419, 48 L. Ed. 1046.

94. **Early cases distinguished.**—Hooker *v.* Burr, 194 U. S. 415, 422, 48 L. Ed. 1046, reviewing Bronson *v.* Kinzie, 1 How. 311, 11 L. Ed. 143; McCracken *v.* Hayward, 2 How. 608, 11 L. Ed. 397; Gantley *v.* Ewing, 3 How. 707, 11 L. Ed. 794; Howard *v.* Bugbee, 24 How. 461, 16 L. Ed. 753; Connecticut, etc., Ins. Co. *v.* Cushman, 108 U. S. 51, 27 L. Ed. 648; Barnitz *v.* Beverly, 163 U. S. 118, 41 L. Ed. 93.

95. **Estoppel to set up invalidity of contract.**—New Orleans *v.* New Orleans Waterworks Co., 142 U. S. 79, 88, 35 L. Ed. 943. See the title ESTOPPEL, vol. 5, p. 913.

96. **City estopped to invoke contract clause.**—New Orleans *v.* New Orleans Waterwork Co., 142 U. S. 79, 35 L. Ed. 943.

IX. How Relief Obtained in Case of Impairment.

Article 1, § 10, which forbids any state to pass laws impairing the obligation of contracts, so far as it can be said to confer upon, or secure to, any person, any individual rights, does so only indirectly and incidentally. It forbids the passage by the states of laws such as are described. If any such are nevertheless passed by the legislature of a state, they are unconstitutional, null and void. In any judicial proceeding necessary to vindicate his rights under a contract, affected by such legislation, the individual has a right to have a judicial determination, declaring the nullity of the attempt to impair its obligation. This is the only right secured to him by that clause of the consitution.[97]

IMPARTIAL JURY.—As to what constitutes an impartial juror, see the title JURY.

IMPEACHMENT.—See the titles JUDGMENTS AND DECREES; PUBLIC OFFICERS; STATUTES; UNITED STATES.

IMPEACHMENT AND CORROBORATION OF WITNESSES.—See the title WITNESSES.

97. **How relief obtained in case of impairment.**—Virginia Coupon Cases, 114 U. S. 269, 317, 322, 29 L. Ed. 185.

Right not a "civil right."—Contractual rights protected by section ten of article one of the federal constitution are not "civil rights" within the meaning of the Revised Statutes, §§ 1979, 563, subdivision 12, and 629, subdivision 16, conferring jurisdiction upon the federal circuit courts without regard to the sum or value in controversy. The only mode in which the security, afforded by the constitution to such rights, takes effect is by judicial process to invalidate the unconstitutional legislation of the state when it is set up against the enforcement of the rights under the contract. The mode in which congress has legislated in aid of the rights secured by the contract clause of the constitution, is, as was pointed out in the opinion of the court in the Civil Rights Cases, 109 U. S. 3, 12, 27 L. Ed. 836, by providing for a review on writ of error to the judgments of the state courts, in cases where they have failed properly to give it effect, and by conferring jurisdiction upon the circuit courts, by the acts of March 3, 1875, ch. 137, 18 Stats. 470, and now by the act of August 13, 1888, 25 Stats. 433, ch. 866, of all cases arising under the constitution and laws of the United States where the sum or value in dispute exceeds $2,000. Virginia Coupon Cases, 114 U. S. 269, 317, 322, 29 L. Ed. 185; Civil Rights Cases, 109 U. S. 3, 12, 27 L. Ed. 836; Holt *v.* Indiana Mfg. Co., 176 U. S. 68, 72, 44 L. Ed. 374.

Error to state court.—The only mode in which that constitutional security takes effect is by judicial process to invalidate the unconstitutional legislation of the state, when it is set up against the enforcement of his rights under his contract. The mode in which congress has legislated in aid of the rights secured by that clause of the constitution, is, as is pointed out with clearness and fullness in the opinion of the court in the Civil Rights Cases, 109 U. S. 3, 12, 27 L. Ed. 836, by providing for a review on writ of error to the judgments of the state courts, in cases where they have failed properly to give it effect, and by conferring jurisdiction upon the circuit courts by the act of March 3, 1875, ch. 137, 18 Stat. 470, of all cases arising under the constitution and laws of the United States, where the sum or value in dispute exceeds $500. Congress has provided no other remedy for the enforcement of this right. Virginia Coupon Cases, 114 U. S. 269, 317, 322, 29 L. Ed. 185.

Virginia coupon cases.—Section 1979 of the Revised Statutes which gives a right of action against every person depriving another of any constitutional right or privilege under color of authority of any state law, regulation or custody and § 629 of the Revised Statutes authorizing the aggrieved party to perfect his action in the federal circuit courts, without regard to the amounts involved, whenever it has been deprived of any constitutional right or privilege under color of any state law, ordinance or regulation, had not extended to an action brought by a holder of coupons issued under the Virginia funding act of March 30, 1871, against a tax collector in that state, for attempting to enforce a collection of the tax by a sale of the plaintiff's personal property after having rejected a tender of the coupons. Virginia Coupon Cases, 114 U. S. 269, 317, 29 L. Ed. 185.

IMPERFECT OBLIGATION.—"The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it, the contract, as such, in the view of the law, ceases to be, and falls into the class of those 'imperfect obligations,' as they are termed, which depend for their fulfillment upon the will and conscience of those upon whom they rest."[1]

IMPERFECT WAR.—As to what constitutes an imperfect war, see the title WAR.

IMPERTINENCE IN PLEADINGS.—See the titles EQUITY, vol. 5, p. 851; PLEADING.

IMPLICATION.—See note 2.

IMPLIED CONTRACTS.

CROSS REFERENCES.

See the title EMINENT DOMAIN, vol. 5, p. 746.

As to when a contract is implied in general, see the title ASSUMPSIT, vol. 2, p. 636. As to contracts void under statute of frauds, see the title ASSUMPSIT, vol. 2, p. 651. As to when the law implies a promise to pay, see the title ASSUMPSIT, vol. 2, p. 639. As to void parol contracts wholly or partly executed, see the title ASSUMPSIT, vol. 2, p. 640. As to persons who receive prize money in a lottery, see the title ASSUMPSIT, vol. 2, p. 645. As to implication of mutuality, see the title CONTRACTS, vol. 4, p. 563. As to jurisdiction of court of claims and forms of pleading therein, see the title COURTS, vol. 4, pp. 1021, 1048. As to private property taken for public use, see the title COURTS, vol. 4, p. 1029. As to claims for use of patents by United States, see the title COURTS, vol. 4, p. 1030. As to rules of construction of an act authorizing the erection of a bridge across a navigable water way, see the title BRIDGES, vol. 3, p. 520. As to implied payment, see the title PAYMENT. As to implied contracts of afreightment, see the title SHIPS AND SHIPPING. As to demand by United States for the proceeds of Indian trust bonds unlawfully converted, see the title TROVER AND CONVERSION. As to goods sold and delivered, work and labor done and materials furnished, see the title ASSUMPSIT, vol. 2, p. 650. As to contracts between master and servant and principal and agent, see the titles MASTER AND SERVANT; PRINCIPAL AND AGENT.

Definition.—"A great mass of human transactions, depend upon implied contracts; upon contracts which are not written, but which grow out of the acts of the parties. In such cases, the parties are supposed to have made those stipulations, which, as honest, fair and just men, they ought to have made. When the law assumes that they have made these stipulations, it does not vary their contract, or introduce new terms into it, but declares that certain acts, unexplained by compact, impose certain duties, and that the parties had stipulated for their performance."[3]

Necessity for Legal Obligation.—The law implies a contract only to do that which the party is legally bound to perform.[3a]

Object Must Be in Contemplation.—"A contract cannot arise by implica-

1. Edwards *v.* Kearzey, 96 U. S. 595, 600, 24 L. Ed. 793.

2. Implication.—"What is implied in a contract, deed, will, or statute is as effectual as what is expressed. United States *v.* Babbit, 1 Black 55, 61, 17 L. Ed. 94. Human affairs are largely conducted upon the principle of implications." Bulkley *v.* United States, 19 Wall. 37, 40, 22 L. Ed. 62. See the titles CONTRACTS, vol. 4, p. 552; DEEDS, vol. 5, p. 245; STATUTES; UNITED STATES; WILLS.

3. Dissenting opinion of Marshall, C. J., in Ogden *v.* Saunders, 12 Wheat. 213, 341, 6 L. Ed. 606.

3a. Necessity for legal obligation.—Dunphy *v.* Ryan, 116 U. S. 491, 497, 29 L. Ed. 703.

tion of law under circumstances the occurrence of which neither of the parties ever had in contemplation."[3]

Inference from Acts and Conduct.—A contract may be inferred from the acts and conduct of the parties.[4]

Taking Private Property for Public Use.—Where the government, in emergencies, takes private property into its use, a contract to reimburse the owner is implied.[5]

Implied Contract to Pay for Service.—A bank or other corporation may be bound by an implied contract in the same manner as an individual may. But, in any case, the mere fact that valuable services are rendered for the benefit of a corporation does not make him liable upon an implied promise to pay for them. To render it liable as a debtor under an implied promise, it must be shown, not only that the services were valuable, but also that they were rendered under such circumstances as to raise the fair presumption that the parties intended and understood that they were to be paid for; or, at least, that the circumstances were such that a reasonable man, in the same situation with the person who receives and is benefited by them, would and ought to understand that compensation was to be paid for them.[6]

Implied Contracts in an Invalid Law.—Although a law is found to be unconstitutional, a party who has received the full benefit under it, may be compelled to pay for that benefit according to the terms of the law. This is upon the theory of an implied contract, the terms of which may be sought in the invalid law, and which arises when the full consideration has been received by the party against whom the contract is sought to be forced.[7]

Transacting Business at the Request of Another.—The law implies a

3. **Object must be in contemplation.**—Carpenter *v.* United States, 17 Wall. 489, 494, 21 L. Ed. 680.

4. **Inference from acts and conduct.**—Eldred *v.* Bell Telephone Co., 119 U. S. 513, 519, 39 L. Ed. 496. See ante, "Definition."

"The implied contract relied upon by the plaintiff in this case is of that class in which the promise of the defendant is to be inferred from the acts and conduct of the parties. The contract assumed to be thus proven is, that, in consideration of 250 shares of its capital stock owned by the plaintiff and advanced by him to the defendant, at its instance and request, to be used for its benefit and advantage, and accepted by the defendant and so used, the defendant undertook and promised to pay the reasonable value thereof. The facts and circumstances relied on to justify this assumption do not seem to us to warrant it." Eldred *v.* Bell Telephone Co., 119 U. S. 513, 519, 39 L. Ed. 496.

Where no objection made to delay in delivery.—When, under a written contract, made by a person to deliver such supplies, as, ex. gr., corn at one time fixed, the quartermaster in charge receives part of the corn from such person for the government, and then, at a later date, no objection being made to the delay, receives the rest, and gives a receipt and voucher for the amount and the price, and the government uses such part of it as it wants, and suffers the remainder to decay by exposure and neglect, there is an implied contract to pay the value of such corn, which value may, in the absence of other testimony, be presumed to be the price fixed in the voucher by the quartermaster. Salomon *v.* United States, 19 Wall. 17, 22 L. Ed. 46.

Contract founded upon obligation to refund money.—The contract which the laws raises between one who has fraudulently obtained money on a lottery ticket and the holders of the lottery, is not founded on the drawing of the lottery, but on the obligation to refund the money which has been received by falsehood and fraud, by the assertion of a drawing which never took place. Catts *v.* Phalen, 2 How. 376, 11 L. Ed. 306. See the title ASSUMPSIT, vol. 2, p. 645.

Demand for the proceeds of Indian trust bonds.—A demand by the United States for the proceeds of Indian trust bonds, unlawfully converted to their own use by persons who had illegally procured and sold them, and had afterwards become wholly insolvent, is a demand arising upon an implied contract, or one which may be so treated by a waiver of the alleged fraud in the conversion of the bonds. Allen *v.* United States, 17 Wall. 207, 21 L. Ed. 553

5. **Taking private property for public use.**—United States *v.* Russell, 13 Wall. 623, 20 L. Ed. 474. See, generally, the title EMINENT DOMAIN, vol. 5, p. 746.

6. **Implied contract to pay for services.**—Fitzgerald, etc., Const. Co. *v.* Fitzgerald, 137 U. S. 98, 111, 34 L. Ed. 608.

7. **Implied contract on an invalid law.**—O'Brien *v.* Wheelock, 184 U. S. 450, 491, 46 L. Ed. 636.

contract between every man who transacts business for another, at the request of that other, and the person for whom it is transacted.[8]

IMPLIED COVENANTS.—See the title COVENANTS, vol. 5, p. 7.

IMPLIED TRUSTS.—See the title TRUSTS AND TRUSTEES.

IMPLIED WARRANTIES.—See the title WARRANTY.

IMPORTATION.—"To constitute an importation so as to attach the right to duties, it is necessary, not only that there should be an arrival within the limits of the United States, and of a collection district, but also within the limits of some port of entry."[1]

IMPORTED.—See ARISE, vol. 2, p. 492. And see ante, EXPORTS AND IMPORTS, pp. 210, 211.

IMPORTER.—See note 2.

IMPORTS AND EXPORTS.—See EXPORTS AND IMPORTS, ante, pp. 210, 211.

IMPOST.—See the titles REVENUE LAWS; TAXATION. And see EXPORTS AND IMPORTS, ante, pp. 210, 211. "An impost, in its enlarged sense, means any tax or tribute imposed by authority, and applies as well to a tax on persons as to a tax on merchandise."[3]

8. **Transacting business at the request of another.**—Massie *v.* Watts, 6 Cranch 148, 161, 3 L. Ed. 181.

1. Arnold *v.* United States, 9 Cranch 104, 120, 3 L. Ed. 671. See United States *v.* Vowell, 5 Cranch 368, 3 L. Ed. 128; Marriott *v.* Brune, 9 How. 619, 632, 13 L. Ed. 282; Lowder *v.* Stone, 187 U. S. 281, 283, 47 L. Ed. 178. See the title REVENUE LAWS. And see EXPORTS AND IMPORTS, ante, pp. 210, 211.

2. **Importer.**—In a commercial sense, an importer is a person engaged in foreign commerce. And it appears that in the acts of congress which regulate foreign commerce, he is spoken of in that light. License Cases, 5 How. 504, 594, 12 L. Ed. 256.

The Bay of Mobile being included within the statutory definition of the port of Mobile, contracts for the purchase of cargoes of foreign merchandise before or after the arrival of the vessel in the said bay, where the goods, by the terms of the contract, are not to be at the risk of the purchaser until delivered to him in said bay, do not constitute the purchaser an importer, and the goods so purchased and sold by him, though in the original packages, may be properly subjected to taxation by the state. Waring *v.* The Mayor, 8 Wall. 110, 19 L. Ed. 342. See, generally, the titles INTERSTATE AND FOREIGN COMMERCE; REVENUE LAWS. And see EXPORTS AND IMPORTS, ante, pp. 210, 211.

3. **Impost.**—Mr. Justice McLean's opinion in Passenger Cases, 7 How. 283, 407, 12 L. Ed. 702.

In Pollock *v.* Farmers' Loan, etc., Co., 158 U. S. 601, 622, 39 L. Ed. 1108, the court say: "Cooley (On Taxation, p. 3) says that the word 'duty' ordinarily 'means an indirect tax imposed on the importation, exportation or consumption of goods;' having 'a broader meaning than custom, which is a duty imposed on imports or exports;' that 'the term **impost** also signifies any tax, tribute or duty, but it is seldom applied to any but the indirect taxes. An excise duty is an inland **impost**, levied upon articles of manufacture or sale, and also upon licenses to pursue certain trades or to deal in certain commodities.'"

"**Impost** is a duty on imported goods and merchandise. In a larger sense, it is any tax or imposition. Story's Const. Abr., § 474. Cowell says it is distinguished from custom, 'because custom is rather the profit which the prince makes on goods shipped out.' Cowell's Interpreter, title 'Impost.' Mr. Madison considered the terms 'duties' and **imposts** in these clauses as synonymous. 1 Story's Constitution, 669, note. Judge Tucker thought 'they were probably intended to comprehend every species of tax or contribution not included under the ordinary terms, "taxes and excises."'" Pacific Ins. Co. *v.* Soule, 7 Wall. 433, 445, 19 L. Ed. 95.

In The Passenger Cases, 7 How. 283, 535, 12 L. Ed. 702, it was said: "An **impost** is usually an ad valorem or specific duty, and not a fixed fee like this for allowing a particular act, or a poll tax like this—a fixed sum per head." This case involved a statute imposing taxes upon alien passengers arriving in part of the state.

In The Passenger Cases, 7 How. 283, 477, 12 L. Ed. 702, Mr. Chief Justice Taney defined the term **imposts**, as follows: "I think it may be safely affirmed, that, both in England and this country, the words imports and importation, in statutes, in statistical tables, in official reports, and in public debates, have uniformly been applied to articles of property, and never to passengers voluntarily coming to the country in ships; and in the debates of

IMPRESSION.—See note 1.

IMPRISONMENT.—See, generally, the title SENTENCE AND PUNISHMENT. See, also, the titles treating the specific offenses.

the convention itself, the words are constantly so used."

"An **impost** or duty on imports, is a custom or a tax levied on articles brought into a country, and is most usually secured, before the importer is allowed to exercise his rights of ownership over them, because evasions of the law can be prevented more certainly by executing it while the articles are in its custody. It would not, however, be less an **impost** or duty on the articles, if it were to be levied on them, after they were landed. * * * 'A duty on imports,' then, is not merely a duty on the act of importation, but is a duty on the thing imported. It is not, taken in its literal sense, confined to a duty levied while the article is entering the country, but extends to a duty levied after it has entered the country." Brown *v.* Maryland, 12 Wheat. 419, 437, 6 L. Ed. 678. See, also, Woodruff *v.* Parham, 8 Wall. 123, 131, 19 L. Ed. 382.

Navigation.—The ordinance of 1787 provides that the navigable waters leading into the Mississippi and the St. Lawrence, shall be common highways and forever free, without any tax, **impost**, or duty therefor. The provision of the ordinance has reference to the navigation of the waters in their natural state. It did not contemplate that such navigation might not be improved by artificial means; and for outlays caused by such works the state making them may exact reasonable toll. By the terms tax, **impost**, and duty, mentioned in the ordinance, is meant a charge for the use of the government, not compensation for improvements. The fact that if any surplus remains from the tolls, over what is used to keep the locks in repair, and for their collection, it is to be paid into the state treasury as a part of the revenue of the state, does not change the character of the toll or **impost**. Huse *v.* Glover, 119 U. S. 543, 549, 30 L. Ed. 487. See, also, Sands *v.* Manistee River Imp. Co., 123 U. S. 288, 31 L. Ed. 149; Ouachita, Packet Co. *v.* Aiken, 121 U. S. 444, 30 L. Ed. 976.

1. **Impression.**—"It is contended by the defendant's counsel, that the affidavit is defective, not being sufficiently certain or positive, as to the loss of the original writing. The affiant only states his **impression** that he tore it up; and if he did not tear it up, it has become lost or mislaid; that this is in the alternative, and not certain or positive. We do not concur in this reasoning. An **impression** is an image fixed in the mind, it is belief; and believing the paper in question was destroyed has been deemed sufficient to let in the secondary evidence." Riggs *v.* Tayloe, 9 Wheat. 483, 486, 6 L. Ed. 140.

IMPRISONMENT FOR DEBT.

BY S. B. FISHER.

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CROSS REFERENCES.

See the titles ASSIGNMENTS FOR BENEFIT OF CREDITORS, vol. 2, p. 599; BANKRUPTCY, vol. 2, p. 792; ESCAPE, vol. 5, p. 893; EXECUTION AGAINST THE BODY AND ARREST IN CIVIL CASES, vol. 6, p. 80; FRAUD AND DECEIT, ante, p. 394; IMPAIRMENT OF OBLIGATION OF CONTRACTS, ante, p. 758; INSOLVENCY; JUDGES; LIMITATIONS OF ACTIONS AND ADVERSE POSSESSION; PERJURY; PRISONS AND PRISONERS; SHERIFFS AND CONSTABLES.

I. Scope of Title.

This title will be confined to a treatment of the decisions under the federal and state statutes regulating or abolishing imprisonment for debt, or "poor debtor acts," as they are often termed. While these acts are often referred to as insolvency acts or laws, there is a wide distinction between them and state insolvency laws properly so termed, and federal bankrupt acts. Such distinction is especially apparent in considering the effect of the discharge under a poor debtor act, and under the various national bankrupt acts and state insolvency laws, amounting, in effect, to state bankrupt laws. It is intended in this title to treat generally of the validity and effect of the state and federal statutes for the relief of poor debtors, who are entitled to relief thereunder, manner of obtaining such relief, and the effect of a discharge under such acts.

II. Statutory Provisions Regulating or Abolishing Imprisonment for Debt.

A. Act of Congress Relating to Debtors Imprisoned under Federal Process.—The act of congress passed in 1800, provides for the mode of dis-

charging insolvent debtors committed under process from the courts of the United States, and the cases in which this may be done.[1] This act is obligatory on the sheriffs in every county of the states acceding to the resolution passed by congress in 1789, relating to the use of state jails for the confinement of persons committed by virtue of legal process issued by the United States courts, and no discharge under any state law not adopted by congress, or a rule of court, can exonerate the officer.[2]

B. Validity of State Laws Relating to Imprisonment for Debt.—See the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, ante, p. 758.[3]

III. Who Entitled to Relief Under Federal Act of 1800 for the Relief of Persons Imprisoned for Debt.

In General.—The provisions of the act of congress of January 6, 1800, for the relief of persons imprisoned for debt, apply not only to persons confined under execution, but also to persons in confinement, against whom judgment is obtained but no execution issued.[4]

IV. Procedure to Obtain Discharge.

A. Notice to Creditor.—In General.—Under the various acts, both state and federal, for the relief of persons imprisoned for debt, notice is usually required to be served upon the person at whose suit the debtor is confined, of the debtor's intention to claim his discharge.[5]

Right of Creditor to Waive Thirty Days' Imprisonment of Debtor after Notice.—Although the federal act of 1800 provides that notice may be served upon the person at whose suit the debtor is confined, and that at the end of thirty days he may be discharged, it has been held that the object of imprisonment being to give the plaintiff an opportunity to ascertain the situation of the defendant, he may dispense with it, when satisfied that the application is an honest one, and that delay would discover nothing that he is not already acquainted with.[6]

B. Time of Application for Discharge.—Under the Pennsylvania act of 1729, for the relief of insolvent debtors, the practice was that only those should

1. **Act of congress of 1800 as to debtors imprisoned under federal process.**—McNutt *v.* Bland, 2 How. 9, 11 L. Ed. 159; United States Bank *v.* Tyler, 4 Pet. 366, 7 L. Ed. 888; United States Bank *v.* Weisiger, 2 Pet. 331, 7 L. Ed. 441.

2. **State laws inapplicable to persons in custody under federal process.**—Duncan *v.* Darst, 1 How. 301, 11 L. Ed. 139, followed in McNutt *v.* Bland, 2 How. 9, 11 L. Ed. 159.

"Congress, however, did not intend to defeat the execution of judgments rendered in the courts of the United States; but meant they should have full effect by force of the state laws adopted: and therefore all state laws regulating proceedings affecting insolvent persons, or that are addressed to state courts, or magistrates in other respects, which confer peculiar powers on such courts and magistrates, do not bind the federal courts, because they have no power to execute such laws." Duncan *v.* Darst, 1 How. 301, 11 L. Ed. 139.

An insolvent debtor who has received a certificate of discharge from arrest and imprisonment, under a state insolvent law, is not entitled to be discharged from execution at the suit of the United States. United States *v.* Wilson, 8 Wheat. 253, 5 L. Ed. 610.

In McNutt *v.* Bland, 2 How. 9, 11 L. Ed. 159, it was held that the Mississippi act of 1822, providing for the discharge of the prisoner by the sheriff in default of the plaintiff in the execution, in paying the prison fees due, could not apply to persons committed on executions from the courts of the United States.

3. As to the effect of this constitutional provision as to impairment of the obligation of contracts, upon the validity of national bankrupt laws, and of state insolvency laws, properly so called, see the titles BANKRUPTCY, vol. 2, pp. 805, 806; INSOLVENCY.

4. **Persons entitled to relief under the act of congress of January 6, 1800.**—United States Bank *v.* Weisiger, 2 Pet. 331, 7 L. Ed. 441.

5. **Notice to person at whose suit debtor confined.**—United States Bank *v.* Weisiger, 2 Pet. 331, 7 L. Ed. 441; United States Bank *v.* Tyler, 4 Pet. 366, 7 L. Ed. 888; Duncan *v.* Darst, 1 How. 301, 11 L. Ed. 139.

6. **Right of creditor to waive thirty days' imprisonment of debtor after notice.**—United States Bank *v.* Weisiger, 2 Pet. 331, 7 L. Ed. 441.

be discharged who made their application within the first three days of the term.[7]

C. Disclosure and Schedule of Property and Surrender of Same.—In order to obtain his discharge under a poor debtor act, the applicant is usually required to disclose all his property,[8] and to deliver a schedule of such property to the tribunal constituted for that purpose;[9] which property is, according to some statutes, to be vested in the sheriff for the benefit of the creditors at whose suit the debtor is in execution.[10]

D. Oath.—A form of oath is usually prescribed by the various acts for the relief of imprisoned debtors, which must be taken by the applicant for discharge before such discharge can be granted,[11] and a false oath will subject the applicant to prosecution for perjury.[12]

E. Release of Debtor from Custody on Bond Conditioned to Apply for Discharge.—By the laws of some states the debtor whose body is in execution may give bond and security, when the process issues from a state court, to the sheriff to appear at the return term of the writ and comply with the requirements of the statute prerequisite to his discharge, such as giving in schedule, taking the poor debtor's oath, etc.[13]

V. The Discharge.

A. Right of Debtor to Discharge.—Where the debtor, whose body is in execution, honestly complies with the provisions of a statute for the relief of such persons, he is entitled to his certificate of discharge.[14]

B. By Whom Granted—1. IN GENERAL.—Under the Virginia insolvent law the certificate of discharge might be granted either by the court, sitting in its ordinary character for the transaction of judicial business, or by two magistrates, who were constituted by law an extraordinary court for this particular purpose.[15] Whether granted in one mode or the other, it is of equal validity.

7. **Time of application under Pennsylvania act of 1729.**—Henderson *v.* Allen (Pa. Ct. of Com. Pl.), 1 Dall. 149, 1 L. Ed. 76.

Application too late after adjournment.—In Mifflin *v.* Gasqui (Pa. Ct. Com. Pl.), 1 Dall. 142, 1 L. Ed. 73, a debtor in confinement under a magistrate's execution, petitioned for his discharge under the insolvent law. He was, however, remanded, because he had not applied before adjournment, the court observing that it was already easy enough for debtors to get out of jail.

8. **Necessity for disclosure of property.**—United States Bank *v.* Tyler, 4 Pet. 366, 7 L. Ed. 888.

9. **Delivery of schedule of property.**—Duncan *v.* Darst, 1 How. 301, 11 L. Ed. 139; Simms *v.* Slacum, 3 Cranch 300, 2 L. Ed. 446; Slacum *v.* Simms, 5 Cranch 363, 3 L. Ed. 126; Bowie *v.* Henderson, 6 Wheat. 514, 5 L. Ed. 319.

Under the Virginia statute it would seem that such schedule is required to be on oath. See Simms *v.* Slacum, 3 Cranch 300, 2 L. Ed. 446.

Effect of including debt in schedule.—It has been held that the including of a demand in the schedule of the insolvent's debts, is sufficient evidence to sustain an issue on a replication of a new promise to the plea of the statute of limitations, if the period of limitations has not elapsed after the date of the schedule. Bowie *v.* Henderson, 6 Wheat. 514, 5 L. Ed. 319. See, generally, the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION.

10. **Vesting of scheduled property in sheriff for benefit of execution creditors.**—Simms *v.* Slacum, 3 Cranch 300, 2 L. Ed. 446; Duncan *v.* Darst, 1 How. 301, 11 L. Ed. 139. And see Rockhill *v.* Hanna, 15 How. 189, 14 L. Ed. 656.

11. **Necessity for oath by debtor.**—United States Bank *v.* Weisiger, 2 Pet. 331, 7 L. Ed. 441; United States Bank *v.* Tyler, 4 Pet. 366, 7 L. Ed. 888; Duncan *v.* Darst, 1 How. 301, 11 L. Ed. 139.

12. **False oath as subjecting to prosecution for perjury.**—See the cases cited in preceding note. And see, generally, the title PERJURY.

"The coercive means of the law are to be found in the searching oath to be administered, and in the fear of prosecution for perjury, and recommitment in the same action." United States Bank *v.* Weisiger, 2 Pet. 331, 7 L. Ed. 441.

13. **Release on bond conditioned to apply for discharge.**—Duncan *v.* Darst, 1 How. 301, 11 L. Ed. 139.

14. **Right of debtor to discharge upon compliance with statutory requirements.**—Simms *v.* Slacum, 3 Cranch 300, 2 L. Ed. 446.

15. **Granted by court, or by extraordinary tribunal of magistrates.**—Simms *v.* Slacum, 3 Cranch 300, 2 L. Ed. 446.

In either case, the judgment of discharge is the judgment of a court, and, as such, is of complete obligation.[16]

2. Incompetency of Tribunal as Invalidating Discharge.—A discharge granted by an incompetent tribunal is wholly void;[17] as, for instance, where a magistrate was disqualified to sit in the discharge of the debtor.[18]

C. Effect of Discharge—1. In General.—A discharge under an act for the relief of persons imprisoned for debt, is confined in its effects altogether to the particular cause, and even as to that, does not exempt the debtor's personal effects, or future acquisitions, from the process of the law,[19] but only discharges the person of the debtor.[20] Nor is his person exempt from confinement for the same debt, should he be detected in a fraud upon his creditor.[21]

2. Effect as Discharging from Conditions of Prison Limits Bonds.—A discharge from imprisonment under an act for the relief of poor debtors, is a lawful discharge, and it is no breach of the conditions of a prison limits bond, for the prisoner to go at large under such discharge.[22] This has been held to be the case though the discharge was obtained by fraud or perjury, where such discharge was the act of a court of competent jurisdiction.[23]

IMPROBABILITY.—See the title Evidence, vol. 5, p. 1048.

16. Discharge by either tribunal equally valid.—Simms *v.* Slacum, 3 Cranch 300, 2 L. Ed. 446.

17. Discharge by incompetent tribunal void.—Slacum *v.* Simms, 5 Cranch 363, 3 L. Ed. 126.

18. Discharge by disqualified magistrate invalid.—Slacum *v.* Simms, 5 Cranch 363, 3 L. Ed. 126, in which case it was held that a magistrate who has received a deed of trust from an insolvent debtor, which deed is fraudulent in law as to creditors, is incompetent to sit as a magistrate in the discharge of the debtor, under the insolvent law of Virginia, and that the discharge so obtained is not a discharge in due course of law.

Generally, as to effect of disqualification of judges, see the title JUDGES.

19. Effect confined to particular cause, etc.—United States Bank *v.* Weisiger, 2 Pet. 331, 7 L. Ed. 441; Bowie *v.* Henderson, 6 Wheat. 514, 5 L. Ed. 319; King *v.* Riddle, 7 Cranch 168, 3 L. Ed. 304.

Leaves contract in full force against property of debtor.—See ante, "Validity of State Laws Relating to Imprisonment for Debt," II.

"A discharge under the insolvent laws, while it exempts the person from future molestation, leaves the effects of the defendant forever liable to the demands of his creditors." Primer *v.* Kuhn, 1 Dall. 452, 1 L. Ed. 219, reversing 1 Dall. 225, 1 L. Ed. 11. See, also, Rockhill *v.* Hanna, 15 How. 189, 14 L. Ed. 656.

As to discharge as satisfaction of judgment, or destroying judgment lien, see the title JUDGMENTS AND DECREES.

20. Only discharges person of debtor.—King *v.* Riddle, 7 Cranch 168, 3 L. Ed. 304.

21. Liability to reimprisonment for fraud upon creditor.—United States Bank *v.* Weisiger, 2 Pet. 331, 7 L. Ed. 441.

22. Effect as discharging from conditions of prison limits bond.—Where the condition of a bond for the jail limits, in Rhode Island, required the party to remain a true prisoner, in the custody of the keeper of the prison, and within the limits of the prison, "until he shall be lawfully discharged, without committing any manner of escape or escapes during the time of restraint, then this obligation to be void, or else to remain in full force and virtue;" held, that a discharge, under the insolvent laws of the state, obtained from the proper court, in pursuance of a resolution of the legislature, and discharging the party from all his debts, etc., "and from all imprisonment, arrest and restraint of his person therefor"—was a lawful discharge, and that his going at large under it, was no breach of the condition of the bond. Mason *v.* Haile, 12 Wheat. 370, 6 L. Ed. 660.

23. Rule applicable though discharge obtained by fraud or perjury.—A discharge from the prison rules, under the insolvent act of Virginia, although obtained by fraud, is a discharge in due course of law; and upon such discharge, no action can be sustained upon the prison-bounds bond. Slacum *v.* Simms, 1 Cranch C. C. 242, reversed. Simms *v.* Slacum, 3 Cranch 300, 2 L. Ed. 446.

Under the laws of Rhode Island, a discharge, according to the act for the relief of poor prisoners for debt, although obtained by fraud and perjury, is a lawful discharge, and not an escape; and upon such a discharge no action can be maintained upon a bond for the liberty of the prison yard. Ammidon *v.* Smith, 1 Wheat. 447, 4 L. Ed. 132.

IMPROVEMENTS.

BY ERNEST P. STEINHAUER.

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See the titles EJECTMENT, vol. 5, p. 695; INDIANS; LANDLORD AND TENANT; PUBLIC LANDS; VENDOR AND PURCHASER.

As to recovery by tenant of buildings on landlord's property, see the title LANDLORD AND TENANT. As to improvements taking a contract out of the statute of frauds, see the title FRAUDS, STATUTE OF, ante, p. 451. As to annual expenditures of labor and improvements to be made on mining claims, see the title MINES AND MINERALS. As to taxation, see the title TAXATION.

I. Persons Entitled to Compensation.

A. Bona Fide Possessor.—The civil law recognized the principle of reimbursing to the bona fide possessor[1] the expense of his improvements if he was removed from his possession by the legal owner, by allowing him the increase in the value of the land created thereby. And the betterment laws of the several states proceed upon that equitable view.[2] The right of recovery, where the occupant in good faith believes himself to be the owner, is declared to stand upon a principle of natural justice and equity, and such laws are held not to be unconstitutional as impairing vested rights, since they adjust the equities of the parties as nearly as possible according to natural justice.[3]

1. **Bona fide possessor.**—Searl *v.* School District, No. 2, 133 U. S. 553, 561, 33 L. Ed. 740.

A bona fide possessor is one who supposes himself to be the true proprietor of the land, and is ignorant that his title is contested by some other person claiming a better right to it. But this character cannot be maintained after the occupant has notice of an adverse claim, especially if that be followed up by a suit to recover the possession. After this, he becomes a mala fide possessor. Green *v.* Biddle, 8 Wheat. 1, 78, 5 L. Ed. 547. See, also, Canal Bank *v.* Hudson, 111 U. S. 66, 81, 28 L. Ed. 354.

2. Searl *v.* School District, No. 2, 133 U. S. 553, 561, 33 L. Ed. 740.

The statutes of Texas making provision for an allowance for improvements in actions of trespass to try title intended to effect the following: To secure to the possessor in good faith compensation for his improvements, either by direct payment therefor by the owner of the land, or by giving him an opportunity to take the land at its assessed value when the plaintiff elected not to pay for the improvements and keep the land, but not to give the possessor the right to an excution for the assessed value of the improvements at the end of one year. Cox *v.* Hart, 145 U. S. 376, 36 L. Ed. 741.

3. **Do not impair vested rights.**—Searl *v.* School District, No. 2, 133 U. S. 553, 561, 33 L. Ed. 740.

Thus where a municipality after investigation and acting upon the advice of

B. Person Lawfully in Possession under Defective Title.—Where a party lawfully in possession under a defective title makes permanent improvements, if relief is asked in equity by the true owner, he will be compelled to allow for such improvements.[4]

C. Improvements Made because of Promise to Convey.—Where one expends large sums of money in improving certain property upon the strength of a promise that the property is to be conveyed to his wife, he has a lien upon such property, which is superior to the claims of the creditors.[5]

D. One Who Obtained Conveyance by Undue Influence.—In a suit in equity brought by heirs at law to set aside a conveyance obtained from their

counsel purchased a tract of land in good faith, from one of two rival claimants, and erected a costly public school building thereon, it was held, upon the land afterwards being recovered by the other claimant in ejectment, that to allow the city the value of the improvements placed thereon did not deprive him of any vested right. Searl *v.* School District, No. 2, 133 U. S. 553, 561, 33 L. Ed. 740.

4. Canal Bank *v.* Hudson, 111 U. S. 66, 82, 28 L. Ed. 354.

Purchaser at judicial sale.—Where a defective title is acquired at a judicial sale, by one exercising good faith, he is entitled to recover the value of improvements that he had made upon the land. Canal Bank *v.* Hudson, 111 U. S. 66, 62, 28 L. Ed 354.

"The present case has an analogy to that of a purchaser at a foreclosure sale, who makes valuable improvements in the belief that he has acquired an absolute title. He is entitled to be paid for them if the premises are redeemed. 2 Jones on Mortgages, § 428." Canal Bank *v.* Hudson, 111 U. S. 66, 82, 28 L. Ed. 354.

Lands awarded by a commission.—Where lands were awarded to a person by a commission, and patents were given by the government under the award, and he remained in possession upon the belief that he had a good title, he should, when ousted by the holder of a superior title, be credited for the amounts paid to the government and with the value of improvements, and no increased rent should be allowed against him on account of the improvements. Goode *v.* Gaines, 145 U. S. 141, 155, 36 L. Ed. 654.

Land held by a trustee.—In a court of equity, when the complainant asserts his right to land and claims to recover both the title and possession from his trustee, he should pay the value of the improvements which that trustee had placed upon it. Case *v.* Kelly, 133 U. S. 21, 29, 33 L. Ed. 513.

5. Improvements made because of promise to convey.—A bill was filed claiming specific performance of an alleged contract to convey a house and lot for the benefit of the wife of the complainant, the latter having expended a large sum of money in improving the property, in the expectation that it would be conveyed as required by the bill. The court not considering that sufficient evidence of an agreement to convey the property was given, ordered that it should be sold, and out of the proceeds that the advances made by the complainant should be repaid; the property sold for a sum far less than the amount expended. Held, that the balance unpaid, after the sale, was not a debt due by the estate of the father of the wife, and could be claimed of his representatives. King *v.* Thompson, 13 Pet. 128, 10 L. Ed. 91.

A few days after the marriage of J. Thompson with the daughter of George King, in 1812, the latter, residing in Georgetown, in the District of Columbia, and having a large active capital, and a large real estate there, proposed to grant to J. T. a house and lot in Georgetown, then much out of repair, and untenantable, provided he would repair the same, so as to make it a comfortable residence; and saying that he intended the property for his daughter; this proposition was accepted by J. T., who repaired the property, expending upwards of $4,000 on the same; and he, with his wife, resided on it about four years. Before his removal from it, a correspondence on the subject of the conveyance of the property to J. T., or to J. T. and his wife, took place, which ended in propositions to convey the property, on certain terms, beneficial to J. T. and wife, in pursuance of, and intended to be in execution of, the original offer of G. K. to J. T., made immediately after the marriage; no conveyance was made. J. T. and wife removed from Georgetown, and G. K. collected and paid to J. T. the rents of the property, for some time after their removal; G. K. died in 1820, insolvent; his debts amounted to $36,000, and his whole estate, both real and personal, when sold, did not pay thirty-nine per cent of his debts; the property claimed by J. T. and wife, in this case, was sold for $1,600, by a trustee, under a decree in chancery, obtained by the creditors of G. K., but the sale had not been ratified. The terms of the contract not being sufficiently established by the evidence, the court decreed that the property should be sold, and the proceeds of the sale should be first applied to the payment of the money expended by Thompson in making improvements on the property; and the balance, if any, paid

ancestor by undue influence, improvements and repairs which enhanced the value of the estate may be recovered by that grantee.[6]

II. Right to Compensation Denied.

A. To Occupant without Title.—An occupant without title is not recognized as entitled to compensation.[7]

One Who Knows He Has No Title.—The principle that one should be estopped from asserting a right to property, upon which he has, by his conduct, misled another, who supposed himself to be the owner, to make expenditures, cannot be invoked by one who, at the time the improvements were made, was acquainted with the true character of his own title, or with the fact that he had none.[8]

B. Purchaser of Mortgage with Notice.—A bona fide purchaser under the mortgagor, with actual notice of the mortgage, or constructive notice by means of a registry, is not entitled to have the value of the improvements made by him, deducted from the proceeds of the sale of the mortgaged premises.[9]

over for the benefits of the creditors of George King—Thompson not to be charged with rent of the premises, while he occupied them, nor with the rent collected and paid to him, after he removed. King *v.* Thompson, 9 Pet. 204, 9 L. Ed. 102.

6. One who obtained conveyance by undue influence.—Harding *v.* Handy, 11 Wheat. 103, 6 L. Ed. 429.

7. Occupant without title.—Jackson *v.* Ludeling, 99 U. S. 513, 537, 25 L. Ed. 460, dissenting opinion.

Mortgagees of person putting on improvements.—Certain land was in the possession of the true owners, their title having been established by an ejectment suit. During the pendency of the ejectment suit the land had been in possession of one claiming title who had erected improvements on the land with money borrowed upon a deed of trust on the land. The mortgagees now sought to subject the land in the hands of the true owners to their equitable lien for the value of the improvements, but the court held that the true owners had been under no obligation to try to find out from whence came the money for the improvements and on what security they were given, since the mortgagees, even if they were not aware of the ejectment actions pending, were aware of a suit in equity questioning the mortgagor's title to the property which had been begun and then dismissed for want of prosecution and without prejudice. Armstrong *v.* Ashley, 204 U. S. 272, 279, 51 L. Ed. 482.

Trespasser.—"If the entry upon land is a naked trespass, buildings permanently attached to the soil become the property of the owner of the latter. The trespasser can acquire no rights by his tortious acts." Searl *v.* School District, No. 2, 133 U. S. 553, 561, 33 L. Ed. 740.

In Louisiana.—It seems to be held in Louisiana, contrary to former decisions, that compensation will not be allowed to the possessor in bad faith for inseparable improvements to land, such as clearing and ditching. Jackson *v.* Ludeling, 99 U. S. 513, 25 L. Ed. 460.

8. One who knows he has no title.—Steel *v.* Smelting Co., 106 U. S. 447, 456, 27 L. Ed. 226.

In Deffeback *v.* Hawke, 115 U. S. 392, 29 L. Ed. 423, it was held that a person who makes improvements upon public land, knowing that he has no title, and that the land is open to exploration and sale for its minerals, and makes no effort to secure the title to it as such land under the laws of congress, or a right of possession under the local customs and rules of miners, has no claim to compensation for his improvements as an adverse holder in good faith when such sale is made to another and the title is passed to him by a patent of the United States. Sparks *v.* Pierce, 115 U. S. 408, 413, 29 L. Ed. 428.

9. Purchase of mortgage with notice.—Hughes *v.* Edwards, 9 Wheat. 489, 6 L. Ed. 142.

"If, by means of these improvements, the value of the land has been increased, the mortgagor, or purchasers, are permitted to enjoy all the benefit of such increase, by paying the debt charged upon the land. If he will not do this, but submits rather to a sale of the property, he has all the benefit of its increased value, by receiving the overplus raised by the sale, after the debt is discharged. His improvements were made upon property which he knew was pledged for the payment of his debt, and he made them solely with a view to his own interest. The land was, in reality, his own, subject only to the lien; so much his own, that he is not accountable to the mortgagee for the rents and profits received by him, during the continuance of his possession, even although the land, when sold, should be insufficient to pay the debt. Neither is the purchaser accountable for any part of the debt, beyond the amount for which the land may be sold, although it should have been deteriorated by waste, dilapidation or other mismanagement. The

C. Compensation for Improvements Made after Purchase.—In an early Pennsylvania case it was held that a recovery in an action of covenant cannot be maintained so far as to include compensation for improvements made after the purchase.[10]

III. Where Statutes Conflict with Treaties.

Statutes providing for recovery of compensation for improvements will not be enforced where they conflict with treaties made with foreign countries.[11]

IV. Statute of Limitations.

The lapse of time, six years, before bringing suit to cancel a conveyance obtained from a woman of doubtful sanity, cannot avail the defendant where he has had posession of the land, and a reasonable rent therefor is equal to the value of his improvements thereon, and there has been no loss of evidence preventing a full presentation of the case.[12]

V. Determination of Value by Jury.

Where the determination of the compensation, due to the one who has made the improvements, is to be in a common-law court, it should be made by a jury.[13]

VI. Dismissal of Bill.

The dismissal of a bill brought to quiet title, will, when there is no examination

claim, therefore, of a purchaser with notice, to have the value of the improvements which may have been made from the fruits of the property itself deducted from the price at which the property may be sold, seems to the court too unreasonable, to admit of a serious argument in its support." Hughes *v.* Edwards, 9 Wheat. 489, 500, 6 L. Ed. 142.

10. Compensation for improvements made after purchase.—Bender *v.* Fromberger, 4 Dall. (Pa. Sup. Ct.) 436, 442, 1 L. Ed. 898.

11. When statutes conflict with treaties.—The act of the legislature of New York, of May 1st, 1786, gave to the purchasers of forfeited estates the like remedy, in case of eviction, for obtaining compensation for the value of their improvements, as is directed in the act of the 12th of May, 1784; the latter act declares, that the person or persons having obtained judgments against such purchasers, shall not have any writ of possession, nor obtain possession of such land, etc., until he shall have paid to the purchaser of such lands, or person holding title under him, the value of all improvements made thereon, after the passing of the act. Held, that claims of compensation for improvements made under the authority of these acts of the legislature of New York, are inconsistent with the provisions of the treaty of peace with Great Britain of 1783, and should be rejected. Carver *v.* Astor, 4 Pet. 1, 7 L. Ed. 761. See, generally, the title TREATIES.

12. Statute of limitations.—Allore *v.* Jewell, 94 U. S. 506, 24 L. Ed. 260. See, generally, the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION.

13. Determination of value by jury.—The occupant-claimant law of Ohio, which declares that an occupying-claimant shall not be turned out of possession, until he shall be paid for lasting and valuable improvements made by him, and directs the courts, in a suit at law, to appoint commissioners to value the same, is repugnant to the 7th amendment of the constitution of the United States, which declares, that "in suits at common law, where the value of controversy shall exceed twenty dollars, the right of trial by jury shall be preserved;" the compensation for improvements is a suit at common law, and must be submitted to a jury. Bank *v.* Dudley, 2 Pet. 492, 7 L. Ed. 496.

Admitting, that the legislature of Ohio can give an occupant-claimant a right to the value of his improvements, and authorize him to retain possession of the land he has improved, until he shall have received that value; and assuming that they may annex conditions to the change of possession, which, so far as they are constitutional, must be respected in all courts; still, the legislature cannot change radically the mode of proceeding prescribed for the courts of the United States, or direct those courts, in a trial at common law, to appoint commissioners for the decision of questions which a court of common law must submit to a jury. Bank *v.* Dudley, 2 Pet. 492, 7 L. Ed. 496.

The inability of the court of the United States to proceed in suits at common law, in the mode prescribed by the occupant law of Ohio, does not deprive the occupant of the benefit intended him; the modes of proceeding which belong to courts of chancery are adapted to the execution of the law; and to the equity side of the court he may apply for relief; sitting in chancery, it can appoint commissioners to estimate improvements, as well as rents and profits, and can enjoin the execution of the judgment at law.

made to the merits, be without prejudice to any remedy of the complainant for compensation for improvements on the land made in good faith.[14]

IMPUTABLE NEGLIGENCE.—See the title NEGLIGENCE.

IN.—See note 1.

Actually in Session.—See ACTUAL, vol. 1, p. 116.

INADEQUACY OF REMEDY AT LAW.—See the title EQUITY, vol. 5, p. 821.

INADEQUATE CONSIDERATION.—See the titles FRAUD AND DECEIT, ante, p. 394; RESCISSION, CANCELLATION AND REFORMATION.

INADEQUATE DAMAGES.—See the title NEW TRIALS.

INCEST.—See the titles DESCENT AND DISTRIBUTION, vol. 5, p. 341; PARENT AND CHILD.

INCHOATE DOWER.—See the title DOWER, vol. 5, p. 488.

until its decree shall be complied with. If any part of the act be unconstitutional, the provisions of that party may be disregarded; while full effect will be given to such as are not repugnant to the constitution of the state, or the ordinance of 1787; the question whether any of its provisions be of this description, will properly arise in the suit brought to carry them into effect. Bank *v.* Dudley, 2 Pet. 492, 7 L. Ed. 496.

14. Dismissal of bill.—Miles *v.* Caldwell, 2 Wall. 35, 45, 17 L. Ed. 755.

1. In actual use.—See ACTUAL, vol. 1, p. 115.

In and to.—As to a conveyance of all right, title and interest "in and to" lands granted by a contract of sale, operating as an assignment, see the title ASSIGNMENTS, vol. 2, p. 553.

In collision.—As to the meaning of the term "in collision" when applied to a vessel, see the titles COLLISION, vol. 3, p. 870; MARINE INSURANCE.

In place of.—Section 596 of the Revised Statutes provides that: "It shall be the duty of every circuit judge, whenever in his judgment the public interest so requires, to designate and appoint, * * * the district judge of any judicial district within his circuit to hold a district or circuit court in the place or in aid of any other district judge within the same circuit." The court said: "While 'in aid of' naturally imply some existing judge to be aided, the words 'in the place of' do not necessarily carry the same implication. * * * They may, without doing violence to language, be construed to mean that the designated judge is to take temporarily the place which is or has been filled by a regular judge." McDowell *v.* United States, 159 U. S. 596, 599, 40 L. Ed. 271.

In pursuance of.—See PURSUANCE.

In service.—The direction in the prize act of June 30, 1864, to make distribution among inferior officers and men "according to their respective rates of pay in the service" naturally implies the rates of their pay at the time of the capture, by relation to which the subsequent distribution is made; and not those rates as affected by promotions after the capture and before decree or distribution, although such promotions, so far as affects rank, and possibly ordinary pay, date from the day of the capture. United States *v.* Steever, 113 U. S. 747, 754, 28 L. Ed. 1133.

In session.—Section 829 of the Revised Statutes provides for a certain compensation to be paid to a United States marshal for attending the circuit and district courts, when both are in session, or either of them when only one is in session. It was held that when the court is open, by its order, for the transaction of business, it is in session within the meaning of this section. If the court by its own order, is closed for all purposes of business for an entire day, or for any given number of days, it is not in session on that day, or during those days, although the current term has not expired. McMullen *v.* United States, 146 U. S. 360, 361, 36 L. Ed. 1007. See United States *v.* Pitman, 147 U. S. 669, 671, 37 L. Ed. 324. And see, also, ACTUAL, vol. 1, p. 115.

In solido.—In Henderson *v.* Wadsworth, 115 U. S. 264, 280, 29 L. Ed. 377, a case arising under the laws of Louisiana, the court says: "Pothier, in his treatise on Obligations, says: 'An obligation is contracted in solido on the part of the debtors when each of them is obliged for the whole, but so that a payment by one liberates them all.'"

In specie.—See SPECIE.

In the state.—As to what constitutes doing business in a state within the meaning of the taxation laws, see DOING BUSINESS, vol. 5, p. 471.

In common.—A statute requiring a certain amount of labor or improvements to be expended annually on mining claims, provides that when claims are held in common, such expenditures may be made on any one claim. But the claims so held in common must be contiguous, so that each claim thus associated may in some way be benefited by the work done on one of them. Chambers *v.* Harrington, 111 U. S. 350, 353, 28 L. Ed. 452. See, generally, the title MINES AND MINING.

INCIDENTAL.—As to incidental powers necessary to carry on a banking business, see the title BANKS AND BANKING, vol. 3, p. 74. See note 1.

INCOME.—See GAINS, ante, p. 537.

INCOME TAX.—See the title REVENUE LAWS.

INCOMPETENT PERSONS.—See the titles CRIMINAL LAW, vol. 5, p. 60; HUSBAND AND WIFE, ante, p. 716; INFANTS; INSANITY; TRUSTS AND TRUSTEES; WITNESSES.

INCONSISTENT CONDUCT.—See the title EVIDENCE, vol. 5, p. 1005.

INCORPORATED COMPANY.—"An incorporated company is an association of individuals acting as a single person, and by their corporate name."[2]

INCORPOREAL HEREDITAMENTS.—See the title EASEMENTS, vol. 5, p. 690.

INCREASED VALUE.—See note 3.

INCRIMINATION OF SELF.—See the titles CONSTITUTIONAL LAW, vol. 4, p. 504; WITNESSES.

INCUMBRANCES.—As to covenant against incumbrances, see the title COVENANTS, vol. 5, p. 13. As to warranty in fire insurance concerning incumbrances, see the title INSURANCE. See note 4.

INCUR.—As to the use of contracted in the sense of incurred, see DEBT, vol. 5, p. 203.

IN CUSTODIA LEGIS.—See the titles ATTACHMENT AND GARNISHMENT, vol. 2, pp. 674, 695; CONTEMPT, vol. 4, p. 537.

INDEBITATUS ASSUMPSIT.—See the title ASSUMPSIT, vol. 2, p. 636.

INDEBTEDNESS.—See DEBT, vol. 5, p. 203. And see note 5.

1. **Incidental.**—A city contracted to issue bonds to raise money to aid a railroad company in completing its unfinished road, and by the contract the railroad company was to pay "all and any expense **incidental** to the issue of any of the bonds." Subsequently congress passed an excise law levying an income tax of three per cent. on all sums due for interest by railroad companies. It was held that the contract of the railroad company to pay "all and any expense **incidental** to the issue of any of the bonds," did not oblige it to pay this tax out of its own money, and so to pay the full interest to the city discharged of the tax; and that the tax was not **incidental** to the issue of the bond. The court said: "To carry out the arrangement between the parties required a considerable expenditure of money for printing, clerk hire, stationary, advertising, and similar matters. These expenses were **incidental** to the issue of the bonds, and it was right and proper that the railroad company—the party to be benefited by the transaction—should pay them. And it agreed to do so; but this agreement cannot be extended to cover the tax in question, for in no sense is it an expense **incidental** to the issue of the bonds." Baltimore *v.* Baltimore Railroad, 10 Wall. 543, 551, 19 L. Ed. 1043.

2. United States *v.* Trinidad Coal, etc., Co., 137 U. S. 160, 169, 34 L. Ed. 640. See, generally, the title CORPORATIONS, vol. 4, p. 621.

3. **Increased value.**—See Boylan *v.* United States, 10 Wall. 58, 19 L. Ed. 859. And see, generally, the title REVENUE LAWS.

4. **Incumbrances.**—Real estate, covered by several mortgages, was granted "subject, however, to certain **incumbrances** now resting thereon, payment of which is assumed by said party of the second part," and the deed contained covenants by the grantor of warranty against all persons claiming from, under or through him, and for further assurance. In construing the provision as to **incumbrances**, the court said: "The clause in question, by the words 'certain **incumbrances** now resting thereon,' designates and comprehends all those mortgages and taxes, as clearly as if the words used had been 'the **incumbrances**,' or 'all **incumbrances**,' or had particularly described each mortgage and each tax. * * * It was argued that, because the deed contains a covenant of special warranty against all persons claiming under the grantor, the words 'certain **incumbrances**' cannot include the mortgages made by the grantor, but must be limited to the unpaid taxes which, it is said, would not come within the covenant of special warranty. But the answer to this argument is that any person claiming title by virtue of a lien created by taxes assessed against the grantor would claim under the grantor, equally with one claiming by a mortgage from him; and **incumbrances** expressly assumed by the grantee are necessarily excluded from the covenants of the grantor." Keller *v.* Ashford, 133 U. S. 610, 619, 33 L. Ed. 667. See, generally, the title VENDOR AND PURCHASER.

5. **Indebtedness.**—"There is a distinction between a debt and a contract for a future **indebtedness** to be incurred, pro-

INDECENT PUBLICATION.—See note 6.
INDEFEASIBLE.—See note 7.

INDEMNITY.

CROSS REFERENCES.

See the titles BANKRUPTCY, vol. 2, p. 792; CONFLICT OF LAWS, vol. 3, p. 1020; CONTRACTS, vol. 4, p. 552; CONTRIBUTION AND EXONERATION, vol. 4, p. 595; COVENANTS, vol. 5, p. 5; DAMAGES, vol. 5, p. 171; FRAUDS, STATUTE OF, ante, p. 451; ILLEGAL CONTRACTS, ante, p. 737; INSURANCE; MARINE INSURANCE; PUBLIC LANDS.

As to a promise to indemnify a surety for performing an illegal contract, see the title ILLEGAL CONTRACTS, ante, p. 737. As to contracts of insurance being contracts of indemnity, see the titles INSURANCE; MARINE INSURANCE. As to contribution between wrongdoers, see the title CONTRIBUTION AND EXONERATION, vol. 4, p. 595. As to indemnity lands, see the title PUBLIC LANDS. As to when plea of non damnificatus is proper, see the title COVENANTS, vol. 5, p. 19. As to the distinction between contracts to pay and contracts of indemnity, see the title DAMAGES, vol. 5, p. 171. As to recovery of damages occurring after institution of suit, see the title DAMAGES, vol. 5, p. 168. As to indemnity for loss occasioned by breach of contract, see the title DAMAGES, vol. 5, p. 169. As to right of guarantee to indemnity fund provided for guarantor, see the title GUARANTY, ante, p. 580. As to the rule as to collateral facts in evidence, see the title GUARANTY, ante, p. 580.

Definition.—An agreement to save a person harmless from any and all liability by reason of certain contracts is an agreement to indemnify.[1]

Agreement to Indemnify and Agreement to Sell Distinguished.—There is a well-settled distinction between an agreement to indemnify and an agreement to pay. In the latter case, a recovery may be had as soon as there is a breach of the contract, and the measure of the damages is the full amount agreed to be paid.[2]

Right of Obligor to Convey Property for Indemnity of Surety.—The obligor in a bond has a right to convey property for the purpose of indemnifying his surety, provided it be done bona fide and there is no lien upon the prop-

vided the contracting party perform the agreement out of which the debt may arise. There is also a distinction between the latter case and one where an absolute debt is created at once, as by the issue of railway bonds, or for the erection of a public improvement, though such debt be payable in the future by installments. In the one case the indebtedness is not created until the consideration has been furnished; in the other the debt is created at once, the time of payment being only postponed." Walla Walla City *v.* Walla Walla Water Co., 172 U. S. 1, 20, 43 L. Ed. 341.

6. **Indecent publications.**—In Dunlop *v.* United States, 165 U. S. 486, 500, 41 L. Ed. 799, the following instruction embodying a definition of **indecent publications** was held not to be erroneous: "Now, what is (are) obscene, lascivious, lewd or **indecent publications** is largely a question of your own conscience and your own opinion; but it must come—before it can be said of such literature or publication—it must come up to this point; that it must be calculated with the ordinary reader to deprave him, deprave his morals, or lead to impure purposes." See, generally, the titles OBSCENITY; POSTAL LAWS.

7. **Indefeasible estate in fee simple.**—A covenant that the grantor is "seized of an indefeasible estate in fee simple" is a covenant for a perfect title. Douglass *v.* Lewis, 131 U. S. 75, 85, 33 L. Ed. 53. See the title COVENANTS, vol. 5, p. 5.

1. **What constitutes contract of indemnity.**—D. and P. agreed to purchase a contract from M. with the agreement and understanding that they will and shall save M. from any and all liability by reason of certain contracts. It was held that this contract was not merely one to indemnify M. from damage arising out of his liability, but was an agreement to assume his contracts and to discharge him from his liability. Mills *v.* Dow, 133 U. S. 423, 432, 33 L. Ed. 717.

2. **Agreement to indemnify and agreement to sell distinguished.**—Wicker *v.* Hoppock, 6 Wall. 94, 99, 18 L. Ed. 752. See the title DAMAGES, vol. 5, p. 171.

erty of the obligor.[3] To a certain extent, even the creditor whose claim the surety has under the terms of his obligation been compelled to satisfy, may be required to co-operate in effecting the indemnity of the latter.[4]

Measure of Damages for Illegally Refusing to Award.—An indemnity agreed upon as the amount to be paid for cancelling a contract, must afford the measure of damages for illegally refusing to award it.[5]

Bond of Indemnity Creating Joint Trespassers.—A bond of indemnity given by a plaintiff in an attachment to induce the officer to hold, after levy, property not subject to the writ, makes such plaintiff a joint trespasser with the officer as to all that is done with the property afterwards.[6]

Indemnitor Concluded by Judgment against Officer.—A plaintiff in attachment who indemnifies the attaching officer, and afterwards takes upon himself the defense when that officer is sued, is concluded by the judgment against that officer where such plaintiff is afterwards sued for the same trespass.[7]

INDEMNITY INSURANCE.—See the titles INDEMNITY, ante, p. 902; INSURANCE. See, also, the title BONDS, vol. 3, p. 408.

INDEMNITY LANDS.—See the title PUBLIC LANDS. See note 1.

INDENTURES.—See the title DEEDS, vol. 5, p. 250.

3. Leggett *v.* Humphreys, 21 How. 66, 16 L. Ed. 50.

Bona fide attempt to protect surety.—Whilst it may be conceded that a fraudulent combination between the officer and his surety, for the purpose of shielding the property of both or either from just responsibility, and in contemplation of delinquency in the former, would have the effect of vitiating any compact or instrument made with such a design, it is undeniable that an open and honest effort of a principal to protect his surety against casualties incident to a responsibility about to be assumed for him, cannot be obnoxious to objection; and it is equally clear, that the simple fact of the existence of such an effort, unattended by any known indicium of fraud, and unassailed by plain or probable direct proofs, can warrant no just impeachment of such an effort, which may be praiseworthy and just with reference to its object, and calculated to promote the performance of services to the public which otherwise could not be undertaken. The practice of providing such an indemnity for sureties is known to be usual and frequent, and it would be difficult to imagine an objection, either legal or moral, to its application to the extent to which the surety had been made answerable upon his bond. Leggett *v.* Humphreys, 21 How. 66, 77, 16 L. Ed. 50. See, generally, the title PRINCIPAL AND SURETY.

4. **Indemnity of surety by creditor.**—Leggett *v.* Humphreys, 21 How. 66, 75, 16 L. Ed. 50.

5. **Measure of damages for illegally refusing to award.**—Garfielde *v.* United States, 93 U. S. 242, 246, 247, 23 L. Ed. 779.

As to illegal refusal of government officer to award contract, see the title DAMAGES, vol. 5, p. 175.

6. **Bond of indemnity creating joint trespassers.**—Lovejoy *v.* Murray, 3 Wall. 1, 18 L. Ed. 129. See the title ATTACHMENT AND GARNISHMENT, vol. 2, p. 690.

7. **Indemnitor concluded by judgment against officer.**—Lovejoy *v.* Murray, 3 Wall. 1, 18 L. Ed. 129.

1. **Indemnity lands.**—In the construction of land grant acts in aid of railroads, "granted lands" are held to be those falling within the limits specially designated, the title to which attaches when the lands are located by an approved and accepted survey of the line, filed in the land department, as of the date of the act of congress; while **indemnity lands** are those selected in lieu of parcels previously disposed of or reserved, the title to which accrues only from their selection. Barney *v.* Winona, etc., R. Co., 117 U. S. 228, 29 L. Ed. 858.

INDEPENDENT CONTRACTORS.

CROSS REFERENCES.

See the titles MASTER AND SERVANT; MUNICIPAL CORPORATIONS; NEGLIGENCE; PRINCIPAL AND AGENT; WORKING CONTRACTS.

Definition.—One who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer, except as to the result of the work, and has the right to employ and control the action of the workmen, is an independent contractor.[1]

Liability.—Where an obstruction or defect which occasions an injury results directly from the acts which an independent contractor agreed and was authorized to do, the person who employs the contractor and authorizes him to do those acts is liable to the injured party;[2] but where the obstruction or defect caused or created is purely collateral to the work contracted to be done, and is

1. **Definition.**—Bouvier's Law Dictionary, vol. 1, p. 1011.

A person agreeing to build piers for a railroad bridge according to his employer's specifications to furnish the material and prepare proper warnings against danger, is an independent contractor. Casement *v.* Brown, 148 U. S. 615, 37 L. Ed. 582.

2. **Employer liable if injury results from work as authorized to be done.**—Robbins *v.* Chicago, 4 Wall. 657, 679, 18 L. Ed. 427; Water Co. *v.* Ware, 16 Wall. 566, 576, 21 L. Ed. 485; Philadelphia, etc., R. Co. *v.* Philadelphia, etc., Steam Towboat Co., 23 How. 209, 16 L. Ed. 433.

If a nuisance necessarily occurs in the ordinary mode of doing work, the employer is liable. Chicago *v.* Robbins, 2 Black 418, 17 L. Ed. 298.

An employer cannot refrain from directing his contractor in the execution of the work so as to avoid making the nuisance. Chicago *v.* Robbins, 2 Black 418, 426, 17 L. Ed. 298.

The principle, which is well settled in the federal courts, is that where a person or corporation is engaged in a work in the ordinary doing of which a nuisance necessarily occurs, the party is liable for any injury that may result to third parties from carelessness or negligence, even though the work may be done by a contractor. Water Co. *v.* Ware, 16 Wall. 566, 579, 21 L. Ed. 485.

Illustrative cases.—Where an incorporated company undertook to lay water pipes in a city, agreeing that it would "protect all persons against damages by reason of excavations made by them in laying pipes, and to be responsible for all damages which may occur by reason of the neglect of their employees on the premises;" held, on the company's having let the work out to a subcontractor, through the negligence of whose servants injury occurred to a person passing over the street, that the company could be properly sued for damages. Water Co. *v.* Ware, 16 Wall. 566, 21 L. Ed. 485.

Where work done on a public highway necessarily constitutes an obstruction or defect in the highway which renders it dangerous as a way for travel and transportation unless properly guarded or shut out from public use, in such a case a principal for whom the work was done cannot defeat the just claim of a municipal corporation which has had to pay damages, or of a private party who has suffered injury, by proving that the work which constituted the obstruction or defect was done by an independent contractor. Robbins *v.* Chicago, 4 Wall. 657, 18 L. Ed. 427, affirming Chicago *v.* Robbins, 2 Black 418, 17 L. Ed. 298.

Where a railroad company employs contractors to build a bridge, and for that purpose to drive piles in a river, and, owing to the abandonment of the contract, the piles are left in the river, in such a condition as to injure a vessel when sailing on her course, the railroad company is liable for the injury. Philadelphia, etc., R. Co. *v.* Philadelphia, etc., Steam Towboat Co., 23 How. 209, 16 L. Ed. 433.

A hole cannot be dug in the sidewalk of a large city and left without guards and lights at night, without great danger to life and limb, and he who orders it dug, and makes no provision for its safety, is chargeable, if injury is suffered. Chicago *v.* Robbins, 2 Black 418, 426, 17 L. Ed. 298.

An act of the general assembly of the state of Louisiana, referring to a certain railroad corporation, enacted that the said corporation should not be liable for any injury "to person or property caused by the act or omission of the persons so contracting with it." Held, that this was a convenient form of declaring the common-law rights of the company, and conferred no exemption on it. Railroad Co.

entirely the result of the wrongful acts af the contractor or his workmen, the rule is that the employer is not liable;[3] and in such case the contractor will be liable for his own negligent acts.[4]

INDEPENDENT COVENANTS.—See the title COVENANTS, vol. 5, p. 10.

INDEXING.—See the title JUDGMENTS AND DECREES. As to fees of clerk for indexing, see the title CLERKS OF COURT, vol. 3, p. 857. As to fees of chief supervisor of elections for indexing, see the title ELECTIONS, vol. 5, p. 725.

v. Hanning, 15 Wall. 649, 21 L. Ed. 220.

Municipality's liability as employer.—Cases arise where improvements are constructed by contractors, in which the municipality is not responsible at all, as where the improvement is of such a character that a prudent man would not find it necessary to incumber or obstruct the street in any respect or for any purpose, as in that case it would be clear that the defect or want of repair which occasioned the injury was solely the result of neglect and carelessness on the part of the contractor, and not of any culpable fault of the officers of the municipality. Water Co. *v.* Ware, 16 Wall. 566, 576, 21 L. Ed. 485.

3. Where injury results from work collateral to work authorized, contractor alone is liable.—Chicago *v.* Robbins, 2 Black 418, 17 L. Ed. 298; Water Co. *v.* Ware, 16 Wall. 566, 576, 21 L. Ed. 485.

4. A contractor to construct piers for a railroad bridge will be liable for injuries resulting from his failure to replace a buoy and light, washed away by a flood, it being the contractor's duty by contract to keep in place buoys and lights to warn against danger. Casement *v.* Brown, 148 U. S. 615, 37 L. Ed. 582.

Contractors with a municipal corporation may or may not be responsible to a third party. Water Co. *v.* Ware, 16 Wall. 566, 577, 21 L. Ed. 485.

INDIANS.

BY J. N. CLAYBROOK.

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As to power of United States to exercise power of eminent domain within Indian country, see the title EMINENT DOMAIN, vol. 5, p. 746. As to power of congress to grant right of way to railroad through Indian country, see the title INTERSTATE AND FOREIGN COMMERCE. As to commerce with the Indian tribes, see the title INTERSTATE AND FOREIGN COMMERCE. As to sale of liquor to Indians, or introduction of liquor into the Indian country, see the title INTOXICATING LIQUORS. As to parol evidence to explain contracts between Indians, see the title PAROL EVIDENCE. As to right of Indians to pre-empt or locate on public lands, see the title PUBLIC LANDS. As to location of Indian or half-breed scrip, see the title PUBLIC LANDS.

I. Definitions and General Considerations.

A. Who Are Indians—1. IN GENERAL.—The illegitimate child of a Choctaw Indian, by a colored woman, who was not his wife, but a slave in the Cherokee Nation, is a negro and not an Indian,[1] and one by blood an Indian, but who has become a citizen by receiving an allotment of land, is not an Indian within the meaning of a statute prohibiting the sale of liquor to Indians.[2]

2. ADOPTION INTO TRIBE OR NATION.—Persons not Indians by blood may become members of a tribe or nation by adoption.[3] Freedmen within the Cherokee[4] and Choctaw Nations[5] have become members of those tribes by adoption under treaties providing therefor, but the Chickasaw Nation has never adopted into the nation freedmen residing therein.[6] Whatever obligations a person may have taken upon himself by becoming a member of an Indian nation by adoption, his responsibility to the laws of the United States remained unchanged and undiminished.[7] While persons adopted by a tribe or nation are members of the tribe, they are not "Indians."[8] It seems that a regulation of the department

1. **Who are Indians.**—Alberty *v.* United States, 162 U. S. 499, 40 L. Ed. 1051.

2. **Allottee not an Indian within act of congress.**—Matter of Heff, 197 U. S. 488, 49 L. Ed. 848.

3. **Adoption of non-Indians by tribes or nations.**—Alberty *v.* United States, 162 U. S. 499, 40 L. Ed. 1051; Lucas *v.* United States, 163 U. S. 612, 41 L. Ed. 282; Roff *v.* Burney, 168 U. S. 218, 222, 42 L. Ed. 442; United States *v.* Rogers, 4 How. 567, 573, 11 L. Ed. 1105.

4. **Cherokee freedmen adopted into nation.**—Alberty *v.* United States, 162 U. S. 499, 40 L. Ed. 1051.

5. **Choctaw freedmen adopted into nation.**—Lucas *v.* United States, 163 U. S. 612, 41 L. Ed. 282.

6. **Chickasaw freedmen not adopted.**—United States *v.* Choctaw Nation, 193 U. S. 115, 48 L. Ed. 640.

7. **Effect of adoption into tribe on status as citizens of United States.**—Roff *v.* Burney, 168 U. S. 218, 222, 42 L. Ed. 442; United States *v.* Rogers, 4 How. 567, 573, 11 L. Ed. 1105.

8. **Persons adopted into tribe not "Indians."**—Alberty *v.* United States, 162 U. S. 499, 40 L. Ed. 1051; United States *v.* Rogers, 4 How. 567, 11 L. Ed. 1105.

making the adoption of a person into an Indian tribe dependent on the approval of the Indian office is not invalid.[9]

B. What Constitutes a "Nation," "Tribe," or "Band"—1. NATION.—Strictly speaking the word "nation" cannot be applied to a body of Indians within the United States. The word when used, with respect to the Indians, as is frequently the case, indicates little more than a large tribe or group of affiliated tribes possessing a common government, language, or racial origin, and acting for the time being in concert.[10]

2. TRIBE.—A tribe is a body of the same or similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory.[11] Whether any particular class of Indians are still to be regarded as a tribe, or have ceased to hold the tribal relation, is primarily a question for the political departments of the government, and if they have decided it, the courts will follow their lead.[12]

3. BAND.—A band is a company of Indians not necessarily, though often, of the same race or tribe, united under the same leadership in a common design.[13] It is not necessary that the Indians composing it be a separate political entity, recognized as such, inhabiting a particular territory, and with whom treaties had

Westmoreland *v.* United States, 155 U. S. 545, 39 L. Ed. 255.

Slaves adopted into nation.—The ninth article of the treaty of 1866 (14 Stat. 799, 801), by which the Cherokee Nation agreed to abolish slavery, and further agreed "that all freedmen who have been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the country at the commencement of the rebellion and are now residents therein or who may return within six months, and their descendants, shall have all the rights of native Cherokees," gave a freedman the rights of a native Cherokee, but did not, standing alone, make him an Indian, within the meaning of Rev. Stat., § 2146, or absolve him from responsibility to the criminal laws of the United States. Alberty *v.* United States, 162 U. S. 499, 40 L. Ed. 1051.

One who married a freed woman of the Cherokee Nation must be treated as a member of the Cherokee Nation, but not an Indian. Alberty *v.* United States, 162 U. S. 499, 40 L. Ed. 1051.

9. Approval of adoption by Indian officer.—United States *v.* Hitchcock, 205 U. S. 80, 51 L. Ed. 718 (where it was held that such authority was probably conferred by §§ 441, 463, of the Revised Statutes which provide that the commissioner of Indian affairs shall, under the direction of the secretary of the interior and agreeably to such regulations as the president may prescribe, have the management of all Indian affairs, and of all matters arising out of Indian relations).

10. Meaning of nation.—Montoya *v.* United States, 180 U. S. 261, 45 L. Ed. 521.

11. Meaning of tribe.—Montoya *v.* United States, 180 U. S. 261, 45 L. Ed. 521.

The Pueblo Indians of New Mexico, are not an Indian tribe within the meaning of the statute prohibiting intrusion on the lands of an Indian tribe. United States *v.* Joseph, 94 U. S. 614, 24 L. Ed. 295.

The Old Settlers or Western Cherokees were described in the 4th article of the treaty of 1846, as "all those Cherokees west of the Mississippi, who emigrated prior to the treaty of 1835," and they may be held to include those now living who so emigrated, together with the descendants of those who have died, the succession to be determined by the Cherokee law. United States *v.* Old Settlers, 148 U. S. 427, 37 L. Ed. 509. See, also, United States *v.* Cherokee Nation, 202 U. S. 101, 124, 50 L. Ed. 949.

12. Whether body or tribe a political question.—United States *v.* Holliday, 3 Wall. 407, 18 L. Ed. 182; The Kansas Indians, 5 Wall. 737, 18 L. Ed. 667.

If the tribal organization of Indian bands is recognized by the political department of the national government as existing; that is to say, if the national government makes treaties with, and has its Indian agent among them, paying annuities, and dealing otherwise with "head men" in its behalf, the fact that the primitive habits and customs of the tribe, when in a savage state, have been largely broken into by their intercourse with the whites—in the midst of whom, by the advance of civilization, they have come to find themselves—does not authorize a state government to regard the tribal organization as gone, and the Indians as citizens of the state where they are, and subject to its laws. The Kansas Indians, 5 Wall. 737, 18 L. Ed. 667.

13. Meaning of band.—Montoya *v.* United States, 180 U. S. 261, 45 L. Ed. 521. See BAND, vol. 2, p. 791. And see the title COURTS, vol. 4, p. 1038.

A "band" means a company of persons, perhaps a company of armed persons. Stuart *v.* United States, 18 Wall. 84, 87, 21 L. Ed. 816.

been or might be made. These peculiarities would rather give them the character of tribes. The word "band" implies an inferior and less permanent organization, though it must be of sufficient strength to be capable of initiating hostile proceedings.[14]

C. What Constitutes Indian Country.—Since many of the statutes of the United States are expressly limited in their application to the Indian country, the question as to what is the Indian country often becomes an important one. The first definition of the Indian country was contained in the act of March 30, 1802,[15] but this act was superseded by the act of June 30, 1834, which provided that all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and also that part of the United States east of the Mississippi, and not within any state, to which the Indian title had not been extinguished, should be taken and deemed to be Indian country.[16] While the act of 1834 was not re-enacted in the Revised Statutes, and consequently was repealed by § 5596 of the revision,[17] still it has been held in several cases that it may be referred to in connection with the provision of the original context which remains in force, and may be considered in connection with the changes which have taken place in our situation, with a view of determining from time to time what must be regarded as Indian country where it is spoken of in the Revised Statutes.[18] The Indian country now embraces all the country to which the Indian title has not been extinguished within the limits of the United States, even when not within a reservation expressly set apart for the exclusive occupancy of Indians, although much of it has been acquired since the passage of the act of 1834, and notwithstanding the formal definition in that act has been dropped from the statutes, excluding, however, any territory embraced within the exterior geographical limits of a state, not excepted from its jurisdiction by treaty or by statute, at the time of its admission into the Union, but saving, even in respect to territory not thus excepted and actually in the ex-

14. Conners *v.* United States, 180 U. S. 271, 275, 45 L. Ed. 525.

15. Act of March 30, 1802.—Bates *v.* Clark, 95 U. S. 204, 206, 24 L. Ed. 471.

The first section of the act of March 30, 1802, describes a boundary, the description occupying over a page of the statute book, and declares that this shall be distinctly marked under orders of the president, and considered as the line of the Indian territory, or Indian country as it is called indifferently in several sections of the act. The country west of the Mississippi then belonged to France or Spain. The boundary above mentioned, commencing at the mouth of the Cayahoga River, on Lake Erie, now Cleveland, runs in a wonderfully tortuous course through the country northwest of the Ohio River to the falls of that river, now Louisville, then down that river to a point between the mouth of the Cumberland and Tennessee Rivers, and thence through Kentucky, Tennessee, and Georgia, to the St. Mary's River, pursuing all the way the lines represented by treaties with various Indian tribes. Bates *v.* Clark, 95 U. S. 204, 206, 24 L. Ed. 471.

16. Act of June 30, 1834.—Bates *v.* Clark, 95 U. S. 204, 24 L. Ed. 471; United States *v.* Le Bris, 121 U. S. 278, 280, 30 L. Ed. 946; Ex parte Crow Dog, 109 U. S. 556, 561, 27 L. Ed. 1030; United States *v.* Forty-Three Gallons of Whiskey, 93 U. S. 188, 23 L. Ed. 846.

17. Act of 1834 not re-enacted in Revised Statutes.—United States *v.* Le Bris, 121 U. S. 278, 280, 30 L. Ed. 946; Ex parte Crow Dog, 109 U. S. 556, 561, 27 L. Ed. 1030.

18. Act of 1834, though repealed, may be considered.—Ex parte Crow Dog, 109 U. S. 556, 561, 27 L. Ed. 1030; Bates *v.* Clark, 95 U. S. 204, 207, 24 L. Ed. 471; United States *v.* Le Bris, 121 U. S. 278, 280, 30 L. Ed. 946.

Notwithstanding the immense changes which have since taken place in the vast region covered by the act of 1834, by the extinguishment of Indian titles, the creation of states and the formation of territorial governments, congress has not thought it necessary to make any new definition of Indian country. Yet during all this time a large body of laws has been in existence, whose operation was confined to the Indian country, whatever that may be. And the men have been punished by death, by fine, and by imprisonment, of which the courts who so punished them had no jurisdiction, if the offenses were not committed in the Indian country as established by law. These facts afford the strongest presumption that the congress of the United States, and the judges who administered those laws, must have found in the definition of Indian country, in the act of 1834, such an adaptability to the altered circumstances of what was then Indian country

clusive occupancy of Indians, the authority of congress over it, under the constitutional power to regulate commerce with the Indian tribes, and under any treaty made in pursuance of it.[19] It is competent for the United States to provide by treaty that Indian country ceded to the United States shall remain subject to the laws of the United States regulating the sale and introduction of spirituous liquors into the Indian country.[20]

D. Status of Nations or Tribes.—While the Indian nations, having the right of self-government, are in a limited sense states,[21] they are not sovereign

as to enable them to ascertain what it was at any time since then. Bates *v.* Clark, 95 U. S. 204, 207, 24 L. Ed. 471.

19. Present definition of Indian country.—Ex parte Crow Dog, 109 U. S. 556, 561, 27 L. Ed. 1030, citing United States *v.* McBratney, 104 U. S. 621, 26 L. Ed. 869; Bates *v.* Clark, 95 U. S. 204, 207, 24 L. Ed. 471; United States *v.* Forty-Three Gallons of Whiskey, 93 U. S. 188, 23 L. Ed. 846; American Fur Co. *v.* United States, 2 Pet. 358, 7 L. Ed. 450; In re Wilson, 140 U. S. 575, 578, 35 L. Ed. 513.

This definition, though not now expressed in the Revised Statutes, is implied in all those provisions, most of which were originally connected with it when first enacted, and which still refer to it. It would be otherwise impossible to explain these references, or give effect to many of the most important provisions of existing legislation for the government of Indian country. Ex parte Crow Dog, 109 U. S. 556, 562, 27 L. Ed. 1030.

Where an act of congress admitting a state into the Union, or organizing a territorial government, provides, in accordance with a treaty stipulation, that the lands in the possession of an Indian tribe shall not be a part of such state or territory, the new government has no jurisdiction over them. Harkness *v.* Hyde, 98 U. S. 476, 25 L. Ed. 237, qualified and explained in Langford *v.* Monteith, 102 U. S. 145, 26 L. Ed. 53.

Dependent on extinguishment of Indian title.—The simple criterion is that as to all the lands described by the act of 1834 it was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer. As soon as they parted with the title, it ceased to be Indian country, without any further act of congress, unless by the treaty by which the Indians parted with their title, or by some act of congress, a different rule was made applicable to the case. Bates *v.* Clark, 95 U. S. 204, 208, 24 L. Ed. 471; United States *v.* Forty-Three Gallons of Whiskey, 93 U. S. 188, 23 L. Ed. 846; American Fur Co. *v.* United States, 2 Pet. 358, 7 L. Ed. 450.

The reservation of the Red Lake and Pembina Indians in Polk County, Minnesota, is Indian country, within the meaning of § 2139 of the Revised Statutes of the United States? United States *v.* Le Bris, 121 U. S. 278, 279, 30 L. Ed. 946; United States *v.* Forty-Three Gallons of Whiskey, 93 U. S. 188, 23 L. Ed. 846; United States *v.* Forty-Three Gallons of Whiskey, 108 U. S. 491, 27 L. Ed. 803.

The White Mountain Indian reservation in Arizona is a part of the Indian country within the meaning of § 2145 of the Revised Statutes extending to the Indian country the general laws of the United States, as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except as to crimes, the punishment of which is otherwise expressly provided for. In re Wilson, 140 U. S. 575, 578, 35 L. Ed. 513.

That portion of the Cherokee Outlet not embraced within the boundaries of the territory of Oklahoma, but attached thereto for judicial purposes, was Indian country within the provisions of the act of February 15, 1888, and the offense of horse stealing committed therein was within the exclusive jurisdiction of the district court of the first judicial district of Oklahoma Territory, sitting as a court of the United States. United States *v.* Pridgeon, 153 U. S. 48, 58, 38 L. Ed. 631.

20. Continuation in force of laws as to Indian country upon cession to United States.—United States *v.* Forty-Three Gallons of Whiskey, 93 U. S. 188, 23 L. Ed. 846. See the title INTOXICATING LIQUORS.

Such a stipulation operates proprio vigore, and is binding upon the courts, although the ceded territory is situate within an organized county of a state. United States *v.* Forty-Three Gallons of Whiskey, 93 U. S. 188, 23 L. Ed. 846.

21. Indian nations as states.—Cherokee Nation *v.* Georgia, 5 Pet. 1, 8 L. Ed. 25; Holden *v.* Joy, 17 Wall. 211, 242, 21 L. Ed. 523; Mackey *v.* Coxe, 18 How. 100, 15 L. Ed. 299; Worcester *v.* Georgia, 6 Pet. 515, 581, 8 L. Ed. 483; United States *v.* Kagama, 118 U. S. 375, 382, 30 L. Ed. 228.

In a certain domestic sense, and for certain municipal purposes, Indian nations are states, and have been uniformly so treated since the settlement of our country and throughout its history, and numerous treaties made with them recognize them as a people capable of maintaining the relations of peace and war, of being responsible, in their political char-

states in the sense that the United States, or the states, are sovereign,[22] nor foreign states within the meaning of the constitution.[23] The recognized relations between the government and the Indians is that of superior and inferior, the latter being under the care and control of the former.[24] They are wards of the nation,[25]

acter, for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted by congress in the spirit of those treaties, and the acts of our government, both in the executive and legislative departments, plainly recognize such tribes or nations as states, and the courts of the United States are bound by those acts. Holden *v.* Joy, 17 Wall. 211, 242, 21 L. Ed. 523.

In the management of their internal concerns, they are dependent on no power. They punish offenses, under their own laws, and in doing so, they are responsible to no earthly tribunal. They make war, and form treaties of peace. The exercise of these and other powers, gives to them a distinct character as a people, and constitutes them, in some respects, a state, although they may not be admitted to possess the right of soil. Worcester *v.* Georgia, 6 Pet. 515, 581, 8 L. Ed. 483.

The Cherokees are a state; they have been uniformly treated as a state, since the settlement of our country; the numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war; of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community; laws have been enacted in the spirit of these treaties; the acts of our government plainly recognize the Cherokee nation as a state; and the courts are bound by those acts. Cherokee Nation *v.* Georgia, 5 Pet. 1, 8 L. Ed. 25; Mackey *v.* Coxe, 18 How. 100, 15 L. Ed. 299.

22. Indian nations not a sovereign state.—Cherokee Nation *v.* Southern Kansas R. Co., 135 U. S. 641, 653, 34 L. Ed. 295; Stephens *v.* Cherokee Nation, 174 U. S. 445, 484, 43 L. Ed. 1041; Cherokee Nation *v.* Hitchcock, 187 U. S. 294, 306, 47 L. Ed. 183.

23. Indian nations not foreign states.—Cherokee Nation *v.* Georgia, 5 Pet. 1, 8 L. Ed. 25; Mackey *v.* Coxe, 18 How. 100, 15 L. Ed. 299; Atlantic, etc., R. Co. *v.* Mingus, 165 U. S. 413, 437, 41 L. Ed. 770; Holden *v.* Joy, 17 Wall. 211, 242, 21 L. Ed. 523; Elk *v.* Wilkins, 112 U. S. 94, 99, 28 L. Ed. 643; Stephens *v.* Cherokee Nation, 174 U. S. 445, 43 L. Ed. 1041; Jones *v.* Meehan, 175 U. S. 1, 10, 44 L. Ed. 49; Worcester *v.* Georgia, 6 Pet. 515, 581, 8 L. Ed. 483; United States *v.* Kagama, 118 U. S. 375, 379, 30 L. Ed. 228.

Indian tribes are not foreign states, or states of the United States, within the meaning of the second section of the third article of the constitution, which extends the judicial power to controversies between two or more states, between a state and citizens of another state, between citizens of different states, and between a state or the citizens thereof and foreign states, citizens, or subjects. Holden *v.* Joy, 17 Wall. 211, 242, 21 L. Ed. 523; Cherokee Nation *v.* Georgia, 5 Pet. 1, 8 L. Ed. 25.

On a motion for an injunction to prevent the execution of certain acts of the legislature of the state of Georgia, in the territory of the Cherokee Nation of Indians, on behalf of the Cherokee Nation; they claiming to proceed in the supreme court of the United States, as a foreign state, against the state of Georgia, under the provision of the constitution of the United States which gives to the court jurisdiction in controversies in which a state of the United States or the citizens thereof, and a foreign state, citizens or subjects thereof, are parties, it was held that the supreme court had no jurisdiction. Cherokee Nation *v.* Georgia, 5 Pet. 1, 8 L. Ed. 25.

24. Relation that of superior and inferior.—Choctaw Nation *v.* United States, 119 U. S. 1, 28, 30 L. Ed. 306; Matter of Heff, 197 U. S. 488, 498, 49 L. Ed. 848; United States *v.* Rickert, 188 U. S. 432, 443, 47 L. Ed. 532; Minnesota *v.* Hitchcock, 185 U. S. 373, 396, 46 L. Ed. 954.

"The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons, equally subject to the same laws." Choctaw Nation *v.* United States, 119 U. S. 1, 28, 30 L. Ed. 306; Minnesota *v.* Hitchcock, 185 U. S. 373, 396, 46 L. Ed. 954; United States *v.* Rickert, 188 U. S. 432, 443, 47 L. Ed. 532.

25. Wards of nation.—Stephens *v.* Cherokee Nation, 174 U. S. 445, 484, 43 L. Ed. 1041; United States *v.* Kagama,

in a state of pupilage,[26] and may be said to be dependent political communities holding such relations to the general government that they and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form any political connection with them, would be considered by all as an invasion of our territory and an act of hostility.[27]

118 U. S. 375, 383, 30 L. Ed. 228; Choctaw Nation *v.* United States, 119 U. S. 1, 27, 30 L. Ed. 306; Lone Wolf *v.* Hitchcock, 187 U. S. 553, 567, 47 L. Ed. 299; United States *v.* Thomas, 151 U. S. 577, 38 L. Ed. 276; Cherokee Nation *v.* Southern Kansas R. Co., 135 U. S. 641, 653, 34 L. Ed. 295; Dunbar *v.* Green, 198 U. S. 166, 168, 49 L. Ed. 998; Cherokee Nation *v.* Georgia, 5 Pet. 1, 17, 8 L. Ed. 25; Elk *v.* Wilkins, 112 U. S. 94, 99, 28 L. Ed. 643; Jones *v.* Meehan, 175 U. S. 1, 10, 44 L. Ed. 49; United States *v.* Hitchcock, 205 U. S. 80, 85, 51 L. Ed. 718.

"These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the states, and receive from them no protection. Because of the local ill-feeling, the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive and by congress, and by this court, whenever the question has arisen." United States *v.* Kagama, 118 U. S. 375, 383, 30 L. Ed. 228; United States *v.* Thomas, 151 U. S. 577, 38 L. Ed. 276; Lone Wolf *v.* Hitchcock, 187 U. S. 553, 567, 47 L. Ed. 299; Choctaw Nation *v.* United States, 119 U. S. 1, 27, 30 L. Ed. 306.

"Chief Justice Marshall's description, that 'they are in a state of pupilage,' and 'their relation to the United States resembles that of a ward to his guardian,' has become more and more appropriate as they have grown less powerful and more dependent. Cherokee Nation *v.* Georgia, 5 Pet. 1, 17, 8 L. Ed. 25; Elk *v.* Wilkins, 112 U. S. 94, 99, 28 L. Ed. 643; United States *v.* Kagama, 118 U. S. 375, 382, 384, 30 L. Ed. 228; Stephens *v.* Cherokee Nation, 174 U. S. 445, 484, 43 L. Ed. 1041." Jones *v.* Meehan, 175 U. S. 1, 10, 44 L. Ed. 49.

It is for congress to determine when and how the relationship of guardianship shall be abandoned. It is not within the power of the courts to overrule the judgment of congress. It is true there may be a presumption that no radical departure is intended, and courts may wisely insist that the purpose of congress be made clear by its legislation, but when that purpose is made clear the question is at an end. Matter of Heff, 197 U. S. 488, 499, 49 L. Ed. 848.

26. Indians in a state of pupilage.—Cherokee Nation *v.* Southern Kansas R. Co., 135 U. S. 641, 653, 34 L. Ed. 295; Stephens *v.* Cherokee Nation, 174 U. S. 445, 484, 43 L. Ed. 1041; Taylor *v.* Brown, 147 U. S. 640, 37 L. Ed. 313; United States *v.* Rickert, 188 U. S. 432, 442, 47 L. Ed. 532; Jones *v.* Meehan, 175 U. S. 1, 10, 44 L. Ed. 49; Elk *v.* Wilkins, 112 U. S. 94, 99, 28 L. Ed. 643; United States *v.* Kagama, 118 U. S. 375, 30 L. Ed. 228; Cherokee Nation *v.* Georgia, 5 Pet. 1, 17, 8 L. Ed. 25; Dred Scott *v.* Sandford, 19 How. 393, 404, 15 L. Ed. 691; Cherokee Nation *v.* Hitchcock, 187 U. S. 294, 306, 47 L. Ed. 183; Cherokee Nation *v.* Southern Kansas R. Co., 135 U. S. 641, 34 L. Ed. 295.

Indians as a race are treated as in a state of pupilage and entitled to special protection. Taylor *v.* Brown, 147 U. S. 640, 37 L. Ed. 313, citing Felix *v.* Patrick, 145 U. S. 317, 330, 36 L. Ed. 719; Pickering *v.* Lomax, 145 U. S. 310, 36 L. Ed. 716.

The relation existing between the United States and the Indians, is not a relation simply of contract, each party to which is capable of guarding his own interests, but the Indians are in a state of dependency and pupilage, entitled to the care and protection of the government. When they shall be let out of that state is for the United States to determine without interference by the courts or by any state. The government would not adequately discharge its duty to these people if it placed its engagements with them upon the basis merely of contract and failed to exercise any power it possessed to protect them in the possession of such improvements and personal property as were necessary to the enjoyment of the land held in trust for them. United States *v.* Rickert, 188 U. S. 432, 442, 47 L. Ed. 532.

27. Indian nations are dependent political communities.—Cherokee Nation *v.* Georgia, 5 Pet. 1, 17, 8 L. Ed. 25; Cherokee Nation *v.* Southern Kansas R. Co., 135 U. S. 641, 653, 34 L. Ed. 295; Stephens *v.* Cherokee Nation, 174 U. S. 445, 484, 43 L. Ed. 1041; The Cherokee Trust Funds, 117 U. S. 288, 29 L. Ed. 880; United States *v.* Kagama, 118 U. S. 375, 30 L. Ed. 228; Talton *v.* Mayes, 163 U. S. 376, 384, 41 L. Ed. 196.

"The condition of the Indians and Indian tribes within the limits of the United States is anomalous. The tribes, though

II. Citizenship of Indians.

A. Indians as Citizens of United States—1. In General.—The mere fact that an Indian is born within the United States does not make him a citizen thereof.[28] And an Indian does not become a citizen by separating himself from his tribe and residing within a state.[29]

2. Mode of Becoming Citizen—a. *In General.*—In order for an Indian to become a citizen he must either be naturalized under the acts of congress passed

in certain respects regarded as possessing the attributes of nationality, are held to be not foreign, but domestic dependent nations. Cherokee Nation *v.* Georgia, 5 Pet. 1, 8 L. Ed. 25; Worcester *v.* Georgia, 6 Pet. 515, 8 L. Ed. 483; Choctaw Nation *v.* United States, 119 U. S. 1, 30 L. Ed. 306; Cherokee Nation *v.* Southern Kansas R. Co., 135 U. S. 641, 34 L. Ed. 295." Roff *v.* Burney, 168 U. S. 218, 221, 42 L. Ed. 442.

In all our intercourse with foreign nations, in our commercial regulations, in any attempt at intercourse between Indians and foreign nations, they are considered as within the jurisdictional limits of the United States, subject to many of those restraints which are imposed upon our own citizens. They acknowledge themselves, in their treaties, to be under the protection of the United States; they admit that the United States shall have the sole and exclusive right of regulating the trade with them, and managing all their affairs as they think proper. Cherokee Nation *v.* Georgia, 5 Pet. 1, 17, 8 L. Ed. 25.

"They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union, or of the state within whose limits they resided." United States *v.* Kagama, 118 U. S. 375, 381, 30 L. Ed. 228; United States *v.* Rogers, 4 How. 567, 11 L. Ed. 1105; Cherokee Nation *v.* Southern Kansas R. Co., 135 U. S. 641, 34 L. Ed. 295; Stephens *v.* Cherokee Nation, 174 U. S. 445, 484, 43 L. Ed. 1041.

The Old Settlers or Western Cherokees are not a governmental body politic, nor have they a corporate existence, nor any capacity to act collectively. United States *v.* Old Settlers, 148 U. S. 427, 37 L. Ed. 509.

28. Indians born in United States not citizens.—Elk *v.* Wilkins, 112 U. S. 94, 28 L. Ed. 643; Smith *v.* United States, 151 U. S. 50, 55, 38 L. Ed. 67; Boyd *v.* Nebraska, 143 U. S. 135, 162, 36 L. Ed. 103; Wilson *v.* Wall, 6 Wall. 83, 18 L. Ed. 727.

Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes (an alien, though dependent, power), although in a geographical sense born in the United States, are no more "born in the United States and subject to the jurisdiction thereof," within the meaning of the first section of the fourteenth amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations. Elk *v.* Wilkins, 112 U. S. 94, 102, 28 L. Ed. 643.

Right of Indian to vote.—One by blood an Indian is not entitled to vote, unless he has become a citizen of the United States. Elk *v.* Wilkins, 112 U. S. 94, 28 L. Ed. 643.

29. Indian separated from tribe and residing in state.—Elk *v.* Wilkins, 112 U. S. 94, 28 L. Ed. 643; Smith *v.* United States, 151 U. S. 50, 55, 38 L. Ed. 67.

An Indian, born a member of one of the Indian tribes within the United States, which still exists and is recognized as a tribe by the government of the United States, who has voluntarily severed himself from his tribe, and taken up his residence among the white citizens of a state, but who has not been naturalized, taxed, or recognized as a citizen, either by the state or by the United States, is not a citizen of the United States within the fourteenth amendment of the constitution. Elk *v.* Wilkins, 112 U. S. 94, 28 L. Ed. 643, quoted in Smith *v.* United States, 151 U. S. 50, 55, 38 L. Ed. 67.

A petition stating that the plaintiff is an Indian, and was born in the United States, and has severed his tribal relation to the Indian tribes, and fully and completely surrendered himself to the jurisdiction of the United States, and still continues to be subject to the jurisdiction of the United States, and is a bona fide resident of the state of Nebraska and city of Omaha, does not show that the plaintiff is a citizen of the United States within the fourteenth amendment. Elk *v.* Wilkins, 112 U. S. 94, 98, 28 L. Ed. 643.

Temporary residence in a state by an Indian, the length of his residence not being shown, nor that he had done anything to indicate his intention to sever his tribal relations, is certainly not sufficient to make him a citizen. Famous Smith *v.* United States, 151 U. S. 50, 55, 38 L. Ed. 67.

for that purpose,[30] or become a citizen by virtue of statutes or treaties providing for his admission, or the admission of a part or the whole of the tribe of which he belongs, to citizenship.[31] The mere fact that a citizen of the United States has become a member of an Indian tribe by adoption does not necessarily cancel his citizenship.[32]

b. *Allotment of Lands.*—An Indian by blood, born within the United States, to whom land has been alotted, under the act of February 8, 1887, is no longer an Indian, but is a citizen of the United States and of the state or territory in which he resides,[33] and is not subject to acts of congress relating to Indians.[34] Citizenship accrues when the allotment is made, and is not postponed until the issuance of the final patent.[35]

3. Effect of Agreement Superseding Treaty Providing for Citizenship.—A treaty providing that Indians shall become citizens at the expiration of five

30. Naturalization of Indians.—Smith *v.* United States, 151 U. S. 50, 55, 38 L. Ed. 67; Elk *v.* Wilkins, 112 U. S. 94, 103, 28 L. Ed. 643; Roff *v.* Burney, 168 U. S. 218, 222, 42 L. Ed. 442.

Indians may, without doubt, like the subjects of any other foreign government, be naturalized by the authority of congress, and become citizens of a state, and of the United States. Dred Scott *v.* Sandford, 19 How. 393, 404, 15 L. Ed. 691.

By § 43 of the act of May 2, 1890, c. 182, 26 Stat. 99, provision is made for the naturalization of members of the Indian tribes in the Indian territory, with a proviso "that the Indians who become citizens of the United States under the provisions of this act do not forfeit or lose any rights or privileges they enjoy or are entitled to as members of the tribe or nation to which they belong." Roff *v.* Burney, 168 U. S. 218, 222, 42 L. Ed. 442.

31. Admission of Indians to citizenship by statutes or treaties.—Boyd *v.* Nebraska, 143 U. S. 135, 162, 36 L. Ed. 103; Elk *v.* Wilkins, 112 U. S. 94, 28 L. Ed. 643; Wilson *v.* Wall, 6 Wall. 83, 18 L. Ed. 727; Matter of Heff, 197 U. S. 488, 503, 49 L. Ed. 848.

By the treaty of December 29, 1835, such individuals and families of the Cherokees as were averse to a removal west of the Mississippi and desirous to become citizens of the states where they resided, were allowed to do so. Boyd *v.* Nebraska, 143 U. S. 135, 162, 36 L. Ed. 103.

By the treaty of September 27, 1830, provision was made for such heads of families of the Choctaws as desired it, to remain and become citizens of the United States. 7 Stat. 335. Boyd *v.* Nebraska, 143 U. S. 135, 162, 36 L. Ed. 103.

By the act of congress of March 3, 1843, it was provided that on the completion of certain arrangements for the partition of the lands of the tribe among its members, "the said Stockbridge tribe of Indians, and each and every one of them, shall then be deemed to be, and from that time forth are hereby declared to be, citizens of the United States, to all intents and purposes, and shall be entitled to all the rights, privileges and immunities of such citizens." 5 Stat. 647, c. 101, § 7. Boyd *v.* Nebraska, 143 U. S. 135, 162, 36 L. Ed. 103.

By the act of March 3, 1839, 5 Stat. c. 83, pp. 349, 351, relating to the Brothertown Indians of Wisconsin, the members of that tribe were made citizens of the United States. Boyd *v.* Nebraska, 143 U. S. 135, 162, 36 L. Ed. 103.

The act of congress approved February 8, 1887, 24 Stat. 388, by its terms made every Indian situated as therein referred to, a citizen of the United States. Matter of Heff, 197 U. S. 488, 503, 49 L. Ed. 848; Boyd *v.* Nebraska, 143 U. S. 135, 162, 36 L. Ed. 103.

32. Loss of citizenship by joining Indian tribe.—Roff *v.* Burney, 168 U. S. 218, 222, 42 L. Ed. 422; United States *v.* Rogers, 4 How. 567, 573, 11 L. Ed. 1105.

33. Effect of allotment on status of Indian.—Matter of Heff, 197 U. S. 488, 49 L. Ed. 848.

The limitation of citizenship to allottees born within the territorial limits of the United States was obviously intended to exclude from that privilege such allottees, if any there should be, who had recently come into this country from the Dominion of Canada or elsewhere. Matter of Heff, 197 U. S. 488, 503, 49 L. Ed. 848.

The fact that the land is not subject to alienation by the allottee does not affect the above rule. Matter of Heff, 197 U. S. 488, 49 L. Ed. 848.

34. Allottee not subject to statutes as to Indians.—Matter of Heff, 197 U. S. 488, 49 L. Ed. 848.

Selling liquor to an allottee, under act of February 8, 1887, is not a crime within the meaning of the act of January 30, 1897, prohibiting sales of liquor to Indians. Matter of Heff, 197 U. S. 488, 49 L. Ed. 848. See the title INTOXICATING LIQUORS.

35. When allottee becomes citizen.—Matter of Heff, 197 U. S. 488, 502, 49 L. Ed. 848.

Citizenship is conferred upon the allottee and not upon the patentee, while at the same time securing to him his right

years from its date, does not operate to make them citizens, where, before that time, the Indians submit a proposition to the United States for the continuance of their tribal organization and dependent position, which is accepted by the United States, although the acceptance is not made until after the expiration of five years from the date of the treaty. When the acceptance is made, it relates back to the date on which the proposition was submitted.[36]

B. Tribal Citizenship—1. DETERMINATION OF TRIBAL CITIZENSHIP—a. *Power of Congress.*—The power of congress over the matter of citizenship in Indian tribes is plenary, and it may adopt any reasonable means to ascertain who are entitled to its privileges, and if the result of one measure is not satisfactory it may try another.[37]

b. *Choctaw and Chickasaw Citizenship Court.*—Congress has power to create a court for Choctaw and Chickasaw nations, and give it power to decide the question as to who are citizens of tribes, and annul the judgments of a territory upon that question, the parties to the suit including every class to be affected by the decision, and the decision to be binding on the classes represented.[38]

to tribal or other property. So far as his political status is concerned the allottee is declared to be a citizen—not that he will be a citizen after twenty-five years have passed and a second patent shall have been issued. Matter of Heff, 197 U. S. 488, 503, 49 L. Ed. 848.

The act of 1887, providing that Indians to whom allotments shall have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside, and no territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law, becomes operative as soon as the allotment is made, and is not postponed until the issuance of the final patent. Matter of Heff, 197 U. S. 488, 502, 49 L. Ed. 848.

36. Agreement superseding treaty providing for citizenship.—Wiggan *v.* Connolly, 163 U. S. 56, 60, 41 L. Ed. 69.

There was a treaty made between the United States and the Ottawa Indians in July 16, 1862, providing that at the expiration of five years from the date of its ratification, that is, on July 16, 1867, the Ottawas should become citizens of the United States, and the tribal organization and relations with the United States should be dissolved. In February, 1867, the Ottawas proposed to change the treaty of 1862, and continue the tribal organization and relations with the United States. This proposition, after some slight amendments, was accepted by the United States in October, 1868. It was held, that though the proposition was not accepted by the United States until after July 16, 1867, the date fixed for the dissolution of the tribe, yet, when accepted, the acceptance related back to the date of the proposition; hence, the treaty of 1867 was valid and determined the status and rights of the Indians politically and in respect to their property. Wiggan *v.* Connolly, 163 U. S. 56, 60, 41 L. Ed. 69.

37. Power of congress to adopt means to determine tribal citizenship.—Wallace *v.* Adams, 204 U. S. 415, 423, 51 L. Ed. 547; Ex parte Joins, 191 U. S. 93, 102, 48 L. Ed. 110; Stephens *v.* Cherokee Nation, 174 U. S. 445, 488, 43 L. Ed. 1041.

The fact that the first provision was by an inquiry in a territorial court does not exhaust the power of congress or preclude further investigation. The functions of the territorial courts in this respect are but little more than those of a commission. Wallace *v.* Adams, 204 U. S. 415, 423, 51 L. Ed. 547.

In view of the paramount authority of congress over the Indian tribes, and of the duties imposed on the government by their condition of dependency, it cannot be said that congress cannot empower the Dawes Commission to determine, in the manner provided, who were entitled to citizenship in each of the tribes and make out correct rolls of such citizens, an essential preliminary to effective action in promotion of the best interests of the tribes. And the constitutionality of these acts in respect of the determination of citizenship cannot be successfully assailed on the ground of the impairment or destruction of vested rights. The lands and moneys of these tribes are public lands and public moneys, and are not held in individual ownership, and the assertion by any particular applicant that his right therein is so vested as to preclude inquiry into his status involves a contradiction in terms. Stephens *v.* Cherokee Nation, 174 U. S. 445, 488, 43 L. Ed. 1041. See, also, Cherokee Nation *v.* Hitchcock, 187 U. S. 294, 302, 47 L. Ed. 183.

38. Choctaw and Chickasaw citizenship court.—Wallace *v.* Adams, 204 U. S. 415, 421, 51 L. Ed. 547; Ex parte Joins, 191 U. S. 93, 102, 48 L. Ed. 110.

On March 21, 1902, an agreement was made between the United States and the Choctaw and Chickasaw nations, which was confirmed by act of congress, July 1, 1902, 32 Stat. 641. This agreement and act were substantially that a court known as the Choctaw and Chickasaw citizen-

2. Withdrawal of Tribal Citizenship.—The Choctaw Nation having power to confer tribal citizenship on one not a member of the tribe, may withdraw it, provided the legislation for that purpose does not conflict with the constitution or laws of the United States,[39] and all personal rights founded on the mere status created by the prior act fall when that status is destroyed.[40]

III. Property Rights.

A. Property Rights of Nations or Tribes—1. Nature of Indian Title—a. *Right of Discoverers as against Indians.*—Upon the discovery and settlement of American by the European nations the Indian tribes were regarded as mere temporary occupants of the soil, the absolute right of property and dominion being in the European nations by which any particular portion of the country was first discovered. Subject to the Indian's right of occupancy, the ultimate absolute fee, jurisdiction and sovereignty was vested in the governments, and grants from the governments vested soil and dominion, and the power of government, whether the land granted was vacant or occupied by Indians.[41]

b. *Succession of United States to Rights of European Nations*—(1) *Succession of Rights of Great Britain.*—By the Declaration of Independence and the treaty of peace concluded upon the termination of the Revolution, the United States succeeded to all the rights of Great Britain, including the rights formerly possessed by Great Britain with respect to lands occupied by the Indians.[42]

ship court should be created, and that court should have power in a suit in equity brought by either or both of these tribes against any ten persons who had been admitted to citizenship or enrollment by the terms of the judgments of the several United States courts in the Indian territory, as representatives of all persons similarly situated, to determine whether the judgments of those courts should be annulled on account of certain alleged irregularities. Wallace *v.* Adams, 204 U. S. 415, 420, 51 L. Ed. 547.

The agreement and act also provided that in case the citizenship courts should decide that those judgments should be annulled, the papers in any action in those courts, wherein such a judgment had been rendered, should, upon seasonable application of either party, be transferred to the citizenship court, which should proceed to a hearing and determination of the question of citizenship. Wallace *v.* Adams, 204 U. S. 415, 51 L. Ed. 547.

The act of congress of July 1, 1902, creating the Choctaw and Chickasaw citizenship court, and giving to it power to examine the judgment of the Indian territory courts and determine whether they should not be annulled on account of irregularities was a valid exercise of power. Wallace *v.* Adams, 204 U. S. 415, 425, 51 L. Ed. 547.

Prohibition against citizenship court.—The question whether the Choctaws and Chickasaw citizenship court was subject to prohibition was left undecided in Ex parte Joins, 191 U. S. 93, 102, 48 L. Ed. 110. See, generally, the title PROHIBITION.

39. Power of Chickasaw Nation to withdraw tribal citizenship.—Roff *v.* Burney, 168 U. S. 218, 222, 42 L. Ed. 442.

40. Effect of act taking away tribal citizenship.—Roff *v.* Burney, 168 U. S. 218, 223, 42 L. Ed. 442.

Where, by intermarriage with one who was at the time by legislative act a Chickasaw citizen, a person acquired the rights and privileges of a member of that tribe or nation, when that which was the foundation upon which such acquisition rested was taken away by act of the nation, then all those rights and privileges ceased. The tie which bound him to the nation was his wife's citizenship, and when that tie the nation destroyed, it released him. That such was the effect of this legislative act is established by the conduct of the Chickasaw government and all its officials, for they have refused to recognize plaintiff as any longer a member of the Chickasaw Nation, and the courts of that nation have declined to entertain jurisdiction of any suits brought by him against a Chickasaw. Roff *v.* Burney, 168 U. S. 218, 222, 42 L. Ed. 442.

41. Right of discoverers as against Indians.—Martin *v.* Waddell, 16 Pet. 367, 409, 10 L. Ed. 997; Mitchel *v.* United States, 9 Pet. 711, 713, 9 L. Ed. 283; Worcester *v.* Georgia, 6 Pet. 515, 520, 8 L. Ed. 483; Johnson *v.* McIntosh, 8 Wheat. 543, 588, 5 L. Ed. 681; Cherokee Nation *v.* Georgia, 5 Pet. 1, 48, 8 L. Ed. 25. See United States *v.* Rogers, 4 How. 567, 11 L. Ed. 1105.

Friendly Indians were protected in the possession of the lands they occupied, and were considered as owning them by a perpetual right of possession in the tribe or nation inhabiting them, as their common property, from generation to generation, not as the right of the individuals located on particular spots. Mitchel *v.* United States, 9 Pet. 711, 713, 9 L. Ed. 283.

42. Succession of United States to rights of European nations.—Cherokee

(2) *Succession to Rights of Spain upon Acquisition of Florida.*—By the acquisition of Florida by the United States, the United States succeeded to the rights of the governments formerly owning that territory, including their rights to property occupied by Indians,[43] except that the United States could not interfere with the rights of property of the Indians guaranteed to them by treaties of the governments from which the United States obtained that territory.[44]

c. *Present Nature of Indian Title*—(1) *General Rule.*—Undoubtedly, the right of the Indian nations or tribes to their lands within the United States at present, is a right of possession or occupancy only, the ultimate title in fee in those lands being in the United States.[45] The Indian title as against the United States is merely a title and right to the perpetual occupancy of the land with the privilege of using it in such mode as they see fit until such right of occupation

Nation *v.* Georgia, 5 Pet. 1, 48, 8 L. Ed. 25; Worcester *v.* Georgia, 6 Pet. 515, 516, 8 L. Ed. 483; Johnson *v.* McIntosh, 8 Wheat. 543, 584, 5 L. Ed. 681.

43. Effect of cession of Florida.—Mitchel *v.* United States, 9 Pet. 711, 713, 9 L. Ed. 283.

44. Acquisition subject to existing rights of Indians.—Mitchel *v.* United States, 9 Pet. 711, 713, 9 L. Ed. 283.

The Indians who claimed lands in Florida had, under the government of Great Britain and Spain, a right of property in them, which could not be impaired, without a violation of the laws of both, and the sanctity of repeated treaties. These rights, continued to the time of the cession, are guaranteed by the treaty and acts of congress in relation to the Floridas, in perfect conformity with its stipulations and faith, unless the Indians had previously made a binding transfer. Mitchel *v.* United States, 9 Pet. 711, 713, 9 L. Ed. 283.

Spain did not consider the Indian right to be that of mere occupancy and perpetual possession, but a right of property in the lands they held under the guarantee of treaties, which was so highly respected that the government could not acquire it from the Indians except by purchase or by permission of the Indians. Mitchel *v.* United States, 9 Pet. 711, 713, 9 L. Ed. 283.

When the United States acquired and took possession of the Floridas, the treaties which had been made with the Indian tribes, before the acquisition of the territory by Spain and Great Britain, remained in force over all the ceded territory as the laws which regulated the relations with all the Indians who were parties to them, and were binding on the United States, by the obligation they had assumed by the Louisiana treaty, as a supreme law of the land, which was inviolable by the power of congress. They were also binding as the fundamental law of Indian rights, acknowledged by royal orders, and municipal regulations of the province, as the laws and ordinances of Spain in the ceded provinces, which were declared to continue in force, by the proclamation of the governor in taking possession of the provinces; and by the acts of congress, which assured all the inhabitants of protection in their property. It would be an unwarranted construction of these treaties, laws, ordinances and municipal regulations, to decide that the Indians were not to be maintained in the enjoyment of all the rights which they could have enjoyed under either, had the provinces remained under the dominion of Spain; it would be rather a perversion of their spirit, meaning and terms, contrary to the injunction of the law under which the court acts, which makes the stipulations of any treaty, the laws and ordinances of Spain, and these acts of congress, so far as either apply to this case, the standard rules for its decision. Mitchel *v.* United States, 9 Pet. 711, 714, 9 L. Ed. 283.

The treaties with Spain and England, before the acquisition of Florida by the United States, which guaranteed to the Seminole Indians their lands, according to the right of property with which they possessed them, were adopted by the United States; who thus became the protectors of all the rights they had previously enjoyed, or could of right enjoy under Great Britain or Spain, as individuals or nations, by any treaty, to which the United States thus became parties, in 1803. Mitchel *v.* United States, 9 Pet. 711, 714, 9 L. Ed. 283.

Power of alienation by Indians in Florida.—See post, "Sale of Land by Indians," III, A, 3.

45. Nature of Indian title.—Jones *v.* Meehan, 175 U. S. 1, 8, 44 L. Ed. 49; Johnson *v.* McIntosh, 8 Wheat. 543, 5 L. Ed. 681; Cherokee Nation *v.* Georgia, 5 Pet. 1, 8 L. Ed. 25; Worcester *v.* Georgia, 6 Pet. 515, 8 L. Ed. 483; United States *v.* Cook, 19 Wall. 591, 22 L. Ed. 210; United States *v.* Kagama, 118 U. S. 375, 381, 30 L. Ed. 228; Buttz *v.* Northern Pac. Railroad, 119 U. S. 55, 67, 30 L. Ed. 330; Spalding *v.* Chandler, 160 U. S. 394, 403, 40 L. Ed. 469; Mitchel *v.* United States, 9 Pet. 711, 713, 9 L. Ed. 283; Martin *v.* Waddell, 16 Pet. 367, 409, 10 L. Ed. 997; United States *v.* Rogers, 4 How. 567, 11 L. Ed. 1105; United States *v.* Cook, 19 Wall. 591, 22 L. Ed. 210; Leavenworth, etc., R. Co. *v.* United States, 92 U. S. 733, 23 L. Ed. 634; Missouri, etc., R. Co. *v.* United

has been surrendered to the government.[46] But the right of the Indians to their occupancy is as sacred as that of the United States to the fee.[47]

(2) *Reservations.*—The rule that Indians have only a right of occupancy in lands in their possession is applicable to land within reservations made expressly for their benefit, as well as to other land in their possession.[48]

(3) *Hunting Grounds.*—Indian possession or occupation is considered with reference to their habits and modes of life. Hence, their hunting grounds are as much in their actual possession as the cleared fields of the whites, and their right to its exclusive enjoyment in their own way, and for their own purposes, as much respected, until they abandon them, make a cession to the government, or an authorized sale to individuals.[49]

d. *Common Right of Members of Tribe in Tribal Property.*—The Indian title is in the tribe as a tribe, for the common use and equal benefit of all its members, and not in the individual members.[50]

2. Mode of Extinguishing Indian Title—a. *In General.*—The Indian title can only be extinguished by the United States with the consent of the Indians.[51]

b. *Cession to Government.*—The Indian title may be extinguished by a cession of the lands by the Indians to the government.[52]

States, 92 U. S. 760, 23 L. Ed. 645; Doe *v.* Wilson, 23 How. 457, 463, 16 L. Ed. 584; Holden *v.* Joy, 17 Wall. 211, 244, 21 L. Ed. 523.

46. Right of use until occupancy surrendered.—Spalding *v.* Chandler, 160 U. S. 394, 403, 40 L. Ed. 469.

47. Right to occupancy as sacred as right of government to fee.—Beecher *v.* Wetherby, 95 U. S. 517, 526, 24 L. Ed. 440; United States *v.* Cook, 19 Wall. 591, 22 L. Ed. 210; Minnesota *v.* Hitchcock, 185 U. S. 373, 398, 46 L. Ed. 954; Leavenworth, etc., R. Co. *v.* United States, 92 U. S. 733, 742, 23 L. Ed. 634; Missouri, etc., R. Co. *v.* United States, 92 U. S. 760, 23 L. Ed. 645; Johnson *v.* McIntosh, 8 Wheat. 543, 574, 5 L. Ed. 681; Cherokee Nation *v.* Georgia, 5 Pet. 1, 48, 8 L. Ed. 25; Worcester *v.* Georgia, 6 Pet. 515, 581, 8 L. Ed. 483; Lone Wolf *v.* Hitchcock, 187 U. S. 553, 564, 47 L. Ed. 299.

48. Nature of Indian title within reservations.—Spalding *v.* Chandler, 160 U. S. 394, 403, 40 L. Ed. 469.

When Indian reservations were created, either by treaty or executive order, the Indians held the land by the same character of title, to wit, the right to possess and occupy the lands for the uses and purposes designated. Spalding *v.* Chandler, 160 U. S. 394, 403, 40 L. Ed. 469.

The nature of the Indian title to lands within the state of Georgia, under the reservation for the use of the Indians contained in the proclamation of 1763, was not such as to be absolutely repugnant to seisin in fee upon the part of the state. Such reservation appears to have been a temporary arrangement, suspending for a time the settlement of a county reserved, but did not amount to an alteration of the boundaries of the colony. Fletcher *v.* Peck, 6 Cranch 87, 142, 3 L. Ed. 162.

49. Title to hunting grounds.—Mitchel *v.* United States, 9 Pet. 711, 746, 9 L. Ed. 283.

50. Indian title is in tribe not individuals.—Cherokee Nation *v.* Hitchcock, 187 U. S. 294, 307, 47 L. Ed. 183; Cherokee Nation *v.* Journeycake, 155 U. S. 196, 207, 39 L. Ed. 120; The Cherokee Trust Funds, 117 U. S. 288, 308, 29 L. Ed. 880; Cherokee Nation *v.* Georgia, 5 Pet. 1, 48, 8 L. Ed. 25; Delaware Indians *v.* Cherokee Indians, 193 U. S. 127, 136, 48 L. Ed. 646.

The lands of the Cherokee Nation are not held in individual ownership, but are public lands, though held for the equal benefit of all the members. Stephens *v.* Cherokee Nation, 174 U. S. 445, 488, 43 L. Ed. 1041; Cherokee Nation *v.* Hitchcock, 187 U. S. 294, 47 L. Ed. 183; Delaware Indians *v.* Cherokee Indians, 193 U. S. 127, 136, 48 L. Ed. 646; Cherokee Nation *v.* Journeycake, 155 U. S. 196, 39 L. Ed. 120; The Cherokee Trust Funds, 117 U. S. 288, 308, 29 L. Ed. 880.

Under a patent issued to the Cherokees for their lands, whatever title conveyed was to the Cherokees as a nation, and no title was vested in severalty in any of the Cherokees. Cherokee Nation *v.* Journeycake, 155 U. S. 196, 207, 39 L. Ed. 120; Delaware Indians *v.* Cherokee Indians, 193 U. S. 127, 136, 48 L. Ed. 646.

51. Extinguishment of Indian title.—Worcester *v.* Georgia, 6 Pet. 515, 519, 8 L. Ed. 483; Leavenworth, etc., R. Co. *v.* United States, 92 U. S. 733, 742, 23 L. Ed. 634; Missouri, etc., R. Co. *v.* United States, 92 U. S. 760, 23 L. Ed. 645.

52. Cession to government defeats Indian title.—Mitchel *v.* United States, 9 Pet. 711, 746, 9 L. Ed. 283; Hot Springs Cases, 92 U. S. 698, 23 L. Ed. 690; Cherokee Nation *v.* Georgia, 5 Pet. 1, 8 L. Ed. 25.

By the treaty of August 24, 1818, the Indian title to the Hot Springs of Arkansas Territory, together with four sec-

c. *Abandonment of Occupancy.*—The possession, when abandoned by the Indians, attaches itself to the fee without further grant.[53]

b. *Authorized Sale.*—The Indian title is extinguished upon an authorized sale made by Indians to an individual. Thus, in Florida, prior to its cession to the United States, a sale by Indians of lands occupied by them, which sale was confirmed in the manner required by the Spanish laws, extinguished the Indian title.[54]

3. SALE OF LAND BY INDIANS—a. *General Rule.*—While Indians may sell their right of occupancy to the United States, which has the fee,[55] it is well settled that they cannot convey their lands to other nations or to private individuals without the consent of the government.[56]

b. *Sale by Florida Indians Prior to Cession to United States*—(1) *Grant Confirmed by Spanish Authorities.*—In Florida, prior to its cession to the United States, the Indians could convey their lands but only in the manner pointed out by the Spanish laws, which made it necessary that the deed be presented to the governor for confirmation.[57]

(2) *Construction of Confirmation.*—The confirmation is not to be construed

tions of land including said springs, was extinguished by cession to the United States by the Quapaws. Hot Springs Cases, 92 U. S. 698, 23 L. Ed. 690.

53. Effect of abandonment of occupancy.—Beecher *v.* Wetherby, 95 U. S. 517, 526, 24 L. E. 440; United States *v.* Cook, 19 Wall. 591, 22 L. Ed. 210; Minnesota *v.* Hitchcock, 185 U. S. 373, 398, 46 L. Ed. 954; Mitchel *v.* United States, 9 Pet. 711, 746, 9 L. Ed. 283; United States *v.* Arredondo, 6 Pet. 691, 8 L. Ed. 547; Minter *v.* Crommelin, 18 How. 87, 15 L. Ed. 279.

In the case of the United States *v.* Arredondo, 6 Pet. 691, 8 L. Ed. 547, the lands granted had been in the possession and occupation of the Alachua Indians, and the centre of the tract was an Indian town of that name; but the land had been abandoned, and before any grant was made by the intendant, a report was made by the attorney and surveyor general, on a reference to them, finding the fact of abandonment; on which, it was decreed, that the land had reverted to and become annexed to the royal domain. Mitchel *v.* United States, 9 Pet. 711, 9 L. Ed. 283.

Under the act of March 3, 1817, which was passed to carry into effect the treaty of August 9, 1814, with the Creek Indians, and which provided in the 6th section that no land reserved to a Creek warrior should be offered for sale by the register of the land office, unless specially directed by the secretary of the treasury, the secretary was authorized to decide whether or not the Indian had abandoned the land. If abandoned, it became forfeited to the United States. Hence, where such a reservation was offered for sale, and a patent isued for it, the presumption is that the secretary had decided the fact of abandonment, and issued the order for the sale. Minter *v.* Crommelin, 18 How. 87, 15 L. Ed. 279.

54. Authorized sale to individuals defeats Indian title.—Mitchel *v.* United States, 9 Pet. 711, 746, 9 L. Ed. 283.

55. Power of Indians to sell to United States.—Holden *v.* Joy, 17 Wall. 211, 244, 21 L. Ed. 523; United States *v.* Kagama, 118 U. S. 375, 381, 30 L. Ed. 228; Doe *v.* Wilson, 23 How. 457, 463, 16 L. Ed. 584; Johnson *v.* McIntosh, 8 Wheat. 543, 603, 5 L. Ed. 681.

Originally the Indians could sell to the government of the discoverer, but they could not sell to any other governments or their subjects, as the government of the discoverer acquired, by virtue of their discovery, the exclusive pre-emption right to purchase, and the right to exclude the subjects of all other governments, and even their own, from acquiring title to the lands. Holden *v.* Joy, 17 Wall. 211, 244, 21 L. Ed. 523.

56. Sale to individuals.—Johnson *v.* McIntosh, 8 Wheat. 543, 603, 5 L. Ed. 681; Doe *v.* Wilson, 23 How. 457, 463, 16 L. Ed. 584; United States *v.* Kagama, 118 U. S. 375, 381, 30 L. Ed. 228; Libby *v.* Clark, 118 U. S. 250, 30 L. Ed. 133; Cherokee Nation *v.* Georgia, 5 Pet. 1, 48, 8 L. Ed. 25; Worcester *v.* Georgia, 6 Pet. 515, 544, 8 L. Ed. 483; United States *v.* Cook, 19 Wall. 591, 22 L. Ed. 210; United States *v.* Kagama, 118 U. S. 375, 381, 30 L. Ed. 228; Buttz *v.* Northern Pac. Railroad, 119 U. S. 55, 67, 30 L. Ed. 330; Jones *v.* Meehan, 175 U. S. 1, 8, 44 L. Ed. 49.

A title to lands, under grant to private individuals, made by Indian tribes or nations northwest of the river Ohio, in 1773 and 1775, cannot be recognized in the courts of the United States. Johnson *v.* McIntosh, 8 Wheat. 543, 5 L. Ed. 681.

57. Conveyance by Florida Indians prior to cession.—Mitchel *v.* United States, 9 Pet. 711, 9 L. Ed. 283; Chouteau *v.* Molony, 16 How. 203, 14 L. Ed. 905; United States *v.* Rillieux, 14 How. 189, 14 L. Ed. 381; United States *v.* Gusman, 14 How. 193, 14 L. Ed. 340; Slidell *v.* Grandjean, 111 U. S. 412, 28 L. Ed. 321.

A claim to lands in East Florida, the title to which was derived from grants by the Creek and Seminole Indians, ratified

as giving greater rights than those intended to be conveyed by the Indians.[58]

(3) *Proof of Confirmation.*—The confirmation may be shown by a copy of the deed of the governor,[59] or may be presumed to have been made, from the facts established in the case.[60]

4. GRANTS BY UNITED STATES TO INDIANS—a. *Right of Indians to Purchase.*—The Indian tribes are capable of taking as owners in fee simple lands by purchase where the United States in form, and for a valuable and adequate consideration, so sell them to them. Such sale is properly made by a treaty.[61]

b. *Construction of Grant.*—A treaty ceding to the United States all the right, title and interest of the Indians in certain lands, and by which the government agrees to set apart a tract of land described by metes and bounds for the use

by the local authorities of Spain, before the cession of Florida by Spain to the United States, confirmed. Mitchel *v.* United States, 9 Pet. 711, 9 L. Ed. 283.

58. Confirmation not to be construed as broader than grant.—Chouteau *v.* Molony, 16 How. 203, 14 L. Ed. 905.

A purchase from the Indians, whilst the province was under French authority, conveyed no title unless sanctioned by that authority. United States *v.* Rillieux, 14 How. 189, 14 L. Ed. 381; United States *v.* Gusman, 14 How. 193, 14 L. Ed. 340.

Where a mining privilege had been granted by the Indians and confirmed by the Spanish authorities, it was held that the grant was not a complete title, making the land private property, and therefore excepting it from what was conveyed to the United States by the treaty of Paris of April 30, 1803, as the Spanish governor intended only to confirm such rights as had been previously received from the Indians, and the words of the grant from the Indians did not show any intention to sell more than a mining privilege, especially as the grant, if construed as contended for by the grantee, included a large Indian village, which it was unreasonable to suppose that the Indians intended to sell. Chouteau *v.* Molony, 16 How. 203, 14 L. Ed. 905.

Where Indians sold their lands to an individual, and the Spanish governor of the province approved the sale, and granted the land, but directed the purchaser to apply to him in order that a complete title might be issued to him, it was held that the words "a complete title" referred only to the instruments which constituted evidence of title, and not to the estate or interest thereby conveyed. Slidell *v.* Grandjean, 111 U. S. 412, 416, 28 L. Ed. 321.

59. Copy of confirmation as evidence.—Where it was objected by the United States that the original acts of the confirmation of the Indian sales were not produced, and that the copies in evidence were not legal proof of such acts, it was held that the objection was not well founded in fact or law, where the original Indian deeds were produced by the agent of the United States, from the public archives, and were before the court, and the deeds of confirmation were made according to the rules of the civil law, adopted by Spain, and in force in Florida and Cuba. The original is a record, and preserved in the office, which cannot be taken out; a testimonio or copy is delivered to the party, which is deemed to be, and is certified as, an original paper, having all the effect of one, in all countries governed by the civil law. Mitchel *v.* United States, 9 Pet. 711, 732, 9 L. Ed. 283.

60. Presumption of confirmation.—Mitchel *v.* United States, 9 Pet. 711, 715, 9 L. Ed. 283.

Where an Indian sale was confirmed, with more than usual solemnity and publicity at a public council and convention of the Indians, comformable to treaties, to which the king was a party, and which the United States adopted, and the grant was known to both parties to the treaty of cession, and the United States were not deceived by the purchase, which they knew was subject to the claim of the plaintiff, or those from whom he purchased, it was held that even if there could be a doubt that the evidence in the record did not establish the fact of a royal license or assent to the purchase, as a matter of specific and judicial belief, it would be presumed as a matter of law, arising from the facts and circumstances of the case, which were admitted or unquestioned. Mitchel *v.* United States, 9 Pet. 711, 715, 9 L. Ed. 283.

61. Right of Indians to take by purchase from government.—Holden *v.* Joy, 17 Wall. 211, 21 L. Ed. 523.

The treaty of the 29th of December, 1835, between the United States and the Cherokee Indians, was not made in virtue of the act of 28th of May, 1830, authorizing an "exchange" of lands west of the Mississippi, for the territory claimed or occupied by any tribe of Indians within the limits of any state or territory, but was made under the treaty-making power vested by the constitution in the president and senate. Holden *v.* Joy, 17 Wall. 211, 21 L. Ed. 523.

The treaty of December 29, 1835, between the United States and the Cherokee Indians made a sale in fee simple to the Cherokee Indians of the lands west of the Mississippi, known as "the Cherokee neutral lands," and the fact and validity of the sale have been recognized by con-

of the Indians as a permanent home for them, in fee simple, patents to be issued by the government, operates as a present grant of land to the Indians.[62]

c. *Forfeiture of Lands by Indians for Breach of Conditions.*—The lands granted may be forfeited to the United States for breach of a condition subsequent to the removal of the Indians thereto within a certain time.[63] But the cession of the lands by the Indians to the United States to be sold by the government for the benefit of the Indians does not amount to an "abandonment" of the lands,[64] and even if it does, the acceptance of the lands by the United States in trust, to sell them for the benefit of the Indians, condones the breach.[65] The United States alone can take advantage of the breach of condition in a grant to the Indians.[66] While the government may declare a forfeiture for breach of condition subsequent, it has no power by simple executive action to re-enter, take possession of the lands and sell them.[67]

5. Cession of Lands by Indians to United States—a. *Property Passing.*—Where a cession of lands by Indians purports to "reserve" to the United States a tract of land outside of the limits of that ceded to the United States, the word "reserve" will be construed as equivalent to "set apart" and the cession will not be limited to its general boundaries but will be extended so as to embrace such special tract.[68]

b. *Whether Cession Absolute or in Trust.*—In order for a cession of lands to amount to a trust, the purpose to create the trust must be definite and clear.[69]

gress through appropriation made in execution of the treaty. Holden *v.* Joy, 17 Wall. 211, 21 L. Ed. 523.

62. Grant by United States to Indian tribes.—New York Indians *v.* United States, 170 U. S. 1, 42 L. Ed. 927.

The treaty of 1830 with the Choctaws provided for a grant of land whose boundaries should conform to the treaty of 1825, so far as such land should lie within the limits of the United States. The Choctaw Nation, by accepting the grant made in pursuance of the treaty, was estopped to claim, under the treaty of 1825, territory not within the United States. United States *v.* Choctaw Nation, 179 U. S. 494, 45 L. Ed. 291.

63. Preach of condition as to removal of Indians to land granted.—New York Indians *v.* United States, 170 U. S. 1, 42 L. Ed. 927.

64. Abandonment by Indians.—Holden *v.* Joy, 17 Wall. 211, 21 L. Ed. 523.

The question cannot be raised whether the lands reverted to the United States in pursuance of a condition inserted in the patent, that the lands should revert to the government, if the Cherokees abandoned them; assuming that such a condition was lawful and of any effect, a matter not conceded. Holden *v.* Joy, 17 Wall. 211, 21 L. Ed. 523.

65. Condonation of breach of conditions.—Holden *v.* Joy, 17 Wall. 211, 21 L. Ed. 523.

66. Who may take advantage of breach of condition.—Holden *v.* Joy, 17 Wall. 211, 21 L. Ed. 523.

67. Mode of declaring and enforcing forfeiture.—New York Indians *v.* United States, 170 U. S. 1, 42 L. Ed. 927.

Where land is conveyed to Indians by treaty with a condition subsequent forfeiting the grant in case the Indians fail to remove thereto within five years, in order to justify a forfeiture it must appear that the repudiation or refusal to remove was as formal, broad and unequivocal as the acceptance. The government should make a formal tender of performance and give notice to the Indians that if they refuse to emigrate they will lose their rights under the treaty. New York Indians *v.* United States, 170 U. S. 1, 42 L. Ed. 927.

Rights of Indians to claim lands conveyed to them by treaty containing a condition subsequent is not lost by abondonment where it appears that the government did not consider a claim abandoned and the Indians intended no abandonment. New York Indians *v.* United States, 170 U. S. 1, 42 L. Ed. 927.

68. Property passing.—In the treaty of the 25th of October, 1805, by which the Cherokees ceded to the United States certain lands, on the north bank of the Tennessee River above the mouth of the Highwassee, and in which there was a stipulation reserving "three other square miles * * * on the north bank of the Tennessee, opposite to and below the mouth of the Highwassee," for a garrison, the reservation for a garrison means what it says, and the land reserved for that purpose lies below and not above the mouth of the Highwassee, where the United States have placed the garrison. Meigs *v.* McClung, 9 Cranch 11, 3 L. Ed. 639.

69. Purpose of creating trust to be clear.—United States *v.* Choctaw Nation, 179 U. S. 494, 45 L. Ed. 291.

The fact that the representatives of the United States present when an Indian treaty was made stated to the Indians that a portion of their lands would be set apart for the settlement of friendly tribes, and that no white person would be permitted to reside thereon, does not show

Thus, a cession is not to be held to create a trust for the purpose of settling Indians on the ceded lands, because cessions from other Indians have been held to create a trust,[70] or because of a recital in a subsequent act of congress that it had that effect, where a still later act saves the right of the government to show that there was no trust,[71] or merely because if no trust is held to have been created the government will acquire the lands at less than their full value.[72]

c. *Cession in Trust to Sell for Benefit of Indians*—(1) *Validity of Cession and Sale.*—The Indians, owning lands in fee simple by purchase from the government, may cede it to the United States in trust that the latter may sell them and hold the proceeds in trust for the Indians,[73] and a sale by the government in pursuance of the treaty of cession is valid.[74]

(2) *Mode and Sufficiency of Sale.*—Where the government, having entered into a treaty stipulation to sell at public auction certain lands for the benefit of the resident Indians, sells such lands at a private sale, it is guilty of a violation of its trust; but, if such lands are sold at the statutory price, it will be inferred, in the absence of proof of the value of the land, that the Indians in reality suffered no damage by such action.[75]

that a treaty from the Indians to the United States made at that time, purporting to cede lands absolutely to the United States, in fact ceded them in trust for the settlement of Indians. United States *v.* Choctaw Nation, 179 U. S. 494, 45 L. Ed. 291.

The cession by the Choctaw and Chickasaw Nations by the treaty of April 28, 1866, of the lands known as the leased district to the United States in consideration of a sum of money paid to them by the government, passed an absolute title to the United States, and the claim of the Choctaw and Chickasaw Indians that the United States took the lease in trust to be used only for the settlement of Indians, and that on the abandonment of the trust, lands reverted to them, is without foundation. United States *v.* Choctaw Nation, 179 U. S. 494, 45 L. Ed. 291.

70. Where other cessions have been held to create trusts.—United States *v.* Choctaw Nation, 179 U. S. 494, 45 L. Ed. 291.

The fact that the interpretation placed by the government upon a treaty with the Indians, if adopted, would result in a less liberal policy to the Indians with whom it is made, than with other tribes with which the government has concluded treaties, does not authorize the court to give the treaty a construction other than that justified by its plain words. United States *v.* Choctaw Nation, 179 U. S. 494, 45 L. Ed. 291.

71. Recital in subsequent act of congress as to trust.—United States *v.* Choctaw Nation, 179 U. S. 494, 45 L. Ed. 291.

The fact that an act of congress appropriating money for the Indians recites that a cession of land by the Indians to the government was in trust for the purpose of settling Indians thereon, does not prevent the government from showing that the cession was absolute, especially where a subsequent act of congress provided that nothing in the original act or in that, shall prevent the government from showing that the cession was absolute and not in trust. United States *v.* Choctaw Nation, 179 U. S. 494, 45 L. Ed. 291.

72. Where government would acquire lands at less than value.—United States *v.* Choctaw Nation, 179 U. S. 494, 45 L. Ed. 291.

The fact that the interpretation of the treaty claimed by the government to be the correct one would, if adopted, put the government in the position of having acquired lands at a price far below their real value, does not authorize the court to depart from the plain words of the treaty. United States *v.* Choctaw Nation, 179 U. S. 494, 45 L. Ed. 291.

73. Cession by Indians to United States for benefit of Indians.—Holden *v.* Joy, 17 Wall. 211, 21 L. Ed. 523.

The cession to the United States by the Cherokees, in the treaty of June 19th, 1866, of the said neutral lands owned by them as aforesaid, in trust that the United States should sell them and hold the proceeds for the benefit of the said Indians, was a lawful cession and trust, and in accordance with the policy and practice of the government. Holden *v.* Joy, 17 Wall. 211, 21 L. Ed. 523.

74. Sale of Indian lands, by government acting as trustee.—Holden *v.* Joy, 17 Wall. 211, 21 L. Ed. 523.

The supplemental article of April 27th, 1868, to the already mentioned treaty of June 19th, 1866, was valid; and a sale and patent made pursuant to its purpose passed a good title, though the treaty did not convey, proprio vigore, the lands meant to be sold, though it required officers of the United States to do certain acts before the sale could be consummated, and though the contract of sale was signed before the treaty was promulgated. Holden *v.* Joy, 17 Wall. 211, 21 L. Ed. 523.

75. Mode and sufficiency of sale.—United States *v.* Blackfeather, 155 U. S. 180, 39 L. Ed. 114.

d. *Right of Indians to Compensation for Lands Ceded in Excess of Those Allotted.*—Indian tribes ceding land to the United States, upon an agreement by the latter to allot each member of tribes or bands a certain quantity of land out of that ceded, are entitled to compensation for the land ceded in excess of that allotted.[76]

e. *Effect of Cession on Rights of Individual Indians.*—Treaties of cession from an Indian nation to the United States conveys not only the common property of the nation, but the interest therein of each of its members.[77]

f. *Actions by Indians with Respect to Ceded Lands*—(1) *Consent of United States to Be Sued.*—A suit by or on behalf of an Indian tribe against the United States controls the disposition, and for an account of the proceeds of the sales of, lands conveyed by the Indians to the United States under the act of January 14, 1889, cannot be maintained, where the United States has not consented to be sued with respect thereto.[78]

(2) *Decree in Action for Compensation for Lands.*—In an action by a tribe of Indians against the United States to recover compensation for land ceded to the government in excess of that allotted to the tribes, upon the cession, the decree should not fix the amount of the price to be recovered per acre,[79] nor require a release by the tribe of their claim to all lands within the United States.[80]

6. RESERVATIONS TO INDIANS—a. *Mode of Creating Reservation.*—In order to create a reservation it is not necessary that there should be a formal cession or a formal act setting apart a particular tract. It is enough that from what has been done there results a certain defined tract appropriated to certain purposes.[81]

76. Compensation for land ceded in excess of that allotted.—United States *v.* Choctaw Nation, 179 U. S. 494, 45 L. Ed. 291.

The Wichita and Affiliated Bands of Indians who ceded their lands to the United States, the latter agreeing to allot to each member of the tribe or band 160 acres of the land, are entitled to compensation from the government for the land in excess of that required to be allotted by the agreement. United States *v.* Choctaw Nation, 179 U. S. 494, 45 L. Ed. 291.

77. Effect of cession by Indian tribe on individual property rights.—The Cherokee Trust Funds, 117 U. S. 288, 308, 29 L. Ed. 880.

78. Indian tribes cannot sue United States without consent.—Naganab *v.* Hitchcock, 202 U. S. 473, 50 L. Ed. 1113, distinguishing Minnesota *v.* Hitchcock, 185 U. S. 373, 46 L. Ed. 954. See, also, Oregon *v.* Hitchcock, 202 U. S. 60, 50 L. Ed. 935. Generally, as to suits against the United States, see the title UNITED STATES.

79. Decree in action for lands in excess of those allotted should not fix price per acre.—In an action by the Wichita and Affiliated Bands of Indians against the United States, in order to determine their rights under the treaty ceding their lands to the government, the decree should declare that they are entitled to compensation in money for such of the lands as are not needed in making the allotment of 160 acres to each member of the tribes, as required by the act of March 2, 1885, leaving the amount to be fixed upon such evidence as may be adduced by the parties, but not in any event to exceed the limitation of $1.25 per acre as prescribed by congress. United States *v.* Choctaw Nation, 179 U. S. 494, 45 L. Ed. 291.

80. Condition of decree requiring tribe to release all claims.—In an action by the Wichita and Affiliated Bands of Indians, to determine their rights with respect to lands ceded to the government and to compensation on account of such lands as are not needed to make the allotment of 160 acres of lands to each member of the tribe or band, it would be improper to make it a condition of the decree, recognizing the rights of the Indians to compensation for the surplus lands, that they execute a release to the United States of all right, title, interest and claim of every nature whatsoever in and to any lands within the limits of the United States, except those allotted to them, as the court of claims could not make any decree in reference to claims not referred to it by congress. United States *v.* Choctaw Nation, 179 U. S. 494, 45 L. Ed. 291.

81. Mode of creating reservations.—Minnesota *v.* Hitchcock, 185 U. S. 373, 390, 46 L. Ed. 954; Spalding *v.* Chandler, 160 U. S. 394, 40 L. Ed. 469.

Where the Indian occupation is confined by the treaty to a certain specified tract, that becomes in effect, an Indian reservation. Spalding *v.* Chandler, 160 U. S. 394, 40 L. Ed. 469; Minnesota *v.* Hitchcock, 185 U. S. 373, 390, 46 L. Ed. 954.

"If the reservation was free from objection by the government, it was as effectual as though the particular tract to be used was specially designated by boundaries in the treaty itself. The reservation thus created stood precisely in

b. *Effect of Reservation of "Hunting Grounds."*—Where hunting grounds was reserved to Indians by a treaty of cession, at a period when the principal occupation of the Indians, and their land was more used for that purpose than for any other, it could not, nevertheless, be supposed that any intention existed of restricting the full use of the lands they reserved. To the United States, it could be a matter of no concern, whether their whole territory was devoted to hunting grounds, or whether an occasional village and an occasional cornfield interrupted, and gave some variety to the scene.[82]

c. *Reservation as Notice to Third Persons.*—A treaty reserving to a tribe of Indians so much of a tract of land as they have been accustomed to use and frequent is notice that a part would be retained by the government, and that the whole might be, for the use of the Indians, and this purpose and stipulation of the United States could not be defeated by the action of any officer of the land department.[83]

7. TIMBER RIGHTS—a. *Growing Timber on Indian Lands*—(1) *Right to Cut*—(a) *For Purpose of Improving Land.*—Indians may cut timber standing upon land occupied by them for the purpose of improving or cultivating the land.[84]

(b) *For Purpose of Sale.*—But timber on Indian lands cannot be cut by them for the purposes of sale. The Indians having only the right of occupancy, the presumption is against their authority to cut and sell the timber.[85]

(2) *Action for Timber Unlawfully Cut.*—Property in timber unlawfully cut does not pass from the United States by severance, and they may maintain an action of replevin against the purchaser for unlawful cutting and carrying it away,[86] and in such case the burden of proof as to whether the cutting was

the same category as other Indian reservations, whether established for general or limited uses, and whether made by the direct authority of congress in the ratification of a treaty or indirectly through the medium of a duly-authorized executive officer." Minnesota *v.* Hitchcock, 185 U. S. 373, 390, 46 L. Ed. 954; Spalding *v.* Chandler, 160 U. S. 394, 40 L. Ed. 469.

82. Reservation of hunting grounds.—Worcester *v.* Georgia, 6 Pet. 515, 518, 8 L. Ed. 483.

83. Reservation as notice.—United States *v.* Carpenter, 111 U. S. 347, 28 L. Ed. 451.

84. Cutting timber to improve land.—United States *v.* Cook, 19 Wall. 591, 22 L. Ed. 210; United States *v.* Loughrey, 172 U. S. 206, 215, 43 L. Ed. 420; Shiver *v.* United States, 159 U. S. 491, 498, 40 L. Ed. 231; Wooden-Ware Co. *v.* United States, 106 U. S. 432, 27 L. Ed. 230; Northern Pac. R. Co. *v.* Lewis, 162 U. S. 366, 376, 40 L. Ed. 1002.

Timber standing on lands occupied by the Indians cannot be cut by them for the purpose of sale alone; though when it is in their possession having been cut for the purpose of improving the land—that is to say, better adapting it to convenient occupation—in other words, when the timber has been cut incidentally to the improvement, and not cut for the purpose of getting and selling it—there is no restriction on the sale of it. United States *v.* Cook, 19 Wall. 591, 22 L. Ed. 210.

This right of use and occupancy by the Indians is unlimited. They may exercise it at their discretion. If the lands in a state of nature are not in a condition for profitable use, they may be made so. If desired for the purposes of agriculture, they may be cleared of their timber to such an extent as may be reasonable under the circumstances. The timber taken off by the Indians in such clearing may be sold by them. But to justify any cutting of the timber, except for use upon the premises, as timber or its product, it must be done in good faith for the improvement of the land. The improvement must be the principal thing, and the cutting of the timber the incident only. Any cutting beyond this would be waste and unauthorized. United States *v.* Cook, 19 Wall. 591, 593, 22 L. Ed. 210.

85. Cutting timber for purposes of sale.—United States *v.* Cook, 19 Wall. 591, 22 L. Ed. 210; United States *v.* Loughrey, 172 U. S. 206, 215, 43 L. Ed. 420; Shiver *v.* United States, 159 U. S. 491, 498, 40 L. Ed. 231; Northern Pac. R. Co. *v.* Lewis, 162 U. S. 366, 376, 40 L. Ed. 1002; Wooden-Ware Co. *v.* United States, 106 U. S. 432, 27 L. Ed. 230; Pine River Logging Co. *v.* United States, 186 U. S. 279, 284, 46 L. Ed. 1164.

86. Action by United States for unlawfully cutting.—United States *v.* Cook, 19 Wall. 591, 22 L. Ed. 210; United States *v.* Loughrey, 172 U. S. 206, 215, 43 L. Ed. 420; Wooden-Ware Co. *v.* United States, 106 U. S. 432, 27 L. Ed. 230; Shiver *v.* United States, 159 U. S. 491, 498, 40 L. Ed. 231; Northern Pac. R. Co. *v.* Lewis, 162 U. S. 366, 376, 40 L. Ed. 1002; Beecher *v.* Wetherby, 95 U. S. 517, 526, 24 L. Ed. 440; United States *v.* Denver, etc., R. Co., 191 U. S. 84, 91, 48 L. Ed. 106.

The United States may maintain an action for unlawfully cutting and carrying

lawful is on the purchaser.[87]

b. *Dead Timber on Indian Reservations*—(1) *In General.*—By statute, Indians residing on reservations or allotments may be authorized to cut, remove, sell or otherwise dispose of dead timber, standing or fallen, on such reservation or allotment, for the sole benefit of such Indians.[88]

(2) *Contract for Cutting and Sale*—(a) *Necessity for Contract and Approval by Government.*—Under this statute, dead timber can only be cut and sold by Indians in pursuance of contracts entered into with the Indians for that purpose and approved by the United States.[89]

(b) *Construction of Contract*—aa. *Contract for Certain Amount, "More or Less."*—A contract approved by the government for cutting a certain amount of timber "more or less" will be given a narrow construction, and will be held to authorize only such accidental or immaterial variations in quantity from that specified therein, as might naturally occur in connection with the transaction.[90]

bb. *Construction of Contract by Parties as Binding Government.*—The fact that the parties contracting for the cutting and the government agents who superintended the cutting construed the contract as authorizing the cutting of an

away timber from the public lands. United States *v.* Cook, 19 Wall. 591, 22 L. Ed. 210.

The Indians having only a right of occupancy in the lands, the presumption is against their authority to cut and sell the timber. Every purchaser from them is charged with notice of this presumption. To maintain his title it is incumbent on him to show that the timber was rightfully severed from the land. United States *v.* Cook, 19 Wall. 591, 22 L. Ed. 210.

87. Burden of proof as to right to cut timber.—United States *v.* Denver, etc., R. Co., 191 U. S. 84, 91, 48 L. Ed. 106.

88. Dead timber on Indian reservation.—Act of Feburary 16, 1899; Pine River Logging Co. *v.* United States, 186 U. S. 279, 46 L. Ed. 1164.

The act of congress passed February 16, 1889, 25 Stat. 673, provides: "That the president of the United States may from year to year in his discretion, under such regulations as he may prescribe, authorize the Indians residing on reservations or allotments, the fee to which remains in the United States, to fell, cut, remove, sell or otherwise dispose of the dead timber standing or fallen, on such reservation or allotment, for the sole benefit of such Indian or Indians. But whenever there is reasonable cause to believe that such timber has been killed, burned, girdled or otherwise injured for the purpose of securing its sale under this act, then in that case such authority shall not be granted." Pine River Logging Co. *v.* United States, 186 U. S. 279, 284, 46 L. Ed. 1164.

No general authority is given to Indians to cut timber upon their reservations. The act contemplates that the authority shall be temporary only, "from year to year," and it is further limited to "dead timber standing or fallen," and that it shall be disposed of solely for the benefit of the Indian or Indians to whom the authority is given. Pine River Logging Co. *v.* United States, 186 U. S. 279, 284, 46 L. Ed. 1164.

The object of the statute, as interpreted by the regulations, was evidently to permit deserving Indians, who had no other sufficient means of support, to cut for a single season a limited quantity of dead and down timber under the superintendence of a properly qualified white man, and to use the proceeds for their support in exact proportion to the scale of logs banked by each, provided that ten per cent of the gross proceeds should go to the stumpage or poor fund of the tribe, from which the old, sick and otherwise helpless might be supported. Pine River Logging Co. *v.* United States, 186 U. S. 279, 285, 46 L. Ed. 1164.

The rights of the government to the unimpaired value of the land and to the standing timber were carefully guarded by the proviso that no green or growing timber should be cut, and no live trees damaged, so as to cause them to die, that they might be marketed under the provisions of the act. Pine River Logging Co. *v.* United States, 186 U. S. 279, 286, 46 L. Ed. 1164.

There was no intention on the part of congress or the president to authorize promiscuous logging operations, or the felling of live standing timber, or that a few Indians should be permitted to monopolize the proceeds, but that they should be divided among the individuals of the tribe in proportion to the scale of the logs banked by each. Pine River Logging Co. *v.* United States, 186 U. S. 279, 286, 46 L. Ed. 1164.

89. Contracts for cutting approved by government.—Pine River Logging Co. *v.* United States, 186 U. S. 279, 46 L. Ed. 1164.

90. Effect of contract authorizing cutting of certain amount more or less.—Pine River Logging Co. *v.* United States, 186 U. S. 279, 46 L. Ed. 1164. See the title VENDOR AND PURCHASER.

Evidence to show the amount of dead timber on the reservation is immaterial in an action for cutting more than the

amount largely in excess of that called for by the contract is not binding upon the government.[91]

(3) *Damages against Purchaser, Where Excess Cut.*—Where the timber is cut in excess of the amount called for by the contracts approved by the government, the measure of damages is the value to the government of the timber after it was cut and banked upon the water near where it is cut,[92] without deduction of the part of the original price paid by the purchaser to the Indian department for the purpose of creating a fund for helpless Indians.[93]

8. WHO MAY SHARE IN TRIBAL PROPERTY—a. *Bands or Tribes Entitled to Share*—(1) *Property of Cherokees*—(a) *Lands and Common Property.*—The members of the Cherokee Nation, whether east or west of the Mississippi, are entitled to share in the lands of the Cherokee Nation west of the Mississippi.[94] But the Cherokees of North Carolina who dissolved their connection with other nations and refused to remove with the other members of the Cherokee tribe, to the lands ceded to the nation west of the Mississippi, are not entitled to an interest in the common property or funds of the Cherokee Nation.[95] Thus they

contracts approved by the government authorized to be cut. Pine River Logging Co. *v.* United States, 186 U. S. 279, 46 L. Ed. 1164.

91. Government not bound by construction of contract by parties.—Pine River Logging Co. *v.* United States, 186 U. S. 279, 46 L. Ed. 1164.

"It is unnecessary to inquire what excuses may be made by these officers for thus indirectly approving the construction put upon the contracts by the parties interested, since they could not bind the government in this particular. With the contracts before them they had but one duty, and that was to see that they were honestly and faithfully carried out according to their spirit and letter. No authority had been given them to extend the contracts either as to the quantity or quality of timber to be cut. In fact, they were placed in charge of the operations for the express purpose of seeing that there should be no violation of the contracts in these particulars. They, as well as the parties thereto, were equally bound by its provisions. No discretion had been given them to waive or alter the contracts in any particular. No conduct of theirs can estop the government from asserting its rights to recover for timber cut beyond the quantity and quality specified in the contract." Pine River Logging Co. *v.* United States, 186 U. S. 279, 291, 46 L. Ed. 1164.

92. Measure of damages.—Pine River Logging Co. *v.* United States, 186 U. S. 279, 46 L. Ed. 1164; Wooden-Ware Co. *v.* United States, 106 U. S. 432, 27 L. Ed. 230.

93. Right to deduct amount paid to fund for helpless Indians.—This is as much a part of the original price as that paid the Indians for cutting, and neither is to be deducted. Pine River Logging Co. *v.* United States, 186 U. S. 279, 299, 46 L. Ed. 1164.

94. Who entitled to share in Western Cherokee lands.—United States *v.* Old Settlers, 148 U. S. 427, 37 L. Ed. 509.

The ownership of land west of the Mississippi by the Western Cherokees was put at rest by the treaty of 1846, which provided that such lands were for the use of the whole Cherokee Nation, including the Eastern as well as the Western Cherokees. United States *v.* Old Settlers, 148 U. S. 427, 37 L. Ed. 509.

95. Right to share in property or funds of Cherokees.—The Cherokee Trust Funds, 117 U. S. 288, 308, 29 L. Ed. 880.

The Cherokees in North Carolina dissolved their connection with their nation when they refused to accompany the body of it on its removal, and they have had no separate political organization since. Whatever union they have had among themselves has been merely a social or business one. Nor is the band, organized as it now is, the successor of any organization recognized by any treaty or law of the United States. The Cherokee Trust Funds, 117 U. S. 288, 309, 29 L. Ed. 880.

If Indians in that state or in any other state east of the Mississippi wish to enjoy the benefits of the common property of the Cherokee Nation, in whatever form it may exist, they must, as held by the court of claims, comply with the constitution and laws of the Cherokee Nation and be readmitted to citizenship as there provided. They cannot live out of its territory, evade the obligations and burdens of citizenship, and at the same time enjoy the benefits of the funds and common property of the nation. Those funds and that property were dedicated by the constitution of the Cherokees, and were intended by the treaties with the United States, for the benefit of the united nation, and not in any respect for those who had separated from it and become aliens to their nation. The Cherokee Trust Funds, 117 U. S. 288, 311, 29 L. Ed. 880.

are not entitled to share in the commuted annuity fund of the Cherokee Nation,[96] nor to share in the proceeds of the sale of western lands.[97]

(b) *Fund Allowed for Removal of Cherokees.*—The Eastern Cherokees,[98] and the eastern band of Cherokees residing in North Carolina,[99] are entitled to share in the fund allowed by the United States to the Cherokee Nation for the express purpose of removing to lands set apart for the nation west of the Mississippi. But the Old Settlers or Western Cherokees were not entitled to share therein.[1]

(2) *Annuities Granted to Tribe Which Has Separated.*—Where an annuity was granted to an Indian tribe which had separated, it was held that both bands were entitled to share therein in proportion to their respective numbers.[2]

b. *Individuals Entitled to Share in Tribal Funds.*—The question as to what individual Indians are entitled to share in a fund allowed by the court of claims to a tribe or band is one to be dealt with by the authorities or the government in distributing the fund and not by the court of claims.[3]

9. Mineral and Oil Lands.—The act of June 28, 1898, providing for the

96. Right to share in commuted annuity fund.—The Cherokee Trust Funds, 117 U. S. 288, 308, 29 L. Ed. 880.

97. Right to share in proceeds of western lands.—The Cherokee Trust Funds, 117 U. S. 288, 308, 29 L. Ed. 880.

The claim by the Cherokees of North Carolina to a share of the commuted annuity fund of $214,000, and of the fund created by sales of lands west of the Mississippi ceded to the Cherokee Nation, resting, as it does, upon the designation in the treaties of the lands originally possessed by the Cherokees and ceded to the United States, or subsequently acquired by them from the United States, as "the common property of the nation," or as held for the "common use and benefit," of the Cherokee people, has no substantial foundation. The Cherokee Trust Funds, 117 U. S. 288, 308, 29 L. Ed. 880.

98. Right of Eastern Cherokees to share in funds awarded Cherokees as expense of removal.—United States *v.* Cherokee Nation, 202 U. S. 101, 50 L. Ed. 949.

99. Right of eastern band of Cherokees to share in removal fund.—United States *v.* Cherokee Nation, 202 U. S. 101, 50 L. Ed. 949.

Under the acts of July 1, 1902, and March 3, 1903, which confer jurisdiction on the court of claims to adjudicate any claim the Cherokee tribe, or any bond thereof, may have against the United States, arising out of treaties, the Eastern and Emigrant Cherokees, numbering about 4,500 persons, more or less, all Eastern Emigrant Cherokees, residing in North Carolina, Alabama and Tennessee, together with about 1,500 emigrants, portions of their various families, gone west, nearly all of whom have been recognized as citizens, and who compose a large portion of those persons heretofore known as the Eastern Band of Cherokee Indians of North Carolina, and others of the same class, whose names, or those of whose ancestors, may be found on the rolls of 1835 and 1838, are only entitled to receive the per capita payment with the Eastern Cherokees out of the fund awarded the Indians for the removal of the Eastern Cherokees west of the Mississippi. United States *v.* Cherokee Nation, 202 U. S. 101, 132, 50 L. Ed. 949.

1. Right of Western Cherokees to share in fund allowed for removal of Indians.—United States *v.* Cherokee Nation, 202 U. S. 101, 50 L. Ed. 949.

2. Annuities granted to tribe which has separated.—The annuity of $2,000 for twenty years granted by the last clause of the supplementary treaty of September 27, 1833, with the Pottawatomie Indians, is distributable between the Indians who went west under the provision of the main treaty and those who remained in Michigan under the supplementary treaty, in proportion to their respective numbers. Phineas Pam-To-Pee *v.* United States, 148 U. S. 691, 37 L. Ed. 613.

The treaty of September 26, 1833, with the Pottawatomie Indians and the supplementary treaty of September 27, 1833, are substantially one, and the annuity given thereby to the Indians is distributable among both classes, those remaining east and those removing west, a just proportion thereof to each. Phineas Pam-To-Pee *v.* United States, 148 U. S. 691, 37 L. Ed. 613.

3. Individuals entitled to share in fund awarded by court of claims.—Phineas Pam-To-Pee *v.* United States, 148 U. S. 691, 37 L. Ed. 613; Pam-To-Pee *v.* United States, 187 U. S. 371, 382, 47 L. Ed. 221.

The question as to the individual Indians who are entitled to participate in the fund allowed by the court of claims to the Pottawatomie Indians of Michigan and Indiana for their just proportion of the amount due the Indians under the treaty of September 26, 1833, and the supplementary treaty thereto of September 27, 1833, is one to be dealt with by the authorities of the government when they come to distribute the fund, and cannot be passed upon by the court of claims.

allotments of Indian lands among the members of the tribe and providing that oil, coal, asphalt and mineral deposits on the lands of any tribe are reserved to the tribe, and authorizing the secretary of the interior to provide for the leasing of such lands, the rents and royalties to be paid into the United States treasury for the benefit of the tribe, is valid.[4] Parties desiring to lease oil and mineral lands are not necessarily parties to a suit by the Cherokee Nation against the secretary of the interior to enjoin him from making the lease.[5]

10. Intrusion on Indian Lands.—It is competent for a state to prohibit and make unlawful, the settlement of any persons other than Indians on lands of Indian tribes within the state.[6] Congress has made it unlawful for any person, not an Indian, to settle on land belonging, secured, or granted by treaty, to an Indian tribe.[7] The pueblo Indians in New Mexico are not an "Indian tribe" within the meaning of the act.[8]

B. Individual Property Rights—1. Power of Indians to Acquire and Hold Property.—In Mexico, Indians are competent to take and hold real property.[9]

Phineas Pam-To-Pee *v.* United States, 148 U. S. 691, 37 L. Ed. 613.

The 5th article of the treaty of 1846 with the Cherokees provided that the per capita allowance to be given to the Western Cherokees should be held in trust by the United States, the individuals entitled thereto to be ascertained by a committee of five appointed by the president from the Western Cherokees, and an agent of the United States. It was held that under the act of February 25, 1889, conferring jurisdiction upon the court of claims to ascertain the amount due to the Western Cherokees, this clause of the treaty should be followed in making the per capita distribution. United States *v.* Old Settlers, 148 U. S. 427, 37 L. Ed. 509.

Jurisdiction of court of claims to determine whether judgment in favor of tribe has been properly executed. See the title COURTS, vol. 4, p. 1034.

4. Mineral and oil lands.—Cherokee Nation *v.* Hitchcock, 187 U. S. 294, 47 L. Ed. 183. See the title MINES AND MINERALS.

The court is not concerned with the question whether the act of June 28, 1898, and the proposed action thereunder, which is complained of, is or is not wise, and calculated to operate beneficially to the interests of the Cherokees. The power existing in congress to administer upon and guard the tribal property, and the power being political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the courts. Cherokee Nation *v.* Hitchcock, 187 U. S. 294, 308, 47 L. Ed. 183.

5. Parties to suit to enjoin lease.—Cherokee Nation *v.* Hitchcock, 187 U. S. 294, 47 L. Ed. 183. See the title PARTIES.

6. Power of state to prohibit settlement on Indian lands.—State of New York *v.* Dibble, 21 How. 366, 16 L. Ed. 149.

As to forfeiture under Indian laws, of buildings erected within Indian country, see post, "Effect of Indian Laws," IV, C, 2.

A statute of the state of New York, making it unlawful for any persons other than Indians to settle or reside upon any lands belonging to or occupied by any nation or tribe of Indians within that state, and providing for the summary ejectment of such persons, is not in conflict with the constitution of the United States, or any treaty, or act of congress, and the proceedings under it did not deprive the persons thus removed of property or rights secured to them by any treaty or act of congress. State of New York *v.* Dibble, 21 How. 366, 16 L. Ed. 149.

7. Act of congress prohibits settlement on Indian lands.—United States *v.* Joseph, 94 U. S. 614, 24 L. Ed. 295; Worcester *v.* Georgia, 6 Pet. 515, 519, 8 L. Ed. 483.

Citizens of the United States are not permitted to encroach on the Cherokee country, and intruders thereon are subject to punishment. Worcester *v.* Georgia, 6 Pet. 515, 519, 8 L. Ed. 483.

8. Land of pueblo Indians not lands of "Indian tribe."—A settled upon land belonging to the Indians of the village or pueblo of Toas, in New Mexico. Held: 1. That he was not liable under the acts of congress which prohibit a settlement by any person on land belonging, secured, or granted by treaty with the United States, to any Indian tribe. 2. That they have a complete title to their land, and are not an Indian tribe within the meaning of those acts. United States *v.* Joseph, 94 U. S. 614, 24 L. Ed. 295.

9. Power of Indians to hold lands in Mexico.—United States *v.* Ritchie, 17 How. 525, 15 L. Ed. 236.

The plan of Iguala, adopted by the revolutionary government of Mexico, in 1821, and all the successive public documents and decrees of that country, recognized an equality amongst all the inhabitants, whether Europeans, Africans, or Indians; and the decree of 1824, providing for colonization, recognized the citizenship of the Indians, and their right

2. Allotment of Lands to Indians—a. *Persons Entitled to Allotments*—(1) *Power of Congress to Provide for Ascertaining.*—Congress has power to provide a method for determining membership in the five civilized tribes, and for ascertaining the citizenship thereof preliminary to a division of the property of the tribe among its members.[10]

(2) *White Persons Married to Indians.*—White person residing in the Cherokee Nation, who became Cherokee citizens by intermarriage with Cherokees by blood, prior to November 1, 1875, are equally interested in and have equal per capita rights with Cherokee Indians by blood in the lands constituting the public domain of the Cherokee Nation, and are entitled to be enrolled in order that they may share in the allotment.[11] But white persons who intermarried with Cherokees subsequent to the passage of the Cherokee act of November 1, 1875, which provided that intermarriage with Cherokees should not give a right in the lands or funds of the Indians,[12] or white persons intermarrying with the Delaware or Shawnee citizens of the Cherokee Nation, whether married prior or subsequent to November 1, 1875,[13] or white men who have married Cherokee women, and abandoned them,[14] or white persons who intermarried with Cherokees by blood and who subsequently, being left a widow or widower by the death of the Cherokee wife or husband, intermarried with persons not of Cherokee blood,[15] have no part or share in the Cherokee lands or funds, and are not entitled to be enrolled for participation in the allotment thereof.

to hold land. United States *v.* Ritchie, 17 How. 525, 15 L. Ed. 236.

10. Power of congress to provide for ascertainment of persons entitled to share.—Cherokee Nation *v.* Hitchcock, 187 U. S. 294, 307, 47 L. Ed. 183; Stephens *v.* Cherokee Nation, 174 U. S. 445, 43 L. Ed. 1041.

"The constitutionality of these acts in respect of the determination of citizenship cannot be successfully assailed on the ground of the impairment or destruction of vested rights. The lands and moneys of these tribes are public lands and public moneys, and are not held in individual ownership, and the assertion by any particular applicant that his right therein is so vested as to preclude inquiry into his status involves a contradiction in terms." Cherokee Nation *v.* Hitchcock, 187 U. S. 294, 306, 47 L. Ed. 183; Stephens *v.* Cherokee Nation, 174 U. S. 445, 43 L. Ed. 1041.

11. White persons married to Cherokees prior to 1875.—Cherokee Intermarriage Cases, 203 U. S. 76, 51 L. Ed. 96.

To what property interest attaches.—White persons residing in the Cherokee Nation, who became Cherokee citizens under the Cherokee laws by intermarriage with the Cherokees by blood prior to the 1st of November, 1875, acquired no rights and had no interest or share in any funds belonging to the Cherokee Nation except where such funds were derived by lease, sale or otherwise from the lands of the Cherokee Nation conveyed to it by the United States by the patent of December, 1838. Cherokee Intermarriage Cases, 203 U. S. 76, 79, 51 L. Ed. 96.

12. White persons marrying Cherokees after 1875.—Cherokee Intermarriage Cases, 203 U. S. 76, 51 L. Ed. 96.

It is a settled rule of construction that, as between the whites and the Indians, the laws are to be construed most favorably to the latter; hence, the fact that the act of congress of July 1, 1902 (32 Stat. at Large 716, ch. 1375), containing the following provision: "No white person who has intermarried with a Cherokee citizen since December 16, 1895, shall be entitled to enrollment or to participate in the distribution of the tribal property of the Cherokee Nation," was ratified by the Cherokee Nation, August 7, 1902, does not make the said act of congress a treaty, nor does it amount to a grant of property rights to white persons who intermarried with Indians prior to the date of December 16, 1895. The doctrine that the denial of a right is the grant of a right is a poor basis for a grant of land. Cherokee Intermarriage Cases, 203 U. S. 76, 51 L. Ed. 96.

13. White persons married to adopted members of Cherokee nation.—Cherokee Intermarriage Cases, 203 U. S. 76, 51 L. Ed. 96.

White persons who intermarried with the Delaware or Shawnee citizens of the Cherokee Nation, either prior or subsequent to November 1, 1875, did not thereby become citizens of the Cherokee Nation, and hence have no part or share in the Cherokee property, and are not entitled to participate in the allotment of the lands or distribution of the funds of the Cherokee Nation, and are not entitled to be enrolled for such purposes. Cherokee Intermarriage Cases, 203 U. S. 76, 51 L. Ed. 96.

14. White men abandoning Cherokee wives.—Cherokee Intermarriage Cases, 203 U. S. 76, 51 L. Ed. 96.

15. White persons remarrying after death of Cherokee wife or husband.—

(3) *White Members of Tribe or Nation.*—The provision of the amendment of Cherokee constitution to the effect that white persons legally members of the nation are to be deemed citizens of the Cherokee Nation, did not amount to a grant of property rights to such persons, but only related to the eligibility of such persons to membership in the national council.[16]

(4) *Indians Adopted into Tribe or Nation.*—Where Indians of one tribe or nation are adopted into another by treaty between the latter and the United States, by which it is agreed that, upon compliance with the terms of the treaty, the Indians adopted shall be entitled to the rights, privileges and immunities of native citizens of the adopting tribe or nation, members of the adopted tribe are entitled to share in the distribution of the common property of the adopting tribe, equally with those who are members thereof by blood.[17]

Cherokee Intermarriage Cases, 203 U. S. 76, 51 L. Ed. 96.

16. White members of Indian tribes or nations.—The amendment, made in 1866, to the Cherokee constitution of 1839, must be taken as a whole, and when so taken it is found that it related to eligibility to a seat in the national council—to civil and political rights, and not to property rights. The contention that the words "citizens of the Cherokee Nation" should be construed as relating to the constitutional provision of 1839, that the lands of the nation should be common property, is without merit in view of the provisions themselves. Cherokee Intermarriage Cases, 203 U. S. 76, 86, 51 L. Ed. 96.

17. Indians adopted into tribe or nation.—Cherokee Nation *v.* Blackfeather, 155 U. S. 218, 39 L. Ed. 126; Cherokee Nation *v.* Journeycake, 155 U. S. 196, 39 L. Ed. 120; Delaware Indians *v.* Cherokee Indians, 193 U. S. 127, 143, 48 L. Ed. 646.

Rights of Delawares in property of Cherokees.—By the fifteenth article of the treaty of July 19, 1866, made between the United States and the Cherokee Nation, contemplating the settlement of other Indians within the limits of the Cherokee country, and the agreement of April 8, 1867, between the Cherokees and Delawares, the purpose of which agreement was "a location of the Delawares upon the Cherokee lands and their consolidation with the Cherokee Nation," the Delawares, who as to the sums to be paid to the Cherokees, complied with the terms of that treaty and removed to the Cherokee settlement, became incorporated into, and a part of, the Cherokee Nation on equal terms in every respect with native Cherokees, and as such entitled to equal rights with native Cherokees in the public lands of the Cherokee Nation. Cherokee Nation *v.* Journeycake, 155 U. S. 196, 39 L. Ed. 120.

In the agreement between the Delaware Indians and the Cherokee Nation, made April 7, 1867, incorporating certain Delawares into the Cherokee Nation, the said Cherokee Nation agreed to sell to the said Delawares certain lands "for occupancy," each registered Delaware to have 160 acres, the ownership and occupancy of said lands by the Delawares being subject to the same conditions and restrictions as are, by the laws of the Cherokee Nation, imposed upon the native citizens thereof. It was further provided that in case of allotment of the Cherokee lands each registered Delaware would be entitled to 160 acres. The lands which were thus conveyed for occupancy are described as "Cherokee lands." Construing these terms of the agreement, the court held that the registered Delawares acquired in these lands only the right of occupancy during life, with a right upon allotment of the lands, to not less than 160 acres together with their improvements, and the children and descendants of such Delawares took only the rights of other citizens of the Cherokee Nation as the same are regulated by its laws. Delaware Indians *v.* Cherokee Indians, 193 U. S. 127, 143, 48 L. Ed. 646.

Right of Shawnees in property of Cherokees.—Where, in pursuance of the treaty of July 19, 1866, made between the United States and the Cherokee Nation, the Shawnees and the Cherokee Nation entered into an agreement on June 7, 1869, containing the following stipulation: "That the said Shawnees shall be incorporated into and ever after remain a part of the Cherokee Nation on equal terms in every respect, and with all the privileges and immunities of native citizens of said Cherokee Nation," it is held that the said stipulation secured to the Shawnees equal rights with the Cherokees in that which was the common property of the Cherokee Nation, to wit, the reservation and the outlet as well as all profits and proceeds thereof. Cherokee Nation *v.* Blackfeather, 155 U. S. 218, 39 L. Ed. 126.

By the 25th section of the act of June 28, 1898, authorizing the Delaware Indians residing in the Cherokee Nation to bring suit in the court of claims of the United States against the Cherokee Nation, for the purpose of determining the rights of said Delaware Indians in and to the lands and funds of said nation under their contract of agreement with the Cherokee Nation of April 8, 1867, it was not intended to authorize inquiry into the administration of the political affairs of the Cherokee Nation with a view to set-

(5) *Negroes Living within, But Not Adopted by, Indian Nation.*—Chickasaw and Choctaw freedmen living within the Chickasaw and Choctaw country, without having been adopted by those nations, are not entitled to share in the allotment of Chickasaw and Choctaw property or funds.[18] Nor are they entitled to participate in the funds agreed to be paid by the United States to freedmen who were willing to remove from the Indian country, and who were removed therefrom by congress.[19]

(6) *Necessity for Allottee to Reside on Reservation.*—An act providing for the allotment of lands to bands of Indians residing on an Indian reservation relates to the residence of the bands upon the reservation as bands, and the fact that a member of the band resides off a reservation does not defeat his right to an allotment.[20]

ting aside the adoption of the constitutional amendments and the revision of political action in admitting persons to citizenship in the nation under authority of its constitution. Delaware Indians *v.* Cherokee Indians, 193 U. S. 127, 144, 48 L. Ed. 646.

18. **Negroes living within, but not adopted by, Indian nation.**—United States *v.* Choctaw Nation, 193 U. S. 115, 126, 48 L. Ed. 640.

A treaty was concluded between the United States and the Choctaw and Chickasaw Indians on January 10, 1873, relating to freed persons of African descent. In 1873 the Chickasaw legislature in conformity with article 3 of said treaty passed an act adopting such freed persons as members of their tribe upon certain conditions, but the act was only to have force and effect "from and after the approval by the proper authority of the United States." This act was not approved by the United States until 1894. In the meantime in 1876 the Chickasaws passed an act by which it was declared to be the unanimous consent of the Chickasaw legislature that the United States exercise the right given to it for the benefit of American freedmen by the treaty of 1866 and remove said freedmen from the Chickasaw territory. In 1885 the Chickasaw legislature passed another act declaring "that the Chickasaw people hereby refuse to accept or adopt the freedmen as citizens of the Cherokee Nation upon any terms or conditions whatever." Upon this state of facts it was held that the ratification by Congress in 1894 of the Chickasaw act of 1873 did not make the freedmen members of the Chickasaw Nation, and necessarily did not acquire the right dependent upon adoption, for, before said act of Congress was passed, the Chickasaw Nation had withdrawn their consent. United States *v.* Choctaw Nation, 193 U. S. 115, 126, 48 L. Ed. 640.

19. United States *v.* Choctaw Nation, 193 U. S. 115, 126, 48 L. Ed. 640.

Chickasaw and Choctaw freedmen, who were not actually removed by congress from the territory of the Chickasaw Nation in accordance with the third article of the treaty of July 10, 1866, even though they expressed a willingness to remove, are not entitled to share in the fund, which was to be paid to the Chickasaw and Choctaw Indians on the adoption of the freedmen aforesaid into the said tribes "with all the rights, privileges and immunities of citizens of said nations," and in default of such adoption to be held by the United States "for the use and benefit of such of said persons of African descent as the United States shall remove from the said territory." United States *v.* Choctaw Nation, 193 U. S. 115, 126, 48 L. Ed. 640.

20. **Residence on reservation as prerequisite.**—Hy-Yu-Tse-Mil-Kin *v.* Smith, 194 U. S. 401, 48 L. Ed. 1039, holding that a member of the Walla Walla tribe of Indians was entitled to an allotment in the Umatilla reservation in the state of Oregon even though not residing on the reservation at the time of the passage of the act of March 3, 1885, providing for the allotment of lands in that reservation to the confederated bands of Cayuse, Walla Walla and Umatilla Indians residing on that reservation.

The purpose of the act would fall very far short of accomplishment were the allotments confined exclusively to those actually residing within the limits of the reservation, while those who were absent therefrom, but still within the old limits of the land, and were members of the band, recognized as such, should be held not entitled to the allotments under the act, simply because of residence outside of the described limits of the reservation. Hy-Yu-Tse-Mil-Kin *v.* Smith, 194 U. S. 401, 412, 48 L. Ed. 1039.

If the individual were a member of the tribe or band, recognized as such by his chiefs, it was not necessary that such person should be an actual resident of the reservation when the act was passed. Hy-Yu-Tse-Mil-Kin *v.* Smith, 194 U. S. 401, 413, 48 L. Ed. 1039.

"When such a large percentage of allottees upon this reservation resided as did the appellee, elsewhere than actually upon the reservation at the date of the passage of the act of 1885, it cannot be that the act passed was intended to limit the right to an allotment to those actually residing on the reservation to the ex-

(7) *Finality of Decision as to Right of Allotment.*—When the question as to who are members of a tribe and entitled to allotments of land, is left to the secretary of interior,[21] or to an Indian agent,[22] this decision is final, and is not subject to control by mandamus.[23]

(8) *Whether Right to First Selection Lost by Making Second.*—If an Indian entitled to an allotment of lands makes his selection of a tract prior to that of any one else, his right to the allotment is not lost by the selection of other lands, where the tract first selected by him is allotted by the government agents to another Indian upon the ground that the first claimant was not entitled to an allotment.[24]

b. *Right of Allottee to Timber on Allotted Lands.*—Individual members of an Indian tribe to whom land has been allotted in pursuance of an act of congress, may cut and sell the timber growing upon the land, notwithstanding the fact that the title thereto is held in trust by the United States for the benefit of the Indians.[25]

clusion of a majority of the members of the different bands or tribes. The fact of such nonresidence is presumed to have been known by congress, and the act should be construed with reference to that knowledge." Hy-Yu-Tse-Mil-Kin *v.* Smith, 194 U. S. 401, 413, 48 L. Ed. 1039.

21. Decision of secretary of interior is final.—United States *v.* Hitchcock, 205 U. S. 80, 51 L. Ed. 718.

By the second article of the agreement of June 4, 1891, with the Wichita and Affiliated Bands of Indians, the United States agreed that there should be allotted to each member of the bands, native and adopted, one hundred and sixty acres of the lands ceded by that agreement to the government, to be selected by the members, the selection to be approved by the secretary of the interior. It was held that it was for the secretary of the interior to decide who were members of the bands entitled to allotments and that his judgment was final. United States *v.* Hitchcock, 205 U. S. 80, 51 L. Ed. 718.

Sections 441, 463, of the Revised Statutes, the latter of which provides that the commissioner of Indian affairs shall, under the direction of the secretary of the interior, and agreeably to such regulations as the president may prescribe, have the management of all Indian affairs and of all matters arising out of the Indian relations, gives the secretary of the interior authority to decide on whether a person has been adopted into the Indian tribe or not and to determine whether such a person is entitled to an allotment of lands agreed to be given to members of the tribes by the government. United States *v.* Hitchcock, 205 U. S. 80, 51 L. Ed. 718.

Where the secretary is authorized to pass on the right of a person to Indian lands as a member of the tribe, his jurisdiction does not depend upon his decision being right. The court cannot make an inquisition into his mental processes to see that they are correct. United States *v.* Hitchcock, 205 U. S. 80, 51 L. Ed. 718.

22. Conclusiveness of decision by Indian agent.—The decision of a special Indian agent identifying Indian half-breeds entitled to participate, and in allotting the portion of each, is, in the absence of fraud, conclusive. Hegler *v.* Faulkner, 153 U. S. 109, 117, 38 L. Ed. 653; Wilcox *v.* Jackson, 13 Pet. 498, 511, 10 L. Ed. 264.

23. Mandamus to compel secretary to make allotment.—The decision of the secretary of the interior as to who were members of the tribes and entitled to selections under act of June 4, 1891, with the Wichita and Affiliated Bands of Indians, could not be controlled by mandamus. United States *v.* Hitchcock, 205 U. S. 80, 51 L. Ed. 718.

24. Selection of other lands as defeating right to first selection.—Hy-Yu-Tse-Mil-Kin *v.* Smith, 194 U. S. 401, 48 L. Ed. 1039.

This is especially true where the government agents advised the Indians that the second selection would not impair his right to insist upon the validity of the first. Hy-Yu-Tse-Mil-Kin *v.* Smith, 194 U. S. 401, 48 L. Ed. 1039.

25. Right to sell timber from allotments held in trust.—United States *v.* Paine Lumber Co., 206 U. S. 467, 51 L. Ed. 1139, distinguishing United States *v.* Cook, 19 Wall. 591, 592, 22 L. Ed. 210.

"The title is held by the United States, it is true, but it is held 'in trust for individuals and their heirs to whom the same were allotted.' The considerations, therefore, which determined the decision in United States *v.* Cook, 19 Wall. 591, 592, 22 L. Ed. 210, do not exist. The land is not the land of the United States, and the timber when cut did not become the property of the United States. And we cannot extend the restraint upon the alienation of the land to a restraint upon the sale of the timber consistently with a proper and beneficial use of the land by the Indians, a use which can in no way affect any interest of the United States." United States *v.* Paine Lumber Co., 206 U. S. 467, 51 L. Ed. 1139.

The Indian allottees under the Stockbridge and Munsie treaty of 1856 (11 Stat.

c. *Sale of Allotment*—(1) *Right to Sell*—(a) *In Absence of Restriction.*—When the rights of the nation are extinguished, an individual of the nation who takes as private owner may, unless restricted by treaty stipulations, sell his interest.[26]

(b) *Restrictions on Sale*—aa. *Postponement of Right to Sell.*—Where an Indian takes up lands, under the act of March 3, 1875, providing that the land so taken up shall not be aliened by the Indian for five years, the day of the issuance of the patent is to be counted in computing the time when the right to alien accrues.[27]

bb. *Lands Held in Trust for Indians.*—Lands allotted to Indians under the act of February 8, 1887, and held in trust by the United States for the benefit of the allottee, cannot be sold or conveyed by the allottee.[28]

cc. *Lands of Minor Allottees.*—Where minor allottees are prohibited from aliening their allotments, a deed by a guardian purporting to convey the lands of his ward, a minor allottee, though made by authority of the probate court, is void.[29]

(2) *Mode of Sale*—(a) *Compliance with Statute.*—A statute granting pieces of lands to Indians, and prescribing a specific mode in which they may sell, forbids by implication a sale independently of the mode.[30]

(b) *Approval of Deed by President or Secretary.*—By statute or treaty deeds by Indians for the sale and transfer of their individual title are sometimes required to be approved by the president,[31] or secretary of the interior.[32] When

663) and the act of congress of 1871 (16 Stat. 404) were vested with sufficient title in their allotments to authorize the cutting of timber, for sale and not by way of improvements, without the approval of the department of the interior. United States *v.* Paine Lumber Co., 206 U. S. 467, 470, 51 L. Ed. 1139.

26. Right of Indian to sell land.—Doe *v.* Wilson, 23 How. 457, 463, 16 L. Ed. 584.

The Indian title is property, and alienable, unless the treaty had prohibited its sale. Doe *v.* Wilson, 23 How. 457, 463, 16 L. Ed. 584.

27. When right to alien accrues, where time limit fixed.—Taylor *v.* Brown, 147 U. S. 640, 37 L. Ed. 313 (holding that an Indian to whom a patent issued June 15, 1880, could alien the same by deed dated June 15, 1885). Generally, as to computation of time, see the title TIME. See, also, the title PUBLIC LANDS.

28. Right of allottee to sell and convey allotment.—United States *v.* Rickert, 188 U. S. 432, 436, 47 L. Ed. 532.

29. Restriction on alienation by minor allottees held by guardian.—Wiggan *v.* Conolly, 163 U. S. 56, 41 L. Ed. 69. Compare Dunbar *v.* Green, 198 U. S. 166, 49 L. Ed. 998.

By the terms of the treaty of 1867 between the United States and the Ottawa Indians, patents were to issue to the heads of families and to all among the allottees coming of age "so that they may sell their lands without restriction;" and this provision in reference to patents must be considered as superseding those of the treaty of 1862 and as introducing a new limitation on the alienability of lands patented to a minor allottee, that is, the limit of minority. And such limit must be applied to sales voluntary and involuntary, and cut off the right of a guardian to dispose of the real estate of his ward; hence, a deed made by a guardian, though under the authority of the probate court of the county of the state in which the lands were situated, conveyed no title. Wiggan *v.* Conolly, 163 U. S. 56, 61, 41 L. Ed. 69.

30. Compliance with statute as to mode of sale.—Smith *v.* Stevens, 10 Wall. 321, 19 L. Ed. 933.

31. Approval by president.—Jones *v.* Meehan, 175 U. S. 1, 21, 44 L. Ed. 49; Pickering *v.* Lomax, 145 U. S. 310, 36 L. Ed. 716; Lomax *v.* Pickering, 173 U. S. 26, 43 L. Ed. 601; Lykins *v.* McGrath, 184 U. S. 169, 173, 46 L. Ed. 485; Smith *v.* Stevens, 10 Wall. 321, 19 L. Ed. 933.

In the Treaty of Prairie du Chien of July 29, 1829, between the United States and certain nations of Chippewa, Ottawa and Pottawatomie Indians, article 4 provided that "there shall be granted by the United States" to each of the persons named, being descendants from Indians, sections of land, and that "the tracts of land herein stipulated to be granted shall never be leased or conveyed by the grantees or their heirs to any persons whatever without the permission of the president of the United States." Under this provision, no alienation could be valid without the approval of the president. Pickering *v.* Lomax, 145 U. S. 310, 36 L. Ed. 716; Lomax *v.* Pickering, 173 U. S. 26, 43 L. Ed. 601; Jones *v.* Meehan, 175 U. S. 1, 21, 44 L. Ed. 49.

32. Approval by secretary of interior.—Smith *v.* Stevens, 10 Wall. 321, 19 L.

this is the case approval subsequent to the execution of the deed, even if after the death of the grantee and the sale of the land by his representatives, is sufficient.[33] The approval need not be recorded in the recorder's office in the state where the land lies.[34] By approval of a deed the title of the grantor is wholly divested, and there is nothing left upon which a subsequent approval can operate.[35]

(3) Rights and Title of Purchaser.—The effect of a warranty deed by an Indian as passing after-acquired title is treated in another title.[36] One claiming title through an Indian, the head of a family, to whom a patent in fee simple has issued from the United States in pursuance of a treaty, is entitled to hold all the land, unaffected with any trust in favor of the Indian's children, even though the treaty contemplated that part of the lands were to be patented to, or for the benefit of, the Indian's children.[37]

Ed. 933; Lykins *v.* McGrath, 184 U. S. 169, 173, 46 L. Ed. 485.

Under the act of congress of May 26th, 1860, referring to the treaty of June 3d, 1825, between the United States and the nation of Kansas Indians (which reserved certain tracts of land for the benefit of particular half-breed Kansas Indians named), and granting "the title, interest, and estate of the United States," to the reservees mentioned in that treaty, and providing that the secretary of the interior, when requested by any one of the Indians named, "is hereby authorized" to sell the piece reserved for such Indians; the reservees had no authority to sell the lands independently of assent by the secretary of the interior; and any such sale was void. Smith *v.* Stevens, 10 Wall. 321, 19 L. Ed. 933.

33. Time of approval.—Pickering *v.* Lomax, 145 U. S. 310, 36 L. Ed. 716; Lykins *v.* McGrath, 184 U. S. 169, 173, 46 L. Ed. 485.

Article 4 of the treaty of Prairie du Chien granting certain lands to Indians therein named and prohibiting the grantees from conveying the same except by permission of the president, is satisfied by the president's approval indorsed upon a deed thirteen years after its execution, and after the death of the grantee and the sale of the land by his administrator. Pickering *v.* Lomax, 145 U. S. 310, 36 L. Ed. 716.

The approval by the secretary may be retroactive and take effect by way of relation as of the date of the deed, and where it appears from the fact of the approval by the secretary that the Indian grantor received full payment for his land and was in no manner imposed upon in the conveyance, and where the plaintiffs have no equitable rights superior to those of the grantee in that deed, the title conveyed must be upheld. Lykins *v.* McGrath, 184 U. S. 169, 173, 46 L. Ed. 485.

34. Recording approval.—Lomax *v.* Pickering, 173 U. S. 26, 29, 43 L. Ed. 601.

Where there is a record of the approval of the president in the department at Washington of the sale of lands held by an Indian under the treaty of Prairie du Chien, that record is notice of all concerned from the time it is made, and the recording laws of the state do not require a copy of that record to be recorded in the recorder's office where the land is located. A record of that character is similar to a patent issued by the president for lands that belong to the government, which is not required to be recorded in the county where the land is located. Lomax *v.* Pickering, 173 U. S. 26, 29, 43 L. Ed. 601.

35. Approval of deed exhausts power to approve.—Lomax *v.* Pickering, 173 U. S. 26, 31, 43 L. Ed. 601.

36. Effect of warranty deed by Indian as passing after-acquired title.—See the title ESTOPPEL, vol. 5, p. 913.

37. Right of bona fide purchaser from Indian, to whom excess has been patented.—Wilson *v.* Wall, 6 Wall. 83, 18 L. Ed. 727.

It seem that under the treaty of the United States with the Choctaws, in 1830, by which the United States agreed that each Choctaw head of a family desirous to remain and become a citizen, etc., should be entitled to one section of land; "and in like manner shall be entitled to one-half that quantity for each unmarried child which is living with him over ten years of age, and a quarter section to such child as may be under ten years of age, to adjoin the location of the parent;" no trust was meant to be created in favor of the children. They were named only as measuring the quantity of land that should be assigned to the head of the family. But, however this may be, if under the assumption that no trust was meant to be created, the United States have issued under the treaty a patent to a Choctaw head of a family, individually and in fee simple for all the sections, a purchaser from him bona fide and for value will not be affected with the trust, even though he knew that his vendor was a Choctaw head of a family, and in a general way that he had the land in virtue of the treaty. Wilson *v.* Wall, 6 Wall. 83, 18 L. Ed. 727.

Where it is sought to affect a bona fide purchaser for value with constructive

d. *List or Census of Allottees as Evidence.*—A census or list filed in the office of Indian affairs, containing the names and ages of half-breeds, who, upon testimony presented to that office, were regarded as entitled to participate in allotments or assignments of lands under the act of July 31, 1854, is not conclusive as to the age of the half-breeds at the time of the allotments, in an action between two persons to each of which he has granted the land.[38]

e. *Actions with Respect to Allotments*—(1) *Jurisdiction*—(a) *Prior to Act of 1894.*—Prior to the act of congress of August 15, 1894, the sole authority for settling disputes as to Indian allotments resided in the secretary of the interior.[39]

(b) *Under Act of 1894.*—Under the act of congress of August 15, 1894, all persons who are in whole or in part of Indian blood or descent, who are entitled to an allotment of land under any law of congress, or who claim to be so entitled to land under any allotment act or under any grant made by congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any act of congress, may commence and prosecute or defend any action, suit or proceeding in relation to their right thereto in the proper circuit court of the United States.[40] The jurisdiction thus conferred on the federal courts is exclusive.[41]

(2) *Parties.*—To a contest between two Indians claiming the same lands under an allotment, the United States is not a necessary party.[42]

(3) *Limitations.*—Where the tribal relations are dissolved by allotment of lands, the statute of limitations begins to run against the Indians from that time.[43] Where an Indian who is not competent to be entrusted with his estate, receives an allotment of land, with a restriction against alienation within five years, or even then without the consent of the president, and he conveys in disobedience of the restriction, the statute of limitations commences to run against him and his heirs, and in favor of his grantee, as soon as his incom-

notice, the question is not whether he had the means of obtaining, and might by prudent caution have obtained the knowledge in question, but whether his not obtaining it was an act of gross or culpable negligence. Wilson *v.* Wall, 6 Wall. 83, 18 L. Ed. 727.

38. Conclusiveness or recital of age of allottee in list of those entitled to allotment.—Hegler *v.* Faulkner, 153 U. S. 109, 38 L. Ed. 653.

39. Jurisdiction of claims to allotments prior to 1894.—McKay *v.* Kalyton, 204 U. S. 458, 468, 51 L. Ed. 566; Hy-Yu-Tse-Mil-Kin *v.* Smith, 194 U. S. 401, 407, 48 L. Ed. 1039.

Prior to the act of congress of 1894, controversies necessarily involving a determination of the title and incidentally of the right to the possession of Indian allotments while the same were held in trust by the United States, were not primarily cognizable by any court, either state or federal. McKay *v.* Kalyton, 204 U. S. 458, 468, 51 L. Ed. 566.

40. Jurisdiction of claims to allotments under act of 1894.—McKay *v.* Kalyton, 204 U. S. 458, 468, 51 L. Ed. 566; Hy-Yu-Tse-Mil-Kin *v.* Smith, 194 U. S. 401, 407, 48 L. Ed. 1039.

41. Jurisdiction of federal courts exclusive.—The act of congress of 1894, which delegated to the courts of the United States the power to determine such questions, cannot be construed as having conferred upon the state courts the authority to pass upon federal questions over which, prior to the act of 1894, no court had any authority. The purpose of the act of 1894 to continue the exclusive federal control over the subject is manifested by the provision of that act, which commands that a judgment or decree rendered in any such controversy shall be certified by the court to the secretary of the interior. McKay *v.* Kalyton, 204 U. S. 458, 468, 51 L. Ed. 566.

42. United States not a necessary party to action between rival claimants.—Hy-Yu-Tse-Mil-Kin *v.* Smith, 194 U. S. 401, 48 L. Ed. 1039.

43. Limitations as against allottees.—Schrimpscher *v.* Stockton, 183 U. S. 290, 297, 46 L. Ed. 203.

"Conceding, but without deciding, that so long as Indians maintain their tribal relations they are not chargeable with laches or failure to assert their claims within the time prescribed by statutes, as to which see Felix *v.* Patrick, 145 U. S. 317, 330, 36 L. Ed. 719, they would lose this immunity when their relations with their tribe were dissolved by accepting allotments of lands in severalty." Schrimpscher *v.* Stockton, 183 U. S. 290, 297, 46 L. Ed. 203.

petency is removed.[44]

3. Reservations to Individuals by Treaty of Cession—a. *Who May Select Where Reservation Is to "Head of Family."*—Under a treaty providing that each head of a family may make a selection of one-half section of land, a grandmother, living with her grandchildren, is the head of the family, and entitled to make a selection.[45]

b. *On What Lands Reservation May Be Located.*—Strictly speaking, of course, Indians in whose favor a reservation to be selected is made by treaty ceding their lands to the United States, can only locate on the lands ceded to the government.[46] But if scrip issued to the Indians as an evidence of the land to which they are entitled under the reservation, is located by them, or by purchasers from them, on lands not a part of the territory ceded by the tribe to the United States, congress may provide that the locators thereof may hold the land located upon the payment to the government of the regular price for public lands.[47]

c. *When Title Becomes Complete.*—The treaty of May 24th, 1834, with the Chickasaw Indians (7 Stat. at Large 450) confers title to the reservations contemplated by it, which was complete when the locations were made to identify them, and reservees are not obliged, in addition to proving that the locations were made by the proper officers, to prove also that the conditions on which these officers were authorized to act had been observed by them.[48]

d. *Necessity for Patent.*—A good title to parts of the lands of an Indian tribe may be granted to individuals by a treaty between the United States and the tribe, without any act of congress, or any patent from the executive authority of the United States.[49]

44. Limitation of action for recovery of allotments sold contrary to restriction.—Schrimpscher *v.* Stockton, 183 U. S. 290, 46 L. Ed. 203.

Under article 4 of the treaty of January 31, 1855, with the Wyandotte Indians, providing for the allotment of certain lands among the tribes, it was stipulated that patents issued to those not competent to be entrusted with the control and management of their affairs and interests should contain an express condition that the lands were not to be sold or alienated for a period of five years, and not then without the consent of the president of the United States. A patent issued under this treaty to one who was incompetent contained a clause stipulating that it "could not be sold without the consent of the secretary of the interior within five years." The patentee sold the land without the consent of the secretary in 1864, and in 1867 another treaty was concluded removing all restrictions on the rights of Indians under the former treaty to convey their interest and providing for the examination of sales made by incompetents in violation of the first treaty and a ratification or disaffirmance of them by the secretary of the interior, as their interests might require. It was held that the statute of limitation commenced to run against the heirs of the patentee as soon as the latter treaty became binding. Schrimpscher *v.* Stockton, 183 U. S. 290, 46 L. Ed. 203.

45. Who may make selection—Head of family.—Ladiga *v.* Roland, 2 How. 581, 11 Ed. 387.

46. Fee *v.* Brown, 162 U. S. 602, 40 L. Ed. 1086.

The reservation for the use of members of the Chippewa tribe of Indians made by the act of December 19, 1854, "to provide for the extinguishment of the title of the Chippewa Indians to the lands owned and claimed by them," can only be made on the territory ceded to the United States, whether made by Indians of pure or mixed blood. Fee *v.* Brown, 162 U. S. 602, 40 L. Ed. 1086.

47. Fee *v.* Brown, 162 U. S. 602, 40 L. Ed. 1086.

The act of June 8, 1872, "to perfect certain land titles," was intended to validate locations made by persons who have purchased land scrip from members of the Chippewa tribe, contrary to the provisions of the statute, upon compliance with that act, the substance of which was that the locator was required to pay to the government not less than $1.25 per acre for the land located. Fee *v.* Brown, 162 U. S. 602, 40 L. Ed. 1086.

48. When title becomes complete.—Best *v.* Polk, 18 Wall. 112, 21 L. Ed. 805.

49. Grants to individuals by treaty of cession.—Jones *v.* Meehan, 175 U. S. 1, 44 L. Ed. 49; Best *v.* Polk, 18 Wall. 112, 21 L. Ed. 805; Holden *v.* Joy, 17 Wall. 211, 21 L. Ed. 523; Crews *v.* Burcham, 1 Black 352, 17 L. Ed. 91; United States *v.* Brooks, 10 How. 442, 13 L. Ed. 489; Mitchel *v.* United States, 9 Pet. 711, 9 L. Ed. 283; Johnson *v.* McIntosh, 8 Wheat.

e. *Conflict between Reservees as to Locations.*—Under a treaty giving certain members of an Indian tribe the right to select and locate a certain amount of lands out of lands ceded to the government by the tribe, and giving the president authority to select certain lands for orphan children of the tribe, the president cannot choose lands embraced in the selections made by members of the tribe under the other provisions of the treaty.[50]

f. *Title or Interest of Reservees*—(1) *Nature of Estate or Interest.*—A reservation in a treaty ceding Indian lands to the United States, creates a fee simple in the reservee in the absence of words limiting its effect.[51]

(2) *School Lands within Reservation.*—Where there are reservations, in Indian treaties, of specific tracts of land, which are afterwards found to be the

543, 5 L. Ed. 681; New York Indians *v.* United States, 170 U. S. 1, 42 L. Ed. 927; Francis *v.* Francis, 203 U. S. 233, 51 L. Ed. 165. See, also, the title PUBLIC LANDS.

50. Conflict between locations.—By a treaty made between the United States and the Creek tribe of Indians, east of the Mississippi river, on the 24th of March, 1832, it was stipulated: That ninety principal chiefs of the tribe should be allowed to select one section each. That every other head of a Creek family should be allowed to select one-half section each; and that these tracts should be reserved from sale, for their use, for the term of five years, unless sooner disposed of by them. That twenty selections should be made, under the direction of the president, for the orphan children of the Creeks, and divided and retained or sold for their benefit as the president should direct. Held, that in making the selections for the orphan children, the president had no authority, under the treaty, to choose any land embraced by the two preceding clauses. Ladiga *v.* Roland, 2 How. 581, 11 L. Ed. 387.

51. Estate created by reservation.—Jones *v.* Meehan, 175 U. S. 1, 21, 44 L. Ed. 49; Francis *v.* Francis, 203 U. S. 233, 238, 51 L. Ed. 165; United States *v.* Brooks, 10 How. 442, 13 L. Ed. 489; Marsh *v.* Brooks, 8 How. 223, 12 L. Ed. 1056.

When the United States, in a treaty with an Indian tribe, and as part of the consideration for the cession by the tribe of a tract of country to the United States, make a reservation to a chief or other member of the tribe of a specified number of sections of land, whether already identified, or to be surveyed and located in the future, the treaty itself converts the reserved sections into individual property, the reservation, unless accompanied by words limiting its effect, is equivalent to a present grant of a complete title in fee simple. Jones *v.* Meehan, 175 U. S. 1, 21, 44 L. Ed. 49; Francis *v.* Francis, 203 U. S. 233, 238, 51 L. Ed. 165.

The only reasonable construction of all the provisions of the treaty of October 2, 1863, between the United States and the Red Lake and Pembina bands of Chickasaw Indians, taken together, is that the ninth article, by which "there shall be set apart from the tract hereby ceded a reservation of six hundred and forty acres near the mouth of the Thief River for the chief, Moose Dung," and a reservation of a like quantity of land at another place designated for the chief, Red Bear, was intended by the United States, and was understood by the Indians, and took effect, as a present grant to each of these two chiefs of an alienable title in fee in that quantity of land at the designated place, subject only to its selection in due form, and to the definition of its boundaries by survey and patent. Jones *v.* Meehan, 175 U. S. 1, 23, 44 L. Ed. 49.

A supplementary article to a treaty between the United States and the Caddo Indians, providing that certain persons "shall have their right to the said four leagues of land reserved for them and their heirs and assigns forever. The said lands to be taken out of the lands ceded to the United States by the said Caddo Nation of Indians, as expressed in the treaty to which these articles are supplementary. And the four leagues of land shall be laid off," etc.—gave to the reservees a fee simple to all the rights which the Caddoes had in those lands, as fully as any patent from the government could make one. Nothing further was contemplated by the treaty to perfect the title. United States *v.* Brooks, 10 How. 442, 13 L. Ed. 489.

The plaintiff in a writ of right produced a patent from the United States, dated in 1839, which contained sundry recitals, referring to titles of anterior date derived from acts of congress for the adjustment of claims to lands. But the patent itself was issued under an act of congress in 1836. The defendant, in order to show an outstanding title, gave in evidence a treaty between the United States and the Sac and Fox Indians, in which this, with other lands, was reserved for the half-breeds, and an act of congress passed in 1834 relinquishing the reversionary interest of the United States to these half-breeds. This was sufficient to show an outstanding title. The recitals in a patent are not enough to show that the title is of an earlier date than the patent itself, although they are evidence for some purposes. Nor was it necessary for the defendant to show that any of the half-breeds were in existence at the time of the trial. Marsh *v.* Brooks, 8 How. 223, 12 L. Ed. 1056.

sections set apart for school purposes, under a general law, the reservees have the better title. They hold under the original Indian title which the United States confirmed in the treaty.[52]

g. *Sale or Conveyance by Reservee.*—The title acquired by Indians to land reserved by treaty for them, is alienable by the grantee at his pleasure,[53] unless the United States, by a provision of the treaty, or of an act of congress, have expressly or impliedly prohibited or restricted its alienation.[54] The government cannot defeat the title or the right to alien by a restriction in the patent sub-

52. School lands within reservation.—Gaines *v.* Nicholson, 9 How. 356, 13 L. Ed. 172.

"But where the reservee claimed under a float, no specific tract of land being designated for him in the treaty, this court abstains from expressing an opinion, that being the legal question pending in the court below." Gaines *v.* Nicholson, 9 How. 356, 13 L. Ed. 172.

53. Right of reservee to alien.—Jones *v.* Meehan, 175 U. S. 1, 13, 44 L. Ed. 49; Francis *v.* Francis, 203 U. S. 233, 238, 51 L. Ed. 165; Crews *v.* Burcham, 1 Black 352, 17 L. Ed. 91.

Where a treaty with an Indian tribe reserves a certain quantity of land, to be afterwards selected by the president, and patented to an individual of the tribe, such reservation creates an equitable estate in the reservee to the land reserved, which he may sell, and upon the selection and patenting of the land, the title will vest in his grantee. This is held to be the rule in a case where the reservee conveyed his interest under the treaty, and died before the issuing of the patent. In a contest between the grantee of the reservee himself under a conveyance before the patent, and the grantee of his heir under a deed made after the land was selected and patented, the title of the former party must prevail. Crews *v.* Burcham, 1 Black 352, 17 L. Ed. 91; Elwood *v.* Flannigan, 104 U. S. 562, 26 L. Ed. 842.

In a treaty made with the Pottawatomie Indians in 1832, there were reservations to individual Indians, which should be selected under the direction of the president of the United States, "after the land shall have been surveyed, and the boundaries shall correspond with the public surveys." Before this was done, one of these reservees made a conveyance by a deed in fee simple, with a clause of general warranty. In 1837, patents were issued for the reservations. This deed vested the title of the reservee in the grantee. The former was a tenant in common with the United States, and could sell his reserved interest; and when the United States selected the lands reserved to him, and made partition (of which the patent is conclusive evidence), his grantee took the interest which the reservee would have taken if living. A prayer to the court that the land patented was not the same as that reserved was properly refused, because the recital in the patent was conclusive evidence to the contrary. Doe *v.* Wilson, 23 How. 457, 16 L. Ed. 584.

It is no objection to the right of the first grantee that the land finally patented did not lie within the district ceded by the treaty which made the reservation, because the recitals in the patent are conclusive; and, at any rate, third parties have no right to impugn the patent for such a reason. Crews *v.* Burcham, 1 Black 352, 17 L. Ed. 91.

Under a lease executed by the heir of an Indian, to whom a strip of land had been granted by the United States, title passed for the term of the lease, and the rights of the lessees could not be divested by any subsequent action of the lessor, or of congress, or of the executive department. Jones *v.* Meehan, 175 U. S. 1, 44 L. Ed. 49.

After-acquired title as passing by deed.—See the titles ESTOPPEL, vol. 5, p. 913; PUBLIC LANDS.

54. Restriction on right of alienation.—Libby *v.* Clark, 118 U. S. 250, 30 L. Ed. 133; Jones *v.* Meehan, 175 U. S. 1, 20, 44 L. Ed. 49.

In the treaty of June 24, 1862, between the United States and a tribe of Ottawa Indians, article 3 provided as follows: "It being the wish of said tribe of Ottawas to remunerate several of the chiefs, councilmen and headmen of the tribe for their services to them many years without pay, it is hereby stipulated that five sections of land are reserved and set apart for that purpose, to be apportioned among the said chiefs, councilmen and headmen as the members of the tribe shall in full council determine; and it shall be the duty of the secretary of the interior to issue patents in fee simple of said lands, when located and apportioned, to said Indians." 12 Stat. 1238. In Libby *v.* Clark, 118 U. S. 250, 30 L. Ed. 133, the federal supreme court, approving and affirming the judgment of the supreme court, of Kansas, delivered by Mr. Justice Brewer, in 14 Kansas 435, held that a deed to a white person from one of those chiefs, of land patented to him pursuant to the treaty, but executed before he had become a citizen of the United States, was void, for the single reason that the treaty itself, as construed by the court, expressly provided, in article 7, that no Indian should alien or encumber the land allotted to him until he had, according to the terms of the treaty, become a citizen of the United

sequently issued which prohibits alienation without the consent of the president.[55]

4. Descent and Distribution.—The right of inheritance in the property of a member of an Indian tribe, whose tribal organization is recognized by the government of the United States, is controlled by the laws, usages and customs of the tribe, and not by the law of the state within which the tribe is located, nor by any action of the secretary of the interior.[56]

5. Right to Hunt on Lands of United States.—A treaty giving Indians the right to hunt on the unoccupied lands of the United States, so long as peace subsists between the whites and Indians on the borders of the hunting districts, does not authorize the Indians to hunt on the unoccupied lands of the United States, within a state, contrary to the laws of the state.[57]

6. Right of Fishery.—The right of Indians to fish at the usual and accustomed places within the territory of the United States may be secured to them by treaty,[58] and such a right, when so secured, is binding as well against a state subsequently admitted within which the fishing rights secured by treaty are located, and its grantees, as against the United States and its grantees.[59] Fishing rights thus secured to Indians cannot be defeated by licenses from the state to

States. Jones *v.* Meehan, 175 U. S. 1, 20, 44 L. Ed 49.

55. Effect of restriction in patent on right of alienation.—Francis *v.* Francis, 203 U. S. 233, 238, 51 L. Ed. 165.

An alienable title in fee simple passed by the treaty of September 24, 1819, with the Chippawa Indians to the children of Bokowtonden, and the patent issued in 1827, regarding the reservation of 640 acres of land contained in said treaty, only located or made definite the boundaries of the tract reserved to them by the said treaty. It follows that the words in the patent of 1827, "but never to be conveyed by them or their heirs without the consent and permission of the president of the United States," were ineffectual as a restriction upon the power of alienation. The president had no authority, in virtue of his office, to impose any such restriction; certainly not, without the authority of an act of congress, and no such act was ever passed. Francis *v.* Francis, 203 U. S. 233, 51 L. Ed. 165.

56. Descent and distribution.—Jones *v.* Meehan, 175 U. S. 1, 29, 44 L. Ed. 49; Mackey *v.* Coxe, 18 How. 100, 15 L. Ed. 299.

By the laws, usages and customs of the Chippewa Indians, the eldest son and successor of a chief inherited the land of his father, to the exclusion of other descendants. Jones *v.* Meehan, 175 U. S. 1, 31, 44 L. Ed. 49.

57. Right to hunt on unoccupied lands of United States within state.—Ward *v.* Race Horse, 163 U. S. 504, 41 L. Ed. 244.

Article 4 of the treaty of February 24, 1869, with the Bannock Indians which provides that "they shall have the right to hunt upon the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists between the whites and Indians on the borders of the hunting districts" did not confer upon such Indians the right to hunt and kill game upon the unoccupied lands of the United States, within a state, contrary to the municipal laws of the state, but only authorized them to hunt upon the unoccupied lands of the United States which were of the character embraced within what the treaty denominates as hunting districts. Ward *v.* Race Horse, 163 U. S. 504, 41 L. Ed. 244.

"Hunting districts" as used in the treaty does not merely signify places where game is to be found. Ward *v.* Race Horse, 163 U. S. 504, 41 L. Ed. 244.

58. Right to fish secured by treaty with United States.—United States *v.* Winans, 198 U. S. 371, 49 L. Ed. 1089.

59. Right to fish binding against United States and grantees thereof.—United States *v.* Winans, 198 U. S. 371, 49 L. Ed. 1089.

The treaty of 1859 between the United States and the Yakima Indians in the territory of Washington reserving to the Indians "the right of taking fish at all usual and accustomed places in common with citizens of the territory, and of erecting temporary places for curing them," was intended to be continuing against the United States and its grantees as well as against the state and its grantees. United States *v.* Winans, 198 U. S. 371, 49 L. Ed. 1089.

The right of fishing secured to the Yakima Indians by reservation in the treaty of 1859, in common with the citizens of the territory of Washington, is binding upon the state of Washington when admitted into the Union. United States *v.* Winans, 198 U. S. 371, 49 L. Ed. 1089.

Patents for lands in the state of Washington are subject to the rights secured to Indians by the treaty of 1859, securing to them the right of fishing at the usual and accustomed places in common with citizens of the territory. United States *v.* Winans, 198 U. S. 371, 49 L. Ed. 1089.

persons other than Indians to erect and maintain fishing wheels, where the use of such device would interfere with the Indians' rights of fishery,[60] and their use, in accordance with the license, may be enforced.[61]

IV. Government of Indians and Indian Country.

A. Power of United States—1. In General.—It is well established that the Indian tribes residing within the territorial limits of the United States are subject to their authority.[62] Thus, the United States may regulate the tribal relations,[63] legislate with respect to tribal lands,[64] provide for the establishment of courts in which Indians may prosecute or defend[65] and provide for the punishment of crimes in the Indian country.[66]

2. Regulation of Trade or Commerce with Indians.—See the title Interstate and Foreign Commerce.

3. Mode of Governing Indians—a. *Formerly Governed by Treaties.*—Prior to the act of March 3, 1871, the customary mode of dealing with Indian

60. Use of fishing wheels by licensee from state excluding Indians.—United States *v.* Winans, 198 U. S. 371, 49 L. Ed. 1089.

The clause in the treaty of 1859 with the Yakima Indians securing to them the right to fish in the territory of Washington at the usual and accustomed places, in common with citizens of the territory, would be nullified by the occupation of the usual places by devices known as fish wheels erected and operated by white men, and where such devices are erected and operated, even though under license from the state, Indians are entitled to relief by injunction. United States *v.* Winans, 198 U. S. 371, 49 L. Ed. 1089.

A license from a state to white men to maintain a fishing wheel within the state gives no power to them to use it as to exclude Indians from the right of taking fish at the usual and accustomed places, in common with citizens of the territory secured to them by treaty with the United States prior to the admission of the state as such. United States *v.* Winans, 198 U. S. 371, 49 L. Ed. 1089.

61. Injunction against fishing wheels interfering with fishing rights.—United States *v.* Winans, 198 U. S. 371, 49 L. Ed. 1089.

62. Power of congress.—United States *v.* Rogers, 4 How. 567, 572, 11 L. Ed. 1105; The Cherokee Tobacco, 11 Wall. 616, 619, 20 L. Ed. 227; United States *v.* Kagama, 118 U. S. 375, 384, 30 L. Ed. 228; United States *v.* Holliday, 3 Wall. 407, 409, 18 L. Ed. 182; Cherokee Nation *v.* Southern Kansas R. Co., 135 U. S. 641, 34 L. Ed. 295; Talton *v.* Mayes, 163 U. S. 376, 384, 41 L. Ed. 196.

"The Indians and the territory which may have been specially set apart for their use, are subject to the jurisdiction of the United States, and congress may pass such laws as it sees fit prescribing the rules governing the intercourse of the Indians with one another and with citizens of the United States, and also the courts in which all controversies to which an Indian may be a party shall be submitted. United States *v.* Rogers, 4 How. 567, 11 L. Ed. 1105; United States *v.* Kagama, 118 U. S. 375, 30 L. Ed. 228; Gon-Shay-ee, Petitioner, 130 U. S. 343, 32 L. Ed. 973; Cherokee Nation *v.* Southern Kansas R. Co., 135 U. S. 641, 34 L. Ed. 295." Roff *v.* Burney, 168 U. S. 218, 221, 42 L. Ed. 442.

63. Control of tribal relations.—Lone Wolf *v.* Hitchcock, 187 U. S. 553, 565, 47 L. Ed. 299; Matter of Heff, 197 U. S. 488, 498, 49 L. Ed. 848.

In Lone Wolf *v.* Hitchcock, 187 U. S. 553, 565, 47 L. Ed. 299, it was said: "Plenary authority over the tribal relations of the Indians has been exercised by congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government." Matter of Heff, 197 U. S. 488, 498, 49 L. Ed. 848.

64. Legislation as to tribal lands.—Lone Wolf *v.* Hitchcock, 187 U. S. 553, 567, 47 L. Ed. 299; Choctaw Nation *v.* United States, 119 U. S. 1, 27, 30 L. Ed. 306; Stephens *v.* Cherokee Nation, 174 U. S. 445, 43 L. Ed. 1041.

Indians who have not been fully emancipated from the control and protection of the United States are subject so far as the tribal lands are concerned, to be controlled by direct legislation of congress. Choctaw Nation *v.* United States, 119 U. S. 1, 27, 30 L. Ed. 306; Stephens *v.* Cherokee Nation, 174 U. S. 445, 483, 43 L. Ed. 1041; Lone Wolf *v.* Hitchcock, 187 U. S. 553, 567, 47 L. Ed. 299. See ante, "Property Rights of Nations or Tribes," III. A.

65. Establishment of courts.—Roff *v.* Burney, 168 U. S. 218, 221, 42 L. Ed. 442. See post, "Jurisdiction over Indians and Indian Country," V.

66. Punishment of crimes in Indian country.—Where the country occupied by Indians is not within the limits of one of the states, congress may, by law, punish any offense committed there, no matter whether the offender be a white man or an Indian. The Cherokee Tobacco, 11 Wall.

tribes was by treaty.[67] The legislation of congress could constitutionally be extended to embrace Indians in the Indian country, by the mere force of a treaty, whenever it operates of itself, without the aid of any legislative provision.[68]

b. *Now Governed by Act of Congress.*—But the act of March 3, 1871, voiced the intention of congress thereafter to make the Indian tribes amenable directly to the power and authority of the laws of the United States by the immediate exercise of its legislative power over them. The customary mode of dealing with the Indian tribes was by treaty.[69]

4. Control and Investment of Indian Funds.—Congress is vested with authority to adopt measures to make tribal property productive, and secure therefrom an income for the benefit of the tribe.[70] The statute of limitations does not run against the United States as to securities purchased by them with funds belonging to the Indian tribes and held in trust by the government for the use of the Indians.[71]

5. Removal of Indians.—The sole power to enforce the removal of Indians from a state to territory set apart for them is in the United States. A state cannot enforce the removal of Indians from the state, even though the Indians have agreed to remove within a certain time and failed to do so.[72] Under the treaties of May 23, 1836, and August 6, 1846, between the United States and the

616, 619, 20 L. Ed. 227; United States v. Rogers, 4 How. 567, 572, 11 L. Ed. 1105.

67. Governed by treaties.—Matter of Heff, 197 U. S. 488, 498, 49 L. Ed. 848; Lone Wolf v. Hitchcock, 187 U. S. 553, 566, 47 L. Ed. 299; United States v. Kagama, 118 U. S. 375, 30 L. Ed. 228; Cherokee Nation v. Hitchcock, 187 U. S. 294, 305, 47 L. Ed. 183.

68. Extension of laws to Indians or Indian country by treaty.—United States v. Forty-Three Gallons of Whiskey, 93 U. S. 188, 23 L. Ed. 846; Holden v. Joy, 17 Wall. 211, 21 L. Ed. 523; The Cherokee Tobacco, 11 Wall. 616, 20 L. Ed. 227; Ex parte Crow Dog, 109 U. S. 556, 567, 27 L. Ed. 1030.

69. Direct legislation for Indians.—Rev. Stat., § 2079; Matter of Heff, 197 U. S. 488, 498, 49 L. Ed. 848; Lone Wolf v. Hitchcock, 187 U. S. 553, 566, 47 L. Ed. 299; United States v. Kagama, 118 U. S. 375, 30 L. Ed. 228; Cherokee Nation v. Hitchcock, 187 U. S. 294, 305, 47 L. Ed. 183.

"In United States v. Kagama, 118 U. S. 375, 30 L. Ed. 228, speaking of the Indians, the court said: 'After an experience of a hundred years of the treaty-making system of government, congress has determined upon a new departure—to govern them by acts of congress.'" Lone Wolf v. Hitchcock, 187 U. S. 553, 566, 47 L. Ed. 299.

While the government of the United States has recognized in the Indian tribes heretofore a state of semi-independence and pupilage, it has the right and authority, instead of controlling them by treaties, to govern them by acts of congress; they being within the geographical limit of the United States, and being necessarily subject to the laws which congress may enact for their protection and for the protection of the people with whom they come in contact. United States v. Kagama, 118 U. S. 375, 30 L. Ed. 228.

70. Power of congress to invest Indian funds.—Cherokee Nation v. Hitchcock, 187 U. S. 294, 307, 47 L. Ed. 183; Stephens v. Cherokee Nation, 174 U. S. 445, 43 L. Ed. 1041.

71. Limitations in action by United States as to Indian trust funds.—United States v. Nashville, etc., R. Co., 118 U. S. 120, 30 L. Ed. 81. See the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION.

72. Enforcing removal of Indians from state.—Fellows v. Blacksmith, 19 How. 366, 15 L. Ed. 684; United States v. Kagama, 118 U. S. 375, 384, 30 L. Ed. 228.

The United States made two treaties, one in 1838, and one in 1842, with the Seneca Indians, residing in the state of New York, by which the Indians agreed to remove to the west within five years, and relinquish their possessions to certain assignees of the state of Massachusetts, and the United States agreed that they would appropriate a large sum of money to aid in the removal, and to support the Indians for the first year after their removal to their new residence. But neither treaty made any provision as to the mode or manner in which the removal of the Indians or surrender of the reservations was to take place. The grantees of the land, under the Massachusetts assignment, cannot enter upon it and take forcible possession of a farm occupied by an Indian, but are liable to an action of trespass, quare clausum fregit, if they do so. The removal of tribes of Indians is to be made by the authority and under the care of the government; and a forcible removal, if made at all, must be made under the direction of the United States. Fellows v. Blacksmith, 19 How. 366, 15 L. Ed. 684.

Cherokee Nation, the expense of removing the Eastern Cherokees to the lands west of the Mississippi River was to be borne by the United States.[73]

B. Power of States.—The Indians owe no allegiance to a state within which their reservation may be established, and the state gives them no protection. Hence, the states have no power over them as long as they maintain their tribal relations.[74] Even though Indians have sold their lands within a state, and agreed to remove away, the state cannot, so long as they remain there, extend its laws to them.[75]

C. Self-Government—1. POWER OF INDIANS TO GOVERN THEMSELVES.—The power of self-government has been conferred on many of the Indian nations by statute and treaties providing therefor.[76] The right of self-government is expressly secured to the Cherokees by treaty,[77] and that nation may, subject to the

73. Expense of removal to be borne by United States.—United States v. Cherokee Nation, 202 U. S. 101, 50 L. Ed. 949.

74. Power of states as to Indians on reservation.—United States v. Kagama, 118 U. S. 375, 30 L. Ed. 228; Matter of Heff, 197 U. S. 488, 506, 49 L. Ed. 848; Worcester v. Georgia, 6 Pet. 515, 520, 8 L. Ed. 483; United States v. Holliday, 3 Wall. 407, 18 L. Ed. 182.

The Cherokee nation is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with the treaties, and with the acts of congress; the whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States. Hence the act of the state of Georgia, of December 22, 1830, which attempted to interfere with them, was void. Worcester v. Georgia, 6 Pet. 515, 520, 8 L. Ed. 483.

The forcible seizure and abduction, under an act of the state legislature, of a person who was residing in the Cherokee Nation, with its permission, and by authority of the president of the United States, is also a violation of the acts which authorize the chief magistrate to exercise this authority, and also in direct hostility with treaties, repeated in a succession of years, which mark out the boundary that separates the Cherokee country from Georgia; guarantee to them all the land within their boundary; solemnly pledge the faith of the United States to restrain their citizens from trespassing on it; and recognize the pre-existing power of the nation to govern itself. Worcester v. Georgia, 6 Pet. 515, 520, 8 L. Ed. 483.

Neither the constitution of the state nor any act of its legislature, whatever rights it may confer on Indians or withhold from them, can withdraw them from the influence of an act of congress which that body has the constitutional right to pass concerning them. United States v. Holliday, 3 Wall. 407, 409, 419, 18 L. Ed. 182.

75. Extension of laws to Indians who fail to remove from state as agreed.—Worcester v. Georgia, 6 Pet. 515, 8 L. Ed. 483; United States v. Kagama, 118 U. S. 375, 384, 30 L. Ed. 228.

Where Indians had by treaty sold their land within that state, and agreed, to remove away, which they had failed to do, it was held that the state could not, while they remained on those lands, extend its laws, criminal and civil, over the tribes; that the duty and power to compel their removal was in the United States, and the tribe was under their protection, and could not be subjected to the laws of the state and the process of its courts. Worcester v. Georgia, 6 Pet. 515, 8 L. Ed. 483, quoted in United States v. Kagama, 118 U. S. 375, 384, 30 L. Ed. 228.

76. Self-government by Indians.—Cherokee Nation v. Georgia, 5 Pet. 1, 8 L. Ed. 25; United States v. Kagama, 118 U. S. 375, 382, 30 L. Ed. 228; Worcester v. Georgia, 6 Pet. 515, 581, 8 L. Ed. 483; The Cherokee Trust Funds, 117 U. S. 288, 29 L. Ed. 880; Delaware Indians v. Cherokee Indians, 193 U. S. 127, 144, 48 L. Ed. 646.

77. Self-government secured to Cherokees by treaty.—Worcester v. Georgia, 6 Pet. 515, 519, 8 L. Ed. 483; The Cherokee Trust Funds, 117 U. S. 288, 29 L. Ed. 880; Delaware Indians v. Cherokee Indians, 193 U. S. 127, 144, 48 L. Ed. 646; Cherokee Nation v. Southern Kansas R. Co., 135 U. S. 641, 654, 34 L. Ed. 295; Stephens v. Cherokee Nation, 174 U. S. 445, 484, 43 L. Ed. 1041; Atlantic, etc., R. Co. v. Mingus, 165 U. S. 413, 437, 41 L. Ed. 770; Mackey v. Coxe, 18 How. 100, 15 L. Ed. 299.

"The Cherokee Nation has many of the rights and privileges of an independent people. They have their own constitution and laws and power to administer their internal affairs. They are recognized as a distinct political community and treaties have been made with them in that character. The Cherokee Trust Funds, 117 U. S. 288, 29 L. Ed. 880." Delaware Indians v. Cherokee Indians, 193 U. S. 127, 144, 48 L. Ed. 646.

"In some respects they bear the same relation to the federal government as a territory did in its second grade of government under the ordinance of 1787. Such territory passed its own laws, subject to the approval of congress, and its inhabitants were subject to the constitution and

approval of congress, pass their own laws,[78] and establish their own courts with jurisdiction over internal affairs of the tribes or nations.[79] A treaty giving the United States sole and exclusive right of regulating the trade with the Indians, and managing all their affairs, does not amount to a surrender by the tribe of the rights of self-government.[80]

2. Effect of Indian Laws.—Indian tribes possessing the power of self-government may, of course, enact their own laws for the regulation of the internal affairs of the nation.[81] Thus, they may provide for the punishment of crimes by and against Indians in the Indian country,[82] provide for the forfeiture and sale of improvements made by the citizens within the Indian nation,[83]

acts of congress. The principal difference consists in the fact that the Cherokees enact their own laws, under the restriction stated, appoint their own officers, and pay their own expenses. This, however, is no reason why the laws and proceedings of the Cherokee territory, so far as relates to rights claimed under them, should not be placed upon the same footing as other territories in the Union. It is not a foreign, but a domestic territory —a territory which originated under our constitution and laws." Mackey *v.* Coxe, 18 How. 100, 15 L. Ed. 299; Atlantic, etc., R. Co. *v.* Mingus, 165 U. S. 413, 41 L. Ed. 770.

73. **Power of Cherokees to legislate.**—Atlantic, etc., R. Co. *v.* Mingus, 165 U. S. 413, 437, 41 L. Ed. 770; Cherokee Nation *v.* Southern Kansas R. Co., 135 U. S. 641, 654, 34 L. Ed. 295; Stephens *v.* Cherokee Nation, 174 U. S. 445, 484, 43 L. Ed. 1041.

The existence of the right in congress to regulate the manner in which the local powers of the Cherokee Nation shall be exercised does not render such local powers federal powers arising from and created by the constitution of the United States. As the powers of local self-government enjoyed by the Cherokee Nation existed prior to the constitution, they are not operated upon by the fifth amendment, which had for its sole object to control the powers conferred by the constitution on the national government. Talton *v.* Mayes, 163 U. S. 376, 384, 41 L. Ed. 196.

79. **Cherokee courts.**—See post, "Jurisdiction over Indians and Indian Country," V.

80. **Authority of United States to "manage affairs" of Indians as surrender of self-government.**—Worcester *v.* Georgia, 6 Pet. 515, 553, 8 L. Ed. 483.

"To construe the expression 'managing all their affairs,' into a surrender of self-government, would be, we think, a perversion of their necessary meaning, and a departure from the construction which has been uniformly put on them. The great subject of the article is the Indian trade; the influence it gave made it desirable that congress should possess it." Worcester *v.* Georgia, 6 Pet. 515, 553, 8 L. Ed. 483.

81. **Indian laws.**—Walker *v.* McLoud, 204 U. S. 302, 51 L. Ed. 495; Eddy *v.* Lafayette, 163 U. S. 456, 465, 41 L. Ed. 225; Cherokee Intermarriage Cases, 203 U. S. 76, 84, 51 L. Ed. 96; Worcester *v.* Georgia, 6 Pet. 515, 8 L. Ed. 483; United States *v.* Choctaw Nation, 193 U. S. 115, 48 L. Ed. 640; United States *v.* Rogers, 4 How. 567, 11 L. Ed. 1105.

The treaty of New Echota secures to the national counsels of the Cherokees the right to make and carry into effect such laws as they may deem necessary for the government and protection of the persons and property within their own country, belonging to their people, or such persons as have connected themselves with them, provided that such laws shall not be inconsistent with the constitution of the United States or acts of congress. United States *v.* Rogers, 4 How. 567, 11 L. Ed. 1105.

Laws as to descent and distribution.—See ante, "Descent and Distribution," III, B, 4.

Effect of errors of compiler.—See the title STATUTES.

82. **Punishment of crimes by and against Indians in Indian country.**—See post, "Jurisdiction over Indians and Indian Country," V.

83. **Forfeiture of buildings erected on Indian country.**—Walker *v.* McLoud, 204 U. S. 302, 51 L. Ed. 495 (building erected by railroad company outside of right of way).

Where the laws of the nation provide for a sale of such improvements for cash, a sale on credit passes no title. Walker *v.* McLoud, 204 U. S. 302, 51 L. Ed. 495.

Where the sale is invalid, an act of the Indian nation ratifying or providing for the enforcement of sales made in accordance with the Indian law is not effective to validate the sale. Walker *v.* McLoud, 204 U. S. 302, 51 L. Ed. 495.

Thus an act appropriating money to defend suits "in any manner relative to the full and complete execution of the laws of the Choctaw Nation by the sheriffs of each and every county in the confiscation of property of noncitizens who are now occupying lands or buildings, or who may thereafter occupy, not in conformity to the laws of the nation," does not amount to a ratification of a sale by a sheriff of the nation on credit, where the laws of the nation only authorized a sale for cash.

or prohibit the cutting of hay from the tribal lands by noncitizens of the tribe.[84] The court of claims of the United States cannot revise or set aside the laws of a tribe or nation without express authority for that purpose.[85]

V. Jurisdiction over Indians and Indian Country.

A. Criminal Jurisdiction—1. CRIMES BY INDIANS—a. *Crimes on Indian Reservation*—(1) *Indian Reservation within State*—(a) *State Courts.*—The state courts have no jurisdiction of crimes committed by Indians within Indian reservations within a state.[86]

(b) *United States Courts*—aa. *General Rule.*—Except where otherwise provided by statute, United States courts have exclusive jurisdiction of crimes committed by Indians upon an Indian reservation within a state.[87] And by the act of March 3, 1885, the United States courts are expressly given exclusive jurisdiction of the crimes of murder, manslaughter, rape, assault with intent to kill, arson, burglary and larceny when committed by Indians within a reservation within a state.[88]

bb. *Crimes against Other Indians.*—Prior to the act of March 3, 1885, United States courts had no jurisdiction of crimes by Indians against other Indians committed within an Indian reservation.[89] But as to the crimes of murder,

Walker *v.* McLoud, 204 U. S. 302, 51 L. Ed. 495.

84. Prohibiting cutting hay on tribal lands.—Eddy *v.* Lafayette, 163 U. S. 456, 465, 41 L. Ed. 225.

Where no law of the Creek Nation is shown forbidding a member of the nation from cutting hay on land occupied in common with other members of the nation, a statute of the nation which forbids such action by a noncitizen licensed trader, does not apply to a case where such a trader cuts and cures hay for a member of the Indian nation on shares. Eddy *v.* Lafayette, 163 U. S. 456, 465, 41 L. Ed. 225.

85. Revision or disregard of laws by court of claims.—Delaware Indians *v.* Cherokee Indians, 193 U. S. 127, 144, 48 L. Ed. 646.

86. State courts.—Rev. Stat., § 2145; Draper *v.* United States, 164 U. S. 240, 41 L. Ed. 419; United States *v.* Kagama, 118 U. S. 375, 383, 30 L. Ed. 228; Worcester *v.* Georgia, 6 Pet. 515, 536, 8 L. Ed. 483.

"In the case of Worcester *v.* Georgia, 6 Pet. 515, 8 L. Ed. 483, it was held that, though the Indians had by treaty sold their land within that state, and agreed to remove away, which they had failed to do, the state could not, while they remained on those lands, extend its laws, criminal and civil, over the tribes; that the duty and power to compel their removal was in the United States, and the tribe was under their protection, and could not be subjected to the laws of the state and the process of its courts. The same thing was decided in the case of Fellows *v.* Blacksmith, 19 How. 366, 15 L. Ed. 684." United States *v.* Kagama, 118 U. S. 375, 384, 30 L. Ed. 228.

87. United States courts.—As a general rule the general laws of the United States as to the punishment of crimes committed within the sole and exclusive jurisdiction of the United States, except the District of Columbia, extend to the Indian country. Rev. Stat., § 2145; Alberty *v.* United States, 162 U. S. 499, 40 L. Ed. 1051; Lucas *v.* United States, 163 U. S. 612, 41 L. Ed. 282; Smith *v.* United States, 151 U. S. 50, 55, 38 L. Ed. 67; Nofire *v.* United States, 164 U. S. 657, 662, 41 L. Ed. 588; In re Mayfield, 141 U. S. 107, 111, 35 L. Ed. 635; United States *v.* McBratney, 104 U. S. 621, 26 L. Ed. 869; United States *v.* Rogers, 4 How. 567, 11 L. Ed. 1105; Ex parte Crow Dog, 109 U. S. 556, 560, 27 L. Ed. 1030; United States *v.* Kagama, 118 U. S. 375, 30 L. Ed. 228.

88. Under act of 1885.—United States *v.* Thomas, 151 U. S. 577, 579, 38 L. Ed. 276; United States *v.* Kagama, 118 U. S. 375, 30 L. Ed. 228.

The act is constitutional.—United States *v.* Kagama, 118 U. S. 375, 30 L. Ed. 228.

Murder on school land added to state.—Where the evidence shows that a murder was committed upon section sixteen, in township forty north, of range eight west, in the state of Wisconsin, said section sixteen being within the outside limits of La Court Oreilles, Chippewa Indian reservation, and having been previously, in 1859, settled, platted, and set apart by the United States as a part and parcel of said reservation and ever after occupied by said Indians as such, though claimed and sold by the state of Wisconsin as and for a part of the school land previously ceded to said state by act of congress, such murder was committed within the limits of said reservation within the meaning of § 9 of ch. 341 of the act of congress, approved March 3, 1885, so as to give the federal courts jurisdiction of the offense. United States *v.* Thomas, 151 U. S. 577, 579, 38 L. Ed. 276.

89. Rule prior to 1885.—Ex parte Crow Dog, 109 U. S. 556, 27 L. Ed. 1030; United States *v.* Kagama, 118 U. S. 375, 30 L. Ed. 228; Westmoreland *v.* United States, 155

manslaughter, rape, assault with intent to kill, arson, burglary and larceny, the act of March 3, 1885, confers jurisdiction upon the courts of the United States, even when committed by an Indian upon another Indian within an Indian reservation within a state.[90] Under the act of May 2, 1890, the United States courts have no jurisdiction of crimes in which members of an Indian nation by nativity or adoption are the sole and only parties.[91]

cc. *Where Indian Has Been Punished by Tribal Court.*—It is provided by statute that the jurisdiction of the United States courts shall not extend to crimes committed by an Indian within the Indian country where the Indian has been punished by the local law of the tribe.[92]

dd. *Jurisdiction Secured to Tribal Courts by Treaty.*—United States courts have no jurisdiction of the crime committed by an Indian within an Indian reservation within a state where jurisdiction over such offenses has been secured to the tribal courts of the Indians by treaty.[93]

(c) *Tribal Courts—aa. Prior to Act of March 3, 1885.*—Prior to the act of March 3, 1885, courts of the Indian nations or tribes have exclusive jurisdic-

U. S. 545, 547, 39 L. Ed. 255; United States *v.* Rogers, 4 How. 567, 11 L. Ed. 1105.

Revised Statutes, § 2146, which excepts "crimes committed by one Indian against the person or property of another Indian," was not repealed by the treaty of 1868 with the Sioux nor by the act of congress of 1877 expressly or by implication. Ex parte Crow Dog, 109 U. S. 556, 570, 27 L. Ed. 1030.

Persons embraced within exception.—This exception does not embrace the case of a white man who, at mature age, is adopted into an Indian tribe. He is not an "Indian" within the meaning of the law. Hence, a plea set up by a white man, alleging that he has been adapted into an Indian tribe, and is not subject to the jurisdiction of the United States circuit court, is not valid. United States *v.* Rogers, 4 How. 567, 11 L. Ed. 1105.

90. Effect of act of 1885.—United States *v.* Kagama, 118 U. S. 375, 30 L. Ed. 228.

The act is constitutional.—United States *v.* Kagama, 118 U. S. 375, 30 L. Ed. 228.

The courts of the United States have jurisdiction or authority to try and punish an Indian belonging to an Indian tribe for committing the crime of murder upon another Indian belonging to the same Indian tribe, both sustaining the usual tribal relations, said crime having been committed upon an Indian reservation made and set apart for the use of the Indian tribe to which said Indians both belong. United States *v.* Kagama, 118 U. S. 375, 376, 30 L. Ed. 228.

"The provisions of said § 9 (of the act of congress of March 3, 1885), making it a crime for one Indian to commit murder upon another Indian, upon an Indian reservation situated wholly within the limits of a state of the Union, and making such Indian so committing the crime of murder within and upon such Indian reservation 'subject to the same laws' and subject to be 'tried in the same court and in the same manner, and subject to the same penalties as are all other persons' committing the crime of murder 'within the exclusive jurisdiction of the United States,' is a constitutional and valid law of the United States." United States *v.* Kagama, 118 U. S. 375, 376, 30 L. Ed. 228.

The circuit court of the United States for the district of California has jurisdiction of an indictment against two Indians for murder committed on the Indian reservation of Hoopa Valley, in the state of California, the person murdered being also an Indian of said reservation. United States *v.* Kagama, 118 U. S. 375, 30 L. Ed. 228.

91. Under act of May 2, 1890.—See post, "Under Act of May 2, 1890," V, A, 1, a, (1), (c), cc.

92. Crime for which Indian had been punished by tribal court.—Rev. Stat., § 2146; Ex parte Crow Dog, 109 U. S. 556, 27 L. Ed. 1030; Westmoreland *v.* United States, 155 U. S. 545, 547, 39 L. Ed. 255.

This statute (§ 2146 of the Revised Statutes) was not respected by the treaty of 1868 with the Sioux Indians, nor by the act of congress of 1877. Ex parte Crow Dog, 109 U. S. 556, 27 L. Ed. 1030.

93. Jurisdiction secured to tribal courts by treaty.—Rev. Stat., § 2146; Ex parte Crow Dog, 109 U. S. 556, 27 L. Ed. 1030; Talton *v.* Mayes, 163 U. S. 376, 381, 41 L. Ed. 196.

This statute (§ 2146, Rev. Stat.), was not repealed by the treaty of 1868 with the Sioux Indians, nor by the act of congress of 1877. Ex parte Crow Dog, 109 U. S. 556, 570, 27 L. Ed. 1030.

Under article 13 of the Cherokee treaty of July 19, 1866, the judicial tribunals of the Cherokee Nation are given exclusive jurisdiction in all civil and criminal cases arising within their country in which members of the country by nativity or adoption, shall be the only parties, or where the cause of action shall arise in the Cherokee Nation except as otherwise provided in the treaty. Alberty *v.* United States, 162 U. S. 499, 40 L. Ed. 1051; In

tion over crimes committed by Indians against Indians within an Indian reservation within a state.[94]

bb. *Under Act of March 3, 1885.*—But by that act the United States courts are given jurisdiction as to crimes of murder, manslaughter, rape, assault with intent to kill, arson, burglary and larceny, even when committed by an Indian against another Indian within an Indian reservation within a state.[95]

cc. *Under Act of May 2, 1890.*—Under the act of congress of May 2, 1890, judicial tribunals of the Indian nations were given exclusive jurisdiction in all civil and criminal cases arising in the country in which members of the nation by nativity or by adoption were the sole and only parties.[96] The words sole and only parties as applied to criminal cases means parties to the crime and not parties to the prosecution.[97] Thus, the courts of the Indian nations have exclusive jurisdiction of the crime of murder of one member of the nation by another,[98] and of the crime of adultery by an Indian with a white woman, com-

re Mayfield, 141 U. S. 107, 35 L. Ed. 635.

94. Rule prior to act of 1885.—Ex parte Crow Dog, 109 U. S. 556, 27 L. Ed. 1030; United States *v.* Kagama, 118 U. S. 375, 30 L. Ed. 228.

95. Effect of act of 1885.—United States *v.* Kagama, 118 U. S. 375, 30 L. Ed. 228.

96. Under act of May 2, 1890.—Alberty *v.* United States, 162 U. S. 499, 40 L. Ed. 1051; Lucas *v.* United States, 163 U. S. 612, 41 L. Ed. 282; Famous Smith *v.* United States, 151 U. S. 50, 55, 38 L. Ed. 67; Nofire *v.* United States, 164 U. S. 657, 662, 41 L. Ed. 588; Talton *v.* Mayes, 163 U. S. 376, 381, 41 L. Ed. 196.

The act of May 2, 1890, is entitled an act to provide a temporary government for the territory of Oklahoma and to enlarge the jurisdiction of the United States in the Indian territory. Alberty *v.* United States, 162 U. S. 499, 502, 40 L. Ed. 1051; In re Mayfield, 141 U. S. 107, 35 L. Ed. 635; Lucas *v.* United States, 163 U. S. 612, 41 L. Ed. 282.

The general object of these statutes is to vest in the courts of the nation jurisdiction of all controversies between Indians, or where a member of the nation is the only party to the proceeding, and to reserve to the courts of the United States jurisdiction of all actions to which its own citizens are parties on either side. In re Mayfield, 141 U. S. 107, 116, 35 L. Ed. 635.

A crime committed by one member of the Cherokee tribe against another is within the jurisdiction of the courts of the nation. Smith *v.* United States, 151 U. S. 50, 53, 38 L. Ed. 67.

The crime of murder committed by one Cherokee Indian upon the person of another within the jurisdiction of the Cherokee Nation is, therefore, clearly not an offense against the United States, but an offense against the local laws of the Cherokee Nation. Talton *v.* Mayes, 163 U. S. 376, 381, 41 L. Ed. 196.

By treaties and statutes of the United States the right of the Cherokee Nation to exist as an autonomous body, subject always to the paramount authority of the United States, has been recognized. And from this fact there has consequently been conceded to exist in that nation power to make laws defining offenses and providing for the trial and punishment by those who violate them when the offenses are committed by one member of the tribe against another one of its members within the territory of the nation. Talton *v.* Mayes, 163 U. S. 376, 379, 41 L. Ed. 196.

The statutes of the United States which provide for an indictment by a grand jury, and the number of persons who shall constitute such a body, have no application, for such statutes relate only, if not otherwise specially provided, to grand juries empaneled for the courts of and under the laws of the United States. Talton *v.* Mayes, 163 U. S. 376, 381, 41 L. Ed. 196.

97. Meaning of "sole and only parties."—Alberty *v.* United States, 162 U. S. 499, 40 L. Ed. 1051; Lucas *v.* United States, 163 U. S. 612, 41 L. Ed. 282.

98. Murder of one member of nation by another.—Alberty *v.* United States, 162 U. S. 499, 40 L. Ed. 1051; Lucas *v.* United States, 163 U. S. 612, 41 L. Ed. 282; Famous Smith *v.* United States, 151 U. S. 50, 55, 38 L. Ed. 67; Nofire *v.* United States, 164 U. S. 657, 662, 41 L. Ed. 588.

"While it is impossible to speak of the deceased in a murder case as a party, in any proper sense, to a criminal prosecution against his assailant, it can scarcely have been the intention of congress to vest jurisdiction in the federal courts of cases in which the accused, an Indian, was guilty of a felonious assault upon a white man, not resulting in death, and deny it in case of a fatal termination, upon the ground that the accused is the only party to the cause." Alberty *v.* United States, 162 U. S. 499, 504, 40 L. Ed. 1051.

Where it appears that a white person sought to become a citizen of the Cherokee Nation, took all the steps he supposed necessary therefor, considered himself a citizen, and that the Cherokee Nation in his lifetime recognized him as a citizen

mitted within the Indian country.[99] On the other hand, if in a murder case either the deceased or the accused are not members of the nation, the courts of the nation have no jurisdiction, but jurisdiction is in the United States courts.[1]

(2) *Indian Reservation within Territory*—(a) *United States Courts*—aa. *General Rule.*—Except where otherwise provided by statute or treaty United States courts have exclusive jurisdiction of crimes committed by Indians within an Indian reservation within a territory.[2]

and still asserts his citizenship, it must be adjudged that he was a citizen by adoption, and consequently that jurisdiction over the offense of murdering him, the murderers being Cherokee Indians, is, by the laws of the United States and treaties with the Cherokee Nation, vested in the courts of that nation. Nofire *v.* United States, 164 U. S. 657, 662, 41 L. Ed. 588.

A negro who has been adopted into the Choctaw tribe, and murders a member of the nation, is within the jurisdiction of its tribunals. Lucas *v.* United States, 163 U. S. 612, 615, 41 L. Ed. 282.

99. **Adultery by Indian with white woman in Indian country.**—In re Mayfield, 141 U. S. 107, 35 L. Ed. 635.

"In the case of Mayfield, 141 U. S. 107, 35 L. Ed. 635, which was a case of adultery, in which the name of the prosecuting witness did not appear, we held that as there was no adverse party, the woman being a consenting party, the defendant was to be regarded as the sole party to the proceeding." Alberty *v.* United States, 162 U. S. 499, 504, 40 L. Ed. 1051.

1. **When one party not an Indian.**—Alberty *v.* United States, 162 U. S. 499, 40 L. Ed. 1051; Lucas *v.* United States, 163 U. S. 612, 614, 41 L. Ed. 282.

In a murder case the defendant, a negro born in slavery, became a citizen of the Cherokee Nation under the ninth article of the treaty of 1866, which gave him the rights of a native Cherokee, but did not make him an Indian within the meaning of § 2146 of the Revised Statutes, or absolve him from responsibility to the criminal laws of the United States. The murdered man was the illegitimate child of a Choctaw Indian, by a colored woman, who was not his wife, but a slave in the Cherokee Nation. It was held that for the purposes of jurisdiction the defendant was a member of the Cherokee Nation, but not an Indian, that the murdered man was a colored citizen of the United States, and that the United States courts and not those of the Indian tribes had jurisdiction. Alberty *v.* United States, 162 U. S. 499, 40 L. Ed. 1051.

2. **Crimes by Indians within Indian reservation in territory.**—Rev. Stat., § 2145; Ex parte Crow Dog, 109 U. S. 556, 27 L. Ed. 1030; United States *v.* Pridgeon, 153 U. S. 48, 38 L. Ed. 631; United States *v.* Rogers, 4 How. 567, 11 L. Ed. 1105; United States *v.* Dawson, 15 How. 467, 14 L. Ed. 775.

The Indian tribes residing within the territorial limits of the United States are subject to their authority, and where the country occupied by them is not within the limits of any one of the states, congress may, by law, punish any offense committed there, no matter whether the offender be a white man or an Indian. United States *v.* Rogers, 4 How. 567, 11 L. Ed. 1105.

The treaty with the Cherokees, concluded at New Echota, in 1835, allows the Indian Council to make laws for their own people or such persons as have connected themselves with them. But it also provides that such laws shall not be inconsistent with acts of congress. The act of 1844, therefore, controls and explains the treaty. United States *v.* Rogers, 4 How. 567, 11 L. Ed. 1105.

In June, 1844, congress passed an act, by virtue of which the circuit court of the United States for the district of Arkansas, was vested with power to try offenses committed within the Indian country. In July, 1844, it was alleged that a murder was committed in that country. In April, 1845, an indictment was found by a grand jury, in the circuit court of the United States for the district of Arkansas, against a person charged with committing the murder. In March, 1851, congress passed an act erecting nine of the western counties and the Indian country into a new judicial district, directing the judge to hold two terms there, and giving him jurisdiction of all causes, civil or criminal, except appeals and writs of error, which are cognizable before a circuit court of the United States. The residue of the state remained a judicial district to be styled the eastern district of Arkansas. This act of congress did not take away the power and jurisdiction of the circuit court of the United States for the eastern district to try the indictment pending. United States *v.* Dawson, 15 How. 467, 14 L. Ed. 775.

Where an Indian reservation lies wholly within the limits of a territory, the district court of the territory having by law the jurisdiction of district and circuit courts of the United States, has jurisdiction of offenses committed against the laws of the United States by Indians within the limits of their reservations. Ex parte Crow Dog, 109 U. S. 556, 559, 27 L. Ed. 1030.

"**The Sioux reservation** is within the geographical limits of the Territory of Dakota, and being excepted out of it only in respect to the territorial government,

bb. *Offenses by Indians against Indian Agents, Policemen, Marshals, etc.*—Under the act of June 9, 1888, Indians committing offenses against Indian agents, policemen, deputy marshals, etc., in the Indian Territory, are subject to the laws of the United States relating to such crimes, and are to be tried by the district courts of the United States exercising criminal jurisdiction for that territory.[3]

cc. *Crimes against Other Indians.*—The United States courts have no jurisdiction of crimes committed by an Indian against another Indian within an Indian reservation within a territory, and this rule is not affected by the act of March 3, 1885.[4]

dd. *Where Indian Has Been Punished by Tribal Court.*—The United States courts have no jurisdiction of crimes committed by Indians within an Indian reservation within a territory, where the Indian committing the crime has been punished by an Indian tribe under the tribal laws.[5]

ee. *Jurisdiction Secured to Tribal Courts by Treaty.*—The United States courts have no jurisdiction of crimes committed by Indians within an Indian reservation within a territory, where exclusive jurisdiction over such offenses is secured to the tribal courts by treaty.[6]

(b) *Territorial Courts.*—Prior to the act of March 3, 1885, the territorial court had no jurisdiction of crimes committed by an Indian within an Indian reservation within a territory.[7] But by that act those courts were given jurisdiction of the crimes of murder, manslaughter, rape, assault with intent to kill, arson, burglary and larceny by Indians within an Indian reservation.[8]

the district court of that territory, within the geographical boundaries of whose district it lies, may exercise jurisdiction under the laws of the United States over offenses made punishable by them committed within its limits. United States *v.* Dawson, 15 How. 467, 14 L. Ed. 775; United States *v.* Jackalow, 1 Black 484, 17 L. Ed. 225; United States *v.* Rogers, 4 How. 567, 11 L. Ed. 1105." Ex parte Crow Dog, 109 U. S. 556, 560, 27 L. Ed. 1030.

Offenses punishable by hard labor.—See the title CRIMINAL LAW, vol. 4, p. 88, note 86.

Offense of horse stealing in Cherokee outlet.—See the title CRIMINAL LAW, vol. 4, p. 88, note 87.

3. Offenses by Indians against Indian agents, policemen, marshals, etc.—Wright *v.* United States, 158 U. S. 232, 39 L. Ed. 963.

One acting as a de facto deputy by the authority of the marshal comes within the provision of the statute. Wright *v.* United States, 158 U. S. 232, 39 L. Ed. 963.

The offense of killing a posse man or guard comes within the jurisdiction of the United States, if the killing occurred when the deceased was not actually engaged in performing services. Wright *v.* United States, 158 U. S. 232, 39 L. Ed. 963.

In a prosecution for murder under this act it appeared that the accused was a Choctaw Indian and that the deceased, also a member of the Choctaw tribe, was a de facto deputy marshal, and was killed while he was not engaged in performing his duties as a posse man or guard. It was held that the United States courts had jurisdiction. Wright *v.* United States, 158 U. S. 232, 39 L. Ed. 963.

4. Rule prior to act of 1885.—Rev. Stat., § 2146; Ex parte Crow Dog, 109 U. S. 556, 27 L. Ed. 1030; United States *v.* Kagama, 118 U. S. 375, 30 L. Ed. 228; Westmoreland *v.* United States, 155 U. S. 545, 547, 39 L. Ed. 255; United States *v.* Rogers, 4 How. 567, 11 L. Ed. 1105.

5. Crime by Indian who has been punished by tribal court.—Rev. Stat., § 2146; Ex parte Crow Dog, 109 U. S. 556, 27 L. Ed. 1030; Westmoreland *v.* United States, 155 U. S. 545, 547, 39 L. Ed. 255.

6. Jurisdiction secured to tribal courts by treaty.—Rev. Stat., § 2146; Ex parte Crow Dog, 109 U. S. 556, 27 L. Ed. 1030; Talton *v.* Mayes, 163 U. S. 376, 381, 41 L. Ed. 196.

7. Rule prior to 1885.—Gon-Shay-ee, Petitioner, 130 U. S. 343, 349, 350, 32 L. Ed. 973.

8. Effect of act of 1885.—United States *v.* Kagama, 118 U. S. 375, 30 L. Ed. 228; Gon-Shay-ee, Petitioner, 130 U. S. 343, 32 L. Ed. 973; Ex parte Captain Jack, 130 U. S. 353, 32 L. Ed. 976; Ex parte Crow Dog, 109 U. S. 556, 27 L. Ed. 1030.

The statute declares "that the Indians shall be tried by the courts of the territory, and according to its laws, and shall be subject to the penalties which those laws prescribe. They are to be tried in the same manner and in the same courts as are all other persons charged with the commission of said crimes respectively, and the said courts are given jurisdiction in all such cases. It will be observed also that this part of the statute makes no distinction in regard to whether the crime was committed by the Indian on or off an

b. *Crimes Outside of Reservation*—(1) *Crimes within State.*—The state courts, of course, have exclusive jurisdiction of crimes committed by Indians within the state outside of the reservation.[9]

(2) *Crimes within Territory.*—The territorial courts have jurisdiction of crimes by an Indian within the territory and outside of an Indian reservation.[10]

2. CRIMES BY PERSONS OTHER THAN INDIANS—a. *On Indian Reservation within State.*—The state courts have exclusive jurisdiction over crimes committed on Indian reservations within the limits of the state, by others than Indians or against Indians, unless the enabling act admitting the state into the Union provides otherwise.[11]

b. *On Indian Reservation within Territory.*—Prior to 1885 the district courts of a territory as a court of the United States, had jurisdiction over the crime of murder, committed by any person other than an Indian, upon an Indian reservation within its territorial limits, and such jurisdiction has not been taken away by the legislation of that year.[12]

c. *Selling Liquor to Indians.*—The 12th section of the judiciary act of 1789, which gives to the circuit courts concurrent jurisdiction of all crimes and offenses cognizable in the district courts, is prospective, and embraces all of-

Indian reservation." Gon-Shay-ee, Petitioner, 130 U. S. 343, 352, 32 L. Ed. 973.

The statute does not even define the crimes of murder, manslaughter, etc., but this must be governed by the laws of the territory, so far as they furnish any definition of the crime. Gon-Shay-ee, Petitioner, 130 U. S. 343, 351, 352, 32 L. Ed. 973.

The statute was enacted to transfer to the territorial courts established by the general government, as all courts of general jurisdiction are in the territories, the jurisdiction to try the crimes described in it under the territorial laws, when sitting as and exercising the functions of such territorial court. Gon-Shay-ee, Petitioner, 130 U. S. 343, 352, 32 L. Ed. 973; Ex parte Crow Dog, 109 U. S. 556, 27 L. Ed. 1030.

The crimes referred to in the act of 1885 committed by Indians in a territory are to be tried in the same manner and in the same courts as are crimes by other persons charged with the commission of such crimes. Gon-Shay-ee, Petitioner, 130 U. S. 343, 32 L. Ed. 973; Ex parte Captain Jack, 130 U. S. 353, 32 L. Ed. 976.

Murder.—Under the act of March 3, 1885, where murder is committed by an Indian within the limits of the territorial government, whether on or off an Indian reservation, the territorial courts have jurisdiction when sitting as territorial courts and not while exercising the functions of the district or circuit courts of the United States. Gon-Shay-ee, Petitioner, 130 U. S. 343, 32 L. Ed. 973; Ex parte Captain Jack, 130 U. S. 353, 32 L. Ed. 976; Ex parte Crow Dog, 109 U. S. 556, 27 L. Ed. 1030.

Constitutionality of act of 1885.—The act of 1885 is constitutional. United States *v.* Kagama, 118 U. S. 375, 30 L. Ed. 228.

9. Crimes committed by Indians within state outside of reservation.—See Gon-Shay-ee, Petitioner, 130 U. S. 343, 32 L. Ed. 973; Ex parte Captain Jack, 130 U. S. 353, 32 L. Ed. 976.

10. Crimes committed by Indians within territory outside of reservation.—Gon-Shay-ee, Petitioner, 130 U. S. 343, 32 L. Ed. 973; Ex parte Captain Jack, 130 U. S. 353, 354, 32 L. Ed. 976 (where the accused, an Indian, was tried for murder committed outside of an Indian reservation).

By the act of March 3, 1885, jurisdiction is given to the territorial courts over the crimes of murder, manslaughter, rape, assault with intent to kill, arson, burglary and larceny, by Indians, and when committed either within or without an Indian reservation. It is immaterial that crimes by an Indian within a territory were not committed in an Indian reservation. Territorial courts have jurisdiction in both cases. Ex parte Captain Jack, 130 U. S. 353, 32 L. Ed. 976.

11. Draper *v.* United States, 164 U. S. 240, 245, 41 L. Ed. 419; United States *v.* McBratney, 104 U. S. 621, 622, 26 L. Ed. 869.

In reserving to the United States jurisdiction and control over Indian lands, by the enabling act admitting Montana as a state into the Union, it was not intended to deprive that state of power to punish for crimes committed on a reservation or Indian lands by other than Indians or against Indians. Draper *v.* United States, 164 U. S. 240, 246, 41 L. Ed. 419.

The circuit court of the United States sitting in and for the district of Colorado has no jurisdiction of the crime of murder, committed by a white man upon a white man, within the Ute reservation in said district, and within the geographical limits of the state of Colorado. United States *v.* McBratney, 104 U. S. 621, 26 L. Ed. 869.

12. Crimes by persons other than Indians on Indian reservation in territory.—

fenses the jurisdiction of which is vested in the district courts by subsequent statutes. Therefore the circuit courts have jurisdiction of the offense of selling ardent spirits to an Indian, under the act of February 12, 1862, although by that act the jurisdiction is vested only in the district court.[13]

3. Averment and Proof of Jurisdictional Facts—a. *Indictment.*—Where the jurisdiction of the court is dependent on the status of the accused or the defendant as Indians or otherwise, it should contain an averment showing that their status is such as to give the court jurisdiction.[14] An indictment in the United States courts for the eastern district of Texas, which has jurisdiction over offenses against the laws of the United States committed in certain portion of the Indian Territory for murder, which charges that the defendant and the deceased were not Indians nor citizens of the Indian Territory, is sufficient.[15]

b. *Evidence*—(1) *Burden of Proof.*—Where the jurisdiction of the court of a criminal prosecution is dependent on whether the person against whom the offense was committed was a white man or an Indian, the burden of proving that his status is such as to give the court jurisdiction rests on the government.[16]

(2) *Admissibility.*—Where the jurisdiction of the United States courts is dependent upon the question whether the deceased was an Indian, statements alleged to have been made by him during his lifetime to a witness that he did not belong to the Indian country are inadmissible.[17]

(3) *Weight and Sufficiency.*—And the evidence adduced to prove the fact

In re Wilson, 140 U. S. 575, 35 L. Ed. 513.

13. Selling liquor in Indian country.—United States *v.* Mayrand, 154 U. S. 552, 18 L. Ed. 699.

Offense of selling liquor to Indians.—United States *v.* Holliday, 3 Wall. 407, 18 L. Ed. 182. See the title CRIMINAL LAW, vol. 4, p. 91, note 4, and p. 94.

14. Indictment must show jurisdiction of parties and crime.—Wheeler *v.* United States, 159 U. S. 523, 40 L. Ed. 244; Westmoreland *v.* United States, 155 U. S. 545, 39 L. Ed. 255.

15. Sufficiency of indictment.—Wheeler *v.* United States, 159 U. S. 523, 40 L. Ed. 244; Westmoreland *v.* United States, 155 U. S. 545, 39 L. Ed. 255.

Where it was insisted that article 38 of the treaty with the Choctaws and Chickasaws, of April 28, 1866, 14 Stat. 769, 779, provides that "every white person who, having married a Choctaw or Chickasaw, resides in the said Choctaw or Chickasaw nation, or who has been adopted by the legislative authorities, is to be deemed a member of said nation, and shall be subject to the laws of the Choctaw and Chickasaw nations according to his domicile, and to prosecution and trial before their tribunals, and to punishment according to their laws in all respects as though he was a native Choctaw or Chickasaw;" and that, therefore, the indictment should also negative the conditions of this article, and it was charged that the defendant and the deceased were not "citizens of the Indian Territory," it was held that force must be given to this term in the indictment, and while it may be conceded that it is not the most apt to describe citizenship in an Indian tribe, yet it is not an unreasonable construction to hold that it refers to all citizenship which could possibly be acquired in the Indian Territory, including therein citizenship in any Indian tribe domiciled within such limits. Westmoreland *v.* United States, 155 U. S. 545, 548, 39 L. Ed. 255.

16. Burden of proof that person against whom crime committed was not an Indian.—Lucas *v.* United States, 163 U. S. 612, 41 L. Ed. 282; Smith *v.* United States, 151 U. S. 50, 38 L. Ed. 67.

That the murdered man was a white man, and not an Indian, was a fact which the government was bound to establish, and if it failed to introduce any evidence upon that point, defendant was entitled to an instruction to that effect. Famous Smith *v.* United States, 151 U. S. 50, 55, 38 L. Ed. 67.

Where a member of the Choctaw Indians is indicted in the United States courts for murder, at the Choctaw Nation, in the Indian country, of a person who is alleged in the indictment to have been "a negro and not an Indian," the burden of proof is on the government to sustain the jurisdiction of the court by showing that the deceased was not a member of the Choctaw Nation as there is no presumption that a negro found within the Indian country is not a member of the tribe. Lucas *v.* United States, 163 U. S. 612, 41 L. Ed. 282.

17. Admissibility of evidence as to status of deceased.—Lucas *v.* United States, 163 U. S. 612, 616, 41 L. Ed. 282.

Such a declaration is not one against interest and admissible as an exception to the hearsay rule, upon the ground that had he been an Indian he would have been entitled to benefits and rights as such. Lucas *v.* United States, 163 U. S. 612, 616, 41 L. Ed. 282.

must be clear and convincing.[18]

(4) *Questions of Law and Fact.*—Where the jurisdiction of the United States courts upon an indictment for murder is dependent upon deceased not being an Indian, the status of the deceased is a question of fact to be determined by the evidence.[19]

B. Civil Jurisdiction—1. INDIAN RESERVATIONS EXCEPTED FROM STATE OR TERRITORY.—When, by the act of congress organizing a territorial government, or admitting a state into the Union, lands within an Indian reservation are, in pursuance of a treaty with the Indians, excepted out of the jurisdiction of the government thus brought into existence, they constitute no part of such state or territory, although they are included within its boundaries.[20]

2. SUITS BETWEEN INDIANS.—Under the act of May 2, 1890, the judicial tribunals of the Indian nations were given exclusive jurisdiction in civil as well as in criminal cases arising in the country in which members of the nation by nativity or adoption were the only parties.[21]

3. SUITS AGAINST INDIAN BY CITIZEN OF UNITED STATES RESIDING IN INDIAN COUNTRY.—The right of a citizen of the United States residing in the Chickasaw Nation, but whose citizenship therein is denied by that nation to appeal to the federal courts to take jurisdiction of his claims against one of the Chickasaw Nation, must be sustained, for it cannot be that a citizen of the United States residing in the Chickasaw Nation can be wronged without an opportunity of redress in some judicial tribunal.[22]

4. SUITS BETWEEN INDIANS AND RAILROAD IN INDIAN COUNTRY.—By the act of July 4, 1884, 23 Stat. 73, c. 179, the United States circuit and district courts for the northern district of Texas, the western district of Arkansas, and the district of Kansas, and such other courts as may be authorized by congress, shall have, without reference to the amount in controversy, concurrent jurisdiction over all controversies arising between said Southern Kansas Railway Company and the nations and tribes through whose territory said railway shall be constructed, and also over all controversies arising between the inhabitants of said nations or tribes and said railway company; and the civil jurisdiction of those courts is thereby extended within the limits of the Indian territory, without distinction as to citizenship of the parties, so far as may be necessary to carry out the provisions of the act.[23]

18. **Sufficiency of evidence.**—Famous Smith *v.* United States, 151 U. S. 50, 55, 38 L. Ed. 67.

Evidence that a man murdered by an Indian was not permitted to vote in the Canadian district, where the murder was committed, was explained by the fact that he had not resided in the district the six months required by law to entitle him to vote, and by the fact that one of the judges of election told him that he had no doubt that he was an Indian, and the fact that the murdered man said he lived in southern Arkansas, without any evidence showing how he came to live there, under what circumstances, or how long he lived there, did not constitute any evidence of his being a white man, or that, being an Indian, he had severed his tribal relations and become a citizen of the United States. Famous Smith *v.* United States, 151 U. S. 50, 55, 38 L. Ed. 67.

19. **Status of deceased a question of fact.**—Lucas *v.* United States, 163 U. S. 612, 616, 41 L. Ed. 282.

20. **Indian reservation excepted from state or territory.**—Langford *v.* Monteith, 102 U. S. 145, 146, 26 L. Ed. 53, explaining Harkness *v.* Hyde, 98 U. S. 476, 25 L. Ed. 237.

Congress, from which the power to exercise the new jurisdiction emanates, has undoubted authority to exclude therefrom any part of the soil of the United States, or of that whereto the Indians have the possessory title, when, by our solemn treaties with them, a stipulation to that effect has been made. Langford *v.* Monteith, 102 U. S. 145, 146, 26 L. Ed. 53.

Indian reservations in Idaho are not excepted from the territorial jurisdiction. Langford *v.* Monteith, 102 U. S. 145, 147, 26 L. Ed. 53, explaining Harkness *v.* Hyde, 98 U. S. 476, 25 L. Ed. 237.

21. **Civil jurisdiction.**—Alberty *v.* United States, 162 U. S. 499, 40 L. Ed. 1051; Lucas *v.* United States, 163 U. S. 612, 41 L. Ed. 282.

22. **Claims by citizen of United States, residing within nation, against Indians.**—Roff *v.* Burney, 168 U. S. 218, 219, 223, 42 L. Ed. 442.

23. **Suits between Indians and railroad in Indian country.**—Southern Kansas R. Co. *v.* Briscoe, 144 U. S. 133, 134, 36 L. Ed. 377.

VI. Taxation.

A. Indian Property.—As a general rule, property of Indians is not subject to taxation by the state or territory within which they reside.[24] Thus, Indian lands are not, as a general rule, subject to taxation by a state,[25] or subject to sale for taxes,[26] even though the statute provides that their occupancy shall not be disturbed by the tax sale.[27] And treaties exempting Indian lands from levy sale and forfeiture are to be construed as exempting them from levy and sale for nonpayment of taxes.[28] Lands allotted to individual members of Indian tribes patented to them with express restriction that they are not to be sold without the consent of the government,[29] or lands allotted to Indians and held in trust by

24. Indian property not subject to taxation.—The Kansas Indians, 5 Wall. 737, 18 L. Ed. 667; Stearns *v.* Minnesota, 179 U. S. 223, 249, 45 L. Ed. 162; Matter of Heff, 197 U. S. 488, 506, 49 L. Ed. 848; United States *v.* Rickert, 188 U. S. 432, 437, 47 L. Ed. 532; The New York Indians, 5 Wall. 761, 18 L. Ed. 708; Elk *v.* Wilkins, 112 U. S. 94, 100, 28 L. Ed. 643.

25. Indian lands not subject to taxation.—The New York Indians, 5 Wall. 716, 18 L. Ed. 708; The Kansas Indians, 5 Wall. 737, 18 L. Ed. 667.

Where Indians, under arrangements approved by the United States, agree to sell their lands to private citizens, and to give possession of them at the expiration of a term of years named, a taxation of the lands before the efflux of the term is premature; even though a sale for the nonpayment of the taxes might not take place until after the time when, if they fulfilled their agreements, the Indians would have left the land; and even though any sale would be subject to the proviso named in the preceding paragraph. The New York Indians, 5 Wall. 761, 18 L. Ed. 708.

Lands of Shawnee Indians held in severalty were not subject to state taxation, although in the last treaty with the Shawnees, the one authorizing the allotments, there was no express stipulation for exemption from taxation. The Kansas Indians, 5 Wall. 737, 18 L. Ed. 667.

The state of Kansas has no right to tax lands held in severalty by individual Indians of the Shawnee, Miami, and Wea tribes, under patents issued to them by virtue of the treaties made with those tribes respectively in 1854, and in pursuance of the provisions of the 11th section of the act of June 30th, 1859 (11 Stat. at Large, p. 431). The Kansas Indians, 5 Wall. 737, 18 L. Ed. 667.

Where Indians, being in possession of lands, their ancient and native homes, the enjoyment of which, "without disturbance by the United States," has been secured to them by treaty with the federal government, with the assurance that "the lands shall remain theirs until they choose to sell them," the state in which the lands lie has no power to tax them, either for ordinary town and county purposes or for the special purpose of surveying them and opening roads through them. The case of The Kansas Indians, 5 Wall. 737, 18 L. Ed. 667, approved in The New York Indians, 5 Wall. 761, 18 L. Ed. 708.

Irrepealibility of exemption.—A legislative act, declaring that certain lands which should be purchased for the Indians, should not, thereafter, be subject to any tax, constituted a contract, which could not be rescinded by a subsequent legislative act—such repealing act being void, under that clause of the constitution of the United States, which prohibits a state from passing any law impairing the obligation of contracts. New Jersey *v.* Wilson, 7 Cranch 164, 3 L. Ed. 303.

26. Indian lands not subject to sale for taxes.—The New York Indians, 5 Wall. 761, 18 L. Ed. 708.

A deed of lands owned by Indians under a sale for taxes, and purporting to convey the lands to the purchaser, would, in law, be a disturbance of the Indian tribe. The New York Indians, 5 Wall. 761, 18 L. Ed. 708.

27. Effect of statute providing that tax sale shall not affect right of occupancy.—A statute of a state authorizing a sale of such lands for taxes so laid, is void, even though the statute provide that "no sale, for the purpose of collecting the tax, shall, in any manner, affect the right of the Indians to occupy the land." The New York Indians, 5 Wall. 761, 18 L. Ed. 708.

28. Exemption from levy and sale construed as exemption from taxation.—The Kansas Indians, 5 Wall. 737, 18 L. Ed. 667.

Rules of interpretation favorable to the Indian tribes are to be adopted in construing our treaties with them. Hence, a provision in an Indian treaty which exempts their lands from "levy, sale, and forfeiture," is not, in the absence of expressions so to limit it, to be confined to levy and sale under ordinary judicial proceedings only, but is to be extended to levy and sale by county officers also, for nonpayment of taxes. The Kansas Indians, 5 Wall. 737, 18 L. Ed. 667.

29. Lands patented to Indians but not subject to sale by them.—The Kansas Indians, 5 Wall. 737, 18 L. Ed. 667; Stearns *v.* Minnesota, 179 U. S. 223, 249, 45 L. Ed. 162.

the United States for the benefit of the Indians,[30] or improvements on personal property upon Indian allotments held in trust for Indians by the United States,[31] are not subject to taxation by the state within which the allotments are situated. But Indian allotments are subject to sale for taxes after all restrictions or exemptions are removed, and the owner thereof has become a citizen and subject to all the laws of the state or territory in which he resides,[32] and lands patented in fee simple to half breeds or Indians intermarrying with white persons are subject to taxation by the state although the owner thereof still keeps up his relations with the tribe as a member thereof.[33]

B. Non-Indian Property within Reservation—1. TAXATION BY STATES OR TERRITORIES.—Property of persons other than Indians situated within an Indian reservation within the limits of a territory may be taxed by the state or

30. **Lands allotted to Indians but held in trust for them by United States.**—United States *v.* Rickert, 188 U. S. 432, 438, 47 L. Ed. 532. See, also, Matter of Heff, 197 U. S. 488, 509, 49 L. Ed. 848.

Where lands are held in trust by the United States in execution of its plans relating to Indians without any right in the Indians to make contracts in reference to them or to do more than occupy and cultivate them, until a regular patent conveying the fee to the several allottees, there is no power in the state in which they are situated to assess and tax lands for state or municipal purposes until the fee is conveyed to the Indians. United States *v.* Rickert, 188 U. S. 432, 438, 47 L. Ed. 532.

The United States has such interest that it may maintain a suit to restrain the collection of taxes upon Indian allotments, improvements thereon and personal property used by the Indians upon the allotments, the land being held in trust by the government for the Indians and the personal property being in fact property of the United States put in the Indian's hands in execution of a purpose of the government in reference to the Indians. United States *v.* Rickert, 188 U. S. 432, 438, 47 L. Ed. 532.

The remedy of the United States to prevent the collection of taxes assessed upon Indian allotments, improvements thereon and personal property used by the Indians upon the allotments, is in equity. There is no remedy at law so prompt and efficacious as to deprive the government of the right to resort to equity. United States *v.* Rickert, 188 U. S. 432, 438, 47 L. Ed. 532.

31. **Improvements on personal property on allotments held in trust.**—United States *v.* Rickert, 188 U. S. 432, 438, 47 L. Ed. 532.

Permanent improvements made upon Indian allotments held in trust for Indians by the United States are not taxable by the taxing officers of the county in which the allotments are situated. United States *v.* Rickert, 188 U. S. 432, 438, 47 L. Ed. 532.

Personal property consisting of cattle, horses and other property of like character issued to Indians by the United States, and being used by them upon allotments held by the United States in trust for them, is not liable to taxation and assessment by the state in which the allotments are situated. United States *v.* Rickert, 188 U. S. 432, 438, 47 L. Ed. 532.

32. **After removal of restrictions against taxation of allotments.**—The original treaty of December 26, 1854, made between the United States and the Tuyallup Indians, provided that the lands allotted to said Indians should be exempt from levy, sale or forfeiture until the legislature of the state within which such lands were located should, with the consent of congress, remove the restriction. The state of Washington passed a statute removing such restriction and granting the power of alienation "in like manner and with like effect as any other person may do under the laws of the United States and of this state, and all restrictions in reference thereto are hereby removed." Congress postponed the operation of this statute for ten years. It was held that after the expiration of the ten years, and after an allottee had become a citizen under the act of congress of February 8, 1887, which subjected allottees who became citizens to the laws, civil and criminal, of the state or territory, wherein they resided, his land was subject to sale for taxes. Goudy *v.* Meath, 203 U. S. 146, 51 L. Ed. 130.

33. **Property deed to half-blood in fee simple.**—By article 10 of the treaty of July, 1860, with the Sacs and Foxes, severing the tenure in common by which the lands of such Indians were held, such members of the tribe as were either mixed and half-bloods, or women who had intermarried with white men, were allowed certain lands, and by another treaty with the tribes, ratified in October, 1868, it was provided that persons entitled to selections of land under the treaty of July, 1860, and whose selections had been approved by the secretary of the interior, should be entitled to patents in fee simple, and under this provision a patent was issued to the plaintiff, a member of the tribe of mixed or half-blood, and also a woman who had intermarried with a white man. It was held that her land was subject to taxation, although she still kept up her

territory in which the reservation is located,[34] and this is true although the property is owned by nonresidents of the state or territory.[35] Thus, the state or territory in which an Indian reservation is located may tax the property of a railroad within the reservation,[36] or cattle grazing on the reservation with the consent of Indians.[37]

2. Taxation by Indian Nations.—The regulations of the secretary of the interior, and the act of the legislature of the Chickasaw Nation approved by the governor on May 5, 1902, and sanctioned by the president of the United States on May 15, 1902, providing for a tax on all live stock introduced by noncitizens into the Chickasaw Nation, is not the exercise of arbitrary power, and neither the act nor the regulations in any respect violate the constitution of the United States.[38]

C. Internal Revenue Laws as Extending to Reservations.—The internal revenue laws of the United States, imposing taxes, are, of course, in force within the Indian country.[39]

relations with the tribe as a member thereof. Pennock *v.* Commissioners, 103 U. S. 44, 26 L. Ed. 367.

34. Taxation by territory of non-Indian property on reservation.—Maricopa, etc., R. Co. *v.* Arizona, 156 U. S. 347, 39 L. Ed. 447; Thomas *v.* Gay, 169 U. S. 264, 275, 42 L. Ed. 740; Utah, etc., R. Co. *v.* Fisher, 116 U. S. 28, 29 L. Ed. 542; Wagoner *v.* Evans, 170 U. S. 588, 591, 42 L. Ed. 1154. See, also, Montana Catholic Missions *v.* Missoula County, 200 U. S. 118, 50 L. Ed. 398.

Taxing personal property of persons other than Indians, and situated within the reservation, did not impair the rights of person or property pertaining to the Indians. Wagoner *v.* Evans, 170 U. S. 588, 590, 42 L. Ed. 1154; Thomas *v.* Gay, 169 U. S. 264, 42 L. Ed. 740.

The territorial legislature may empower the authorities of an organized county to tax personal property situated in a reservation attached to such county for judicial purposes. Wagoner *v.* Evans, 170 U. S. 588, 590, 42 L. Ed. 1154.

35. Property of nonresidents of state or territory.—Wagoner *v.* Evans, 170 U. S. 588, 590, 42 L. Ed. 1154; Thomas *v.* Gay, 169 U. S. 264, 275, 42 L. Ed. 740.

36. Taxation of railroad within Indian reservation.—Utah, etc., R. Co. *v.* Fisher, 116 U. S. 28, 29 L. Ed. 542; Maricopa, etc., R. Co. *v.* Arizona, 156 U. S. 347, 39 L. Ed. 447.

The lands and railroad of a railway company within the limits of the Fort Hill Indian reservation in the territory of Idaho was lawfully subject to territorial taxation, which may be enforced within the exterior boundaries of the reservation by proper process. Utah, etc., R. Co. *v.* Fisher, 116 U. S. 28, 29 L. Ed. 542.

The part of a railroad constructed through an Indian reservation in a territory, in pursuance to a grant of a right of way from congress, is subject to taxation by the territory. Maricopa, etc., R. Co. *v.* Arizona, 156 U. S. 347, 39 L. Ed. 447.

37. Taxation of cattle grazing within reservation.—Thomas *v.* Gay, 169 U. S. 264, 275, 42 L. Ed. 740; Wagoner *v.* Evans, 170 U. S. 588, 590, 42 L. Ed. 1154.

Taxation of cattle kept for grazing purposes upon the reservations, under leases duly authorized by act of congress, was not a violation of the rights of the Indians, nor an invasion of the jurisdiction and control of the United States over them and their lands. Wagoner *v.* Evans, 170 U. S. 588, 591, 42 L. Ed. 1154; Thomas *v.* Gay, 169 U. S. 264, 42 L. Ed. 740.

The legislative assembly of Oklahoma has power to pass laws taxing property, such as cattle grazing within an Indian reservation, though belonging to a citizen of another state within the limits of the Indian reservations, and belonging to persons not Indians. Thomas *v.* Gay, 169 U. S. 264, 275, 42 L. Ed. 740; Wagoner *v.* Evans, 170 U. S. 588, 590, 42 L. Ed. 1154.

38. Taxation of property within reservation by Indian nations.—Morris *v.* Hitchcock, 194 U. S. 384, 48 L. Ed. 1030.

While it is unquestioned that, by the constitution of the United States, congress is vested with paramount power to regulate commerce with the Indian tribes, yet it is also undoubted that in treaties entered into with the Chickasaw Nation, the right of that tribe to control the presence within the territory assigned to it of persons who might otherwise be regarded as intruders has been sanctioned, and the duty of the United States to protect the Indians "from aggression by other Indians and white persons, not subject to their jurisdiction and laws," has also been recognized. Arts. 7 and 14, Treaty June 22, 1855, 11 Stat. 611; Art. 8, Treaty April 28, 1866, 14 Stat. 769. And it is not disputed that under the authority of these treaties the Chickasaw Nation has exercised the power to attach conditions to the presence within its borders of persons who might otherwise not be entitled to remain within the tribal territory. Morris *v.* Hitchcock, 194 U. S. 384, 48 L. Ed. 1030.

39. Internal revenue laws in force within Indian country.—The 107th sec-

VII. Indian Officers or Agents.

A. Powers.—No officer of the government was authorized to bind the United States by any contract for the subsistance of Indians not based upon appropriations made by congress, and the court of claims has no jurisdiction of an action to enforce such a contract.[40]

B. Liability of United States for Default of Agent.—Even if the United States is liable to an Indian tribe for embezzlement of the funds of Indian orphans by an Indian agent, there can be no recovery unless the amount thereof is shown.[41]

C. Personal Liability of Agent.—An Indian agent is not personally liable on a contract made by him for the government with one who knew of his agency.[42]

D. Compensation and Fees.—While an agent officer of the United States, such as an Indian, is not entitled to extra compensation or commission for acts within the line of his official duty,[43] he may have a right to compensation for

tion of the internal revenue act of July 20, 1868, which enacts that "the internal revenue laws imposing taxes on distilled spirits, fermented liquors, tobacco, snuff, and cigars, shall be construed to extend to such articles produced anywhere within the exterior boundaries of the United States, whether the same shall be within a collection district or not," applies to and is in force in the Indian territory embraced within the western district of Arkansas, and occupied by the Cherokee Nation of Indians, notwithstanding the 10th article of the prior treaty of 1866, between the United States and that nation, by which it was agreed that "every Cherokee Indian and freed person residing in the Cherokee Nation shall have the right to sell any products of his farm, including his or her live stock, or any merchandise or manufactured products, and to ship and drive the same to market without restraint, paying any tax thereon which is now or may be levied by the United States on the quantity sold outside of the Indian territory." The Cherokee Tobacco, 11 Wall. 616, 20 L. Ed. 227.

40. Power of agent to contract for subsistence of Indians.—United States *v.* McDougall, 121 U. S. 89, 100, 30 L. Ed. 861.

Congress did not intend to invest the president or the head of a department, or any officer of the government, with unrestricted authority in the making of treaties with Indians, or in regulating intercourse with them, to purchase merchandise for them, or to make payments of money or goods to them. It appropriated certain sums to enable the president to hold treaties with the various Indian tribes in California. To the extent of such appropriations the president, through persons designated by him, could purchase merchandise, required in the making of a treaty, and could make payment of money or goods on account of the Indians. United States *v.* McDougall, 121 U. S. 89, 100, 30 L. Ed. 861.

41. Liability of United States to Indian tribe for embezzlement by agent.—Where there was a certain sum of money to be paid by the government to certain Indian orphans in accordance with the treaty of 1825, and it was paid, in part, to guardians appointed by the Indian council, which part by laches or dishonesty never reached said orphans, and, in part, to a United States Indian superintendent for distribution, and he embezzled it, conceding that the government is justly liable for such portion of this money as was committed to the Indian superintendent (though it clearly is not for the portion paid to the guardians appointed by the Indian council) it is by no means clear that the Indian tribe, as such, is entitled to recover the amount embezzled by said superintendent. But, whether the tribe is so entitled or not, there is nothing in the record of this case to indicate how much of this money was embezzled by the guardians created by the Indian council, and how much by the Indian superintendent, so there is in reality no basis for a decree in favor of the said Indian tribe. United States *v.* Blackfeather, 155 U. S. 180, 193, 39 L. Ed. 114.

42. Personal liability of agent on public contract.—Where the United States and the Cherokee Nation agreed that the latter should emigrate across the Mississippi, and the former pay the expenses thereof, and the Cherokees undertook to conduct the movement entirely by their own agents, a person whose wagons had been hired could not hold the agent who had hired them personally responsible. The owner of the wagons knew that the agent was a public officer, and dealt with him as such. Parks *v.* Ross, 11 How. 362, 13 L. Ed. 730.

43. Extra compensation while acting as Indian agent.—Minis *v.* United States, 15 Pet. 423, 10 L. Ed. 791; Stewart *v.* United States, 206 U. S. 185, 51 L. Ed. 1017.

In Stewart *v.* United States, 206 U. S. 185, 51 L. Ed. 1017, it was held that a register of the land office was not entitled to compensation which would make his salary more than $2,500 for services in selling lands under the treaty of Septem-

work or services performed by him outside of the line of his duty.[44] If an Indian agent accepts the amount appropriated by congress for payment of his salary, and gives a receipt in full, he is not entitled to recover anything more, though the amount received is less than the salary fixed by general law for the services rendered by him.[45]

VIII. Claims by Indians against United States.

A. Liability of Government—1. ACCOUNT RENDERED BY GOVERNMENT AND ACCEPTED BY INDIANS.—The United States is liable to an Indian tribe for an amount found due by an officer of the government, who was authorized to make an accounting for that purpose, which account was accepted by the Indians.[46]

2. LANDS TAKEN BY MISTAKE.—The United States is liable to an Indian tribe for lands appropriated by the government, as a part of their public domain by mistake, in surveying and fixing the boundary of a state.[47]

3. INTEREST ON FUNDS DUE INDIANS.—See the title INTEREST.

B. Enforcement—1. ARBITRATION.—As to certainty and conclusiveness of award by senate upon submission to that body of claim by Choctaw Nation against United States, see the title ARBITRATION AND AWARD, vol. 2, p. 482, notes 89, 90.

2. ACTION IN COURT OF CLAIMS—a. *Jurisdiction.*—See the title COURTS, vol. 4, pp. 1038, 1040.

b. *Power of Court to Convert Annuities.*—In the absence of express statutory authority, the court of claims has no power to convert perpetual annuities given to Indians into a present fund.[48]

ber 29, 1865, with the Osage Indians, as the duty had been imposed upon the various registers prior to the claimant's appointment, and there was no express provision that their compensation should not exceed $2,500.

The passage of an act providing for submission to the court of claims of a claim of the register of the United States land office to extra compensation for the sale of land provided for by the treaty of September 29, 1865, with the Osage Indians was not an admission that anything was due beyond his regular salary which had been paid. Stewart *v.* United States, 206 U. S. 185, 51 L. Ed. 1017. See the title COURTS, vol. 4, p. 1036.

Right of any officer acting as Indian disbursing agent to commissions.—See the title ARMY AND NAVY, vol. 2, p. 533, note 23.

44. Services outside of line of duty.—United States *v.* Brindle, 110 U. S. 688, 695, 28 L. Ed. 286, where a receiver of public land money was held entitled to extra compensation for acting as agent of Indian trust lands under the treaty of 1854 with the Delaware Indians, the duties performed being special in the nature and the treaty expressly providing for payment therefor, although the salary of the agent was thereby made to exceed $2,500 per year.

45. Acceptance in full of less amount appropriated than allowed by general statute.—Belknap *v.* United States, 150 U. S. 588, 37 L. Ed. 1191.

46. Accounting made by officer of United States and accepted by Indians.—United States *v.* Cherokee Nation, 202 U. S. 101, 50 L. Ed. 949.

By the agreement between the United States and the Cherokee Nation ceding the Cherokee Outlet to the United States, it was agreed that the United States should render to the Cherokee Nation an account of the money due by the United States to the nation under previous treaty stipulations between the two, and that if the amount was accepted by the nation congress was to appropriate the money for such payment. It was held that the United States was liable to the nation for the amount stated to be due in an account submitted to the Indians by the government and accepted by them in accordance with the agreement. United States *v.* Cherokee Nation, 202 U. S. 101, 50 L. Ed. 949.

47. Lands taken by mistake.—Choctaw Nation *v.* United States, 119 U. S. 1, 2, 30 L. Ed. 306.

Where the court of claims found as a fact, that, in the location of the line which was surveyed under the treaty of the United States, and fixed as the permanent boundary between the state of Arkansas and the Indian country by the act of March 3, 1875, the government made a mistake, whereby they embraced in the territory appropriated by the United States as part of the public lands a portion of the Indian lands, this is a just and valid claim for which the Choctaw Nation is entitled to compensation. Choctaw Nation *v.* United States, 119 U. S. 1, 2, 30 L. Ed. 306.

48. Power of court to convert annuities.—Phineas Pam-To-Pee *v.* United States, 148 U. S. 691, 37 L. Ed. 613.

3. Set-Off and Counterclaim.—In an action by an Indian tribe against the United States for a debt due, a set-off cannot be sustained, unless it be shown that the claim on which it is founded is actually due in whole or in part.[49]

4. Costs.—The Cherokee Nation prosecuting a claim against the United States for the amount agreed to be allowed to the nation for the removal of the Eastern Cherokees to the lands set apart for them west of the Mississippi, are entitled to have their counsel fees allowed to them out of the amount found to be due the Eastern Cherokees as expenses of the removal.[50]

5. Attorney's Fees.—The question as to allowance of fees to attorneys prosecuting claims against the United States on behalf of Indians, is treated in another title.[51]

IX. Depredations by or against Indians.

See the title Courts, vol. 4, pp. 1036, 1038.

X. Treaties with Indians.

As to validity, construction and general effect of treaties with Indians, see the title Treaties. The governmental, personal, and property rights of Indians, as well as the control and regulation of Indians or Indian country, as dependent on particular treaties, is treated in this title under heads relating thereto.

INDIA RUBBER.—See note 1.

The court of claims has no power to convert the perpetual annuity given to the Pottawatomie Indians by the treaty of September 26, 1833, and the supplementary treaty thereto of September 27, 1833, into a sum for present payment. Phineas Pam-To-Pee *v.* United States, 148 U. S. 691, 37 L. Ed. 613.

49. Set-off and counterclaim.—United States *v.* Blackfeather, 155 U. S. 180, 39 L. Ed. 114.

When the government, in the treaty of 1825 with the Shawnee Indians, undertook to support and keep a blacksmith for the use of the Indians on the land assigned by said treaty to the Indians, "for the term of five years, or as long as the president may deem it advisable" the finding that the sum of $17,408.73 was paid the Shawnees for blacksmiths from 1825 to 1854 is too indefinite to be made the subject of a set-off in a suit by the Indians to collect a debt due from the United States, unless it is shown how much of this sum was expended during the five years, or the extended period deemed "advisable" by the president. United States *v.* Blackfeather, 155 U. S. 180, 39 L. Ed. 114.

50. Costs allowed to one band of Indians for prosecution of claim in behalf of another.—United States *v.* Cherokee Nation, 202 U. S. 101, 50 L. Ed. 949. See the title COSTS, vol. 4, p. 802.

51. Attorneys' fees.—See the title ATTORNEY AND CLIENT, vol. 2, p. 724, note 85. And see Gilfillan *v.* McKee, 159 U. S. 303, 40 L. Ed. 161; McKee *v.* Lamon, 159 U. S. 317, 40 L. Ed. 165; McKee *v.* Latrobe, 159 U. S. 327, 40 L. Ed. 169.

1. India rubber.—See Judge *v.* Hedden, 146 U. S. 233, 239, 36 L. Ed. 953. See the title REVENUE LAWS.

India rubber shoes.—Lawrence *v.* Allen, 7 How. 785, 12 L. Ed. 914. See the title REVENUE LAWS.

INDICTMENTS, INFORMATIONS, PRESENTMENTS AND COMPLAINTS.

BY T. B. BENSON.

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CROSS REFERENCES.

See the titles CONSTITUTIONAL LAW, vol. 4, p. 1; CRIMINAL LAW, vol. 5, p. 43; GRAND JURY, ante, p. 570.

I. Accusation in General.

A. What Constitutes.—A criminal charge or accusation, strictly speaking, exists only when a formal written complaint has been made against the accused and a prosecution to which he is legally called upon to make answer has been initiated. Mere investigation by prosecuting officers, or even the inquiry and consideration by examining magistrates of the propriety of initiating a prosecution, do not of themselves create a criminal charge.[1]

B. The Different Forms of Accusation—1. INDICTMENT.—An indictment is the charge of the government against the accused, the pleading by which the latter is informed of the fact, nature and scope of the accusation.[2] The word "indictment" is defined technically,[3] and implies the finding of a grand jury.[4] It is peculiar to Anglo-Saxon jurisprudence,[5] and designates a common-law remedy.[6] The indictment referred to in article 5 of the amendments to the constitution, is the presentation to the proper court, under oath, by a grand jury, duly impaneled, of a charge describing an offense against the law for which the party charged may be punished.[7]

2. PRESENTMENT.—A presentment, properly speaking, is a notice taken by a grand jury of any offense from their own knowledge or observation, without any bill of indictment laid before them at the suit of the state or sovereign, upon which the officer of the court must afterwards frame an indictment, before the party presented can be put to answer it.[8] A presentment and indictment are to be considered as one act, the former as amended by and merged in the latter.[9] Presentments have largely fallen into disuse in this country,[10] except for offenses

1. **What constitutes legal accusation.**—United States *v.* Patterson, 150 U. S. 65, 68, 37 L. Ed. 999.

Distinction between popular and legal sense of term.—In its popular sense, the term "accusation," is freely used with reference to all accusations, whether oral, in the newspapers, or otherwise; but, in legal phraseology, it is properly limited to such accusations only as have taken shape in a prosecution, to which the accused person is legally bound to make answer. United States *v.* Patterson, 150 U. S. 65, 68, 37 L. Ed. 999.

2. **Indictment.**—In re Wilson, 140 U. S. 575, 585, 35 L. Ed. 513.

3. **Defined technically.**—Grin *v.* Shine, 187 U. S. 181, 192, 47 L. Ed. 130; The Samuel, 1 Wheat. 9, 14, 4 L. Ed. 23.

4. **Finding of grand jury.**—In re Bonner, 151 U. S. 242, 257, 38 L. Ed. 149; Grin *v.* Shine, 187 U. S. 181, 192, 47 L. Ed. 130; Hale *v.* Henkel, 201 U. S. 43, 59, 50 L. Ed. 652.

5. **Peculiar to Anglo-Saxon jurisprudence.**—A complaint by the Russian government before an extradition commissioner which sets forth that a fugitive from justice has been "indicted" for embezzlement, no indictment having ever been found, uses the word "indicted" in the general sense of charged or accused by legal proceedings, and not in the technical sense of an indictment as understood in our jurisprudence. Grin *v.* Shine, 187 U. S. 181, 192, 47 L. Ed. 130.

6. **Common-law remedy.**—The Samuel, 1 Wheat. 9, 14, 4 L. Ed. 23.

7. **As referred to in United States constitution.**—Ex parte Bain, 121 U. S. 1, 30 L. Ed. 849.

8. **Presentment—Blackstone's definition.**—Hale *v.* Henkel, 201 U. S. 43, 60, 50 L. Ed. 652, quoting IV Blackstone, 301. And see post, "Ancient English Practice," III, A.

9. **Presentment and indictment considered as one act.**—"In United States *v.* Hill, 1 Brock. 156, it was indicated by Chief Justice Marshall that a presentment and an indictment are to be considered as one act, the second to be considered only as an amendment to the first, and that the usage of this country has been to pass over, unnoticed, presentments on which the attorney does not think it proper to institute proceedings." Hale *v.* Henkel, 201 U. S. 43, 60, 50 L. Ed. 652.

10. **Fallen into disuse.**—Hale *v.* Henkel, 201 U. S. 43, 61, 50 L. Ed. 652.

committed in the presence of the grand jury.[11]

3. INFORMATION—a. *In General.*—An information is a formal charge against the accused of the offense,[12] with such particulars as to time, place, and attendant circumstances as will apprise him of the nature of the charge he is to meet,[13] in the name of the king in England,[14] and of the state or people in America,[15] and signed[16] and presented by the public prosecutor,[17] without the intervention of a grand jury.[18] Informations for the prosecution of minor offenses are said by Blackstone to be as old as the common law itself, and a proceeding before magistrates for the apprehension and commitment of persons charged with crime has been the usual method of procedure since the adoption of the constitution.[19] It is asserted in Story on the Constitution, § 1780, that this process had never been formally put into operation by any positive authority of congress in cases of misdemeanor, and has but rarely been recurred to; though common enough in civil prosecutions for penalties and forfeitures.[20]

b. *At Relation of Private Person.*—Informations at the relation of private persons are in a great measure private suits. They are drawn, moved for and conducted, not by the officers of the crown, but by counsel employed by such private person, who is known as the prosecutor.[21] The information is filed at leave of court,[22] which will not be granted where the private prosecutor appears to the court unworthy.[23] Pro forma, the attorney general must allow his

11. Hale *v.* Henkel, 201 U. S. 43, 59, 50 L. Ed. 652.

12. Information—Formal charge.—In re Bonner, 151 U. S. 242, 257, 38 L. Ed. 149; Territory *v.* Lockwood, 3 Wall. 236, 239, 18 L. Ed. 47; The Samuel, 1 Wheat. 9, 14, 4 L. Ed. 23.

Departure from prescribed form fatal.—Territory *v.* Lockwood, 3 Wall. 236, 239, 18 L. Ed. 47.

13. In re Bonner, 151 U. S. 242, 257, 38 L. Ed. 149.

14. In name of king.—Territory *v.* Lockwood, 3 Wall. 236, 238, 18 L. Ed. 47; Hale *v.* Henkel, 201 U. S. 43, 59, 50 L. Ed. 652; Respublica *v.* Griffiths, 2 Dall. 112, 113, 1 L. Ed. 311.

"Whether filed by the attorney general or the master of the crown office, and whether it relates to public offenses or to the class of private rights specified in the statute of 9 Anne, ch. 20, * * * it is brought in the name of the king, and the practice is substantially the same in all cases." Territory *v.* Lockwood, 3 Wall. 236, 238, 18 L. Ed. 47.

15. In name of state.—"In this country the proceeding is conducted in the name of the state or of the people, according to the local form in indictments, and a departure from this form is a substantial and fatal defect." Territory *v.* Lockwood, 3 Wall. 236, 239, 18 L. Ed. 47.

16. Signed by prosecutor.—In re Bonner, 151 U. S. 242, 257, 38 L. Ed. 149.

17. In England.—The information may be filed by either the attorney general or the master of the crown office. Territory *v.* Lockwood, 3 Wall. 236, 238, 18 L. Ed. 47.

18. Without action of grand jury—Distinguishing feature.—"In the English courts an information for an offense differs from an indictment, chiefly in the fact that it is presented by the law officer of the crown without the intervention of a grand jury." Territory *v.* Lockwood, 3 Wall. 236, 238, 18 L. Ed. 47.

As used in election laws, Revised Statutes, § 2026.—United States *v.* Poinier, 140 U. S. 160, 35 L. Ed. 395. See post, INFORMATION.

19. Of ancient origin.—Davis *v.* Burke, 179 U. S. 399, 404, 45 L. Ed. 249.

20. Was formerly rarely used in criminal cases.—Informations are principally, if not exclusively, used for the recovery of fines and forfeitures, such as those imposed by the revenue and embargo laws. Ex parte Wilson, 114 U. S. 417, 424, 29 L. Ed. 89.

But within the fifteen years previous to this case, prosecutions by information have greatly increased, and the general current of opinion in the circuit and district courts has been towards sustaining them for any crime, a conviction of which would not at common law have disqualified the convict to be a witness. Ex parte Wilson, 114 U. S. 417, 425, 29 L. Ed. 89.

21. At relation of private person.—Respublica *v.* Griffiths, 2 Dall. 112, 1 L. Ed. 311. See post, "Who May Make Motion," XV, C, 1, a.

"There is, in England, a known and established distinction, between informations filed by the attorney general, and those filed by him, at the relation of a private person, in the name of the master of the crown office. The former are always filed ex officio; and the court will not, upon motion of the attorney general, give him leave to file an information against any person." Respublica *v.* Griffiths, 2 Dall. 112, 1 L. Ed. 311.

22. By leave of court.—Respublica *v.* Griffiths, 2 Dall. 112, 1 L. Ed. 311.

23. When leave refused.—Boyd *v.* Nebraska, 143 U. S. 135, 36 L. Ed. 103.

name to be used by the prosecutor, but he can charge no fees for drawing or filing. In many cases the prosecutor is liable for costs.[25]

c. *In Nature of Quo Warranto.*—For treatment of this subject, see elsewhere.[26]

d. *Libel in Nature of Information.*—For treatment of this subject, see elsewhere.[27]

4. Complaint—a. *In General.*—An accused person is usually charged with crime by a complaint made before a committing magistrate.[28]

b. *In Extradition Cases.*—For treatment of this subject, see elsewhere.[29]

C. Object and Purpose—1. Notice to Accused.—The object of the accusation is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause;[30] and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had.[31]

2. Commencement of Prosecution.—Criminal proceedings cannot be said to be brought or instituted until a formal charge is openly made against the accused, either by indictment presented or information filed in court, or, at least, by complaint before a magistrate.[32]

D. Offenses Subject to Accusation.—An information or an indictment cannot be founded on any statute which is not penal in its character.[33] The numerous indictable offenses are to be found treated in the specific criminal law titles in this work.

II. Necessity for Presentment or Indictment.

A. In General.—This subject is treated elsewhere.[34]

25. **Prosecutor liable for costs.**—Respublica *v.* Griffiths, 2 Dall. 112, 113, 1 L. Ed. 311.

26. **Information in nature of quo warranto.**—See the title QUO WARRANTO.

27. **Libel in nature of information.**—See the title ADMIRALTY, vol. 1, p. 164. And see post, "In Admiralty," VII, H, 1.

28. **Complaint.**—Hale *v.* Henkel, 201 U. S. 43, 59, 50 L. Ed. 652.

29. **In extradition cases.**—See the titles EXTRADITION, ante, p. 215; HABEAS CORPUS, ante, p. 610.

30. **Object and purpose—Notice to accused.**—United States *v.* Hess, 124 U. S. 483, 487, 31 L. Ed. 516; Potter *v.* United States, 155 U. S. 438, 445, 39 L. Ed. 214; Dealy *v.* United States, 152 U. S. 539, 545, 38 L. Ed. 545.

"In order that he may decide whether he should present his defense by motion to quash, demurrer, or plea; and the court, that it may determine whether the facts will sustain the indictment." United States *v.* Cruikshank, 92 U. S. 542, 559, 23 L. Ed. 588.

31. **To support conviction.**—United States *v.* Cruikshank, 92 U. S. 542, 558, 23 L. Ed. 588, quoted in Fitzpatrick *v.* United States, 178 U. S. 304, 309, 44 L. Ed. 1078; United States *v.* Hess, 124 U. S. 483, 487, 31 L. Ed. 516. See, also, United States *v.* Reese, 92 U. S. 214, 243, 23 L. Ed. 563, Hunt, J., dissenting.

32. **Commencement of prosecution.**—Post *v.* United States, 161 U. S. 583, 587, 40 L. Ed. 816; Virginia *v.* Paul, 148 U. S. 107, 119, 121, 37 L. Ed. 386. See the title CRIMINAL LAW, vol. 5, p. 96. And see ante, "Indictment," I, B, 1; post, "Effect of Funding—Commencement of Prosecution," III, G.

33. **Offenses against penal statutes only.**—Stockwell *v.* United States, 13 Wall. 531, 555, 20 L. Ed. 491, opinion of Field, J., dissenting.

34. **Prosecution by United States—Fifth amendment.**—See the title CONSTITUTIONAL LAW, vol. 4, p. 492.

Same—Sixth amendment.—See the title CONSTITUTIONAL LAW, vol. 4, p. 495. And see post, "Constitutional Provisions," VIII, C, 2.

Prosecution by state—Fifth amendment.—See the title CONSTITUTIONAL LAW, vol. 4, p. 492.

Same—Sixth amendment.—See the title CONSTITUTIONAL LAW, vol. 4, p. 495.

Same — Fourteenth amendment.—See the title DUE PROCESS OF LAW, vol. 5, p. 667. And see post, "Constitutional Provisions," VIII, C, 2.

Prosecution by territory.—Mattox *v.* United States, 156 U. S. 237, 239, 39 L. Ed. 409. See the title TERRITORIES.

In Hawaiian Islands.—Hawaii *v.* Mankichi, 190 U. S. 197, 47 L. Ed. 1016; Dorr *v.* United States, 195 U. S. 138, 139, 49 L. Ed. 128; Carter *v.* Gear, 197 U. S. 348, 354, 49 L. Ed. 787. See, also, Rassmussen *v.* United States, 197 U. S. 516, 521, 49 L.

B. In Contempt Cases.—A proceeding by indictment is not exclusive if the offense of obstructing justice be committed under such circumstances as to bring it within the power of the court.[35]

C. In Extradition Cases.—The finding of an indictment against a fugitive from justice is not a prerequisite to extradition proceedings.[36]

D. In Examination of Witnesses by Grand Jury.—The examination of witnesses by a federal grand jury need not be preceded by a formal indictment or a presentment.[37]

III. Finding of Indictment.

A. Ancient English Practice.—Under the ancient English system, criminal prosecutions were instituted either at the suit of private prosecutors, to which the king lent his name in the interest of the public peace and good order of society, or by the grand jurors upon facts within their own knowledge. In the former case, their action was embodied in an indictment formally laid before them for their consideration; in the latter case, in the form of a presentment.[38]

B. American Practice.—While no case has arisen in the federal supreme court in which the question has been distinctly presented, the authorities in the state courts largely preponderate in favor of the theory that the grand jury may act upon information received by them from the examination of witnesses without a formal indictment, or other charge previously laid before them.[39]

C. Concurrence of Grand Jurors.—An indictment can only be found by a specified number of the grand jury. If not found by that number, the court cannot proceed at all.[40] But the failure of an indictment to show, by express recital that it was found by the concurrence of at least twelve jurors, is a mere formal defect.[41]

D. Necessity for Preliminary Examination.—In the absence of a statutory requirement, a preliminary examination is not indispensable to the finding of an indictment.[42]

Ed. 862. See the title TERRITORIES.

Prosecution by Indian nation.—See the titles CONSTITUTIONAL LAW, vol. 4, p. 492; INDIANS, ante, p. 906.

Infamous crimes.—See the title CONSTITUTIONAL LAW, vol. 4, p. 494.

Offenses by persons in military and naval forces.—See the title CONSTITUTIONAL LAW, vol. 4, p. 493.

35. In contempt cases.—So held in punishment of an offense arising under § 725, Rev. Stat. Pettibone *v.* United States, 148 U. S. 197, 206, 37 L. Ed. 419; Savin, Petitioner, 131 U. S. 267, 33 L. Ed. 150. See the title CONTEMPT, vol. 4, p. 539.

36. In extradition cases.—Greene *v.* Henkel, 183 U. S. 249, 46 L. Ed. 177. See the title EXTRADITION, ante, p. 215.

37. Prerequisite to examination of witnesses by grand jury.—Hale *v.* Henkel, 201 U. S. 43, 65, 50 L. Ed. 652. See the title GRAND JURY, ante, p. 570.

38. Finding of indictment.—Hale *v.* Henkel, 201 U. S. 43, 60, 50 L. Ed. 652.

39. American practice.—Hale *v.* Henkel, 201 U. S. 43, 62, 50 L. Ed. 652.

"While the grand jury may not indict upon current rumors or unverified reports, they may act upon knowledge acquired either from their own observations or upon the evidence of witnesses given before them." Hale *v.* Henkel, 201 U. S. 43, 65, 50 L. Ed. 652.

In Frisbie *v.* United States, 157 U. S. 160, 39 L. Ed. 657, Mr. Justice Brewer, said: "In this country it is for the grand jury to investigate any alleged crime, no matter how or by whom suggested to them, and after determining that the evidence is sufficient to justify putting the supected party on trial, to direct the preparation of the formal charge or indictment." Hale *v.* Henkel, 201 U. S. 43, 63, 50 L. Ed. 652.

40. Concurrence of grand jurors.—In re Bonner, 151 U. S. 242, 257, 38 L. Ed. 149.

41. Omission of recital mere formal defect.—Which defect comes within § 1025 of the Revised Statutes, and does not prejudice the accused. Caha *v.* United States, 152 U. S. 211, 221, 38 L. Ed. 415.

Where the record shows that at a term of the district court the grand jurors of the United States in and for said district came into open court, and, through their foreman, presented the bill of indictment, and that the bill was endorsed "a true bill," with the signature of the foreman immediately thereunder. With reference to all these objections it is enough to refer to § 1025 of the Revised Statutes. Caha *v.* United States, 152 U. S. 211, 221, 38 L. Ed. 415.

Need not be set out in the caption.—Caha *v.* United States, 152 U. S. 211, 221, 38 L. Ed. 415.

42. Thiede *v.* Utah Territory, 159 U. S. 510, 513, 40 L. Ed. 237; Goldsby *v.* United States, 160 U. S. 70, 40 L. Ed. 343.

E. Not Part of Trial.—The finding of the indictment is no part of the trial.[43]

F. Effect of Mistake and Misconception.—The fact that the indictment was found by the grand jury by mistake and misconception is a proper subject of inquiry in the courts of the state, but affords no ground for interposition by the courts of the United States by writ of habeas corpus.[44]

G. Effect of Finding—Commencement of Prosecution.—The prosecution is begun by the finding of the indictment.[45]

IV. Return of Indictment.

In the United States an indictment is returned into court by the grand jury.[46]

V. Docketing Indictment.

Where several persons are indicted jointly but tried separately on the motion of some of the defendants, the clerk is entitled to fees for docketing the indictments in each separate case.[47]

VI. Delivery of Copy of Indictment and List of Witnesses to Accused.

This subject is treated elsewhere.[48]

VII. Form and Requisites.

A. Statutory Provision.—It is provided by the Revised Statutes that no indictment or presentment shall be deemed insufficient by reason of any defect or imperfection in matter of form only, which does not prejudice the defendant.[49] This, of course, is not to be construed as permitting the omission of any matter of substance,[50] but is applicable where the only defect complained of is that some element of the offense is stated loosely and without technical accuracy.[51]

B. Form Prescribed by Statute.—Each state has the right to prescribe the forms of pleading and process to be observed in its courts in criminal cases, subject only to those provisions of the national constitution designed for the protection of life, liberty and property in all the states of the Union.[52]

C. Caption—1. SEPARATE FROM BODY OF INDICTMENT.—Although the cap-

43. Logan *v.* United States, 144 U. S. 263, 297, 36 L. Ed. 429.

44. Whitten *v.* Tomlinson, 160 U. S. 231, 243, 40 L. Ed. 406; In re Wilson, 140 U. S. 575, 35 L. Ed. 513.

45. Virginia *v.* Paul, 148 U. S. 107, 37 L. Ed. 386. See the title REMOVAL OF CAUSES.

46. Returned into court.—Frisbie *v.* United States, 157 U. S. 160, 163, 39 L. Ed. 657.

47. United States *v.* Keatley, 204 U. S. 562, 563, 51 L. Ed. 618. See Revised Statutes, § 828.

"We think the order granting separate trials made separate causes, and therefore each was independent of the other. The services rendered were a proper charge under the statute." United States *v.* Keatley, 204 U. S. 562, 563, 51 L. Ed. 618.

48. Delivery of copy of indictment of list to accused.—See the title CRIMINAL LAW, vol. 5, pp. 110, 113.

49. Statutory provision.—Section 1025, Rev. Stat.; Crain *v.* United States, 162 U. S. 625, 637, 40 L. Ed. 1097; Markham *v.* United States, 160 U. S. 319, 40 L. Ed. 441; Rosen *v.* United States, 161 U. S. 29, 32, 40 L. Ed. 606; Price *v.* United States, 165 U. S. 311, 315, 41 L. Ed. 727; Caha *v.* United States, 152 U. S. 211, 221, 38 L. Ed. 415; Dunbar *v.* United States, 156 U. S. 185, 192, 39 L. Ed. 390. See post, "In United States," VII, F, 1, c.

Incorrect spelling immaterial.—Faust *v.* United States, 163 U. S. 452, 454, 41 L. Ed. 224.

In indictments for perjury.—This provision does not dispense with any of the requirements in Revised Statutes, § 5366, in regard to indictments for perjury. Markham *v.* United States, 160 U. S. 319, 40 L. Ed. 441. See the title PERJURY.

50. Does not permit omission of matter of substance.—United States *v.* Carll, 105 U. S. 611, 26 L. Ed. 1135; Dunbar *v.* United States, 156 U. S. 185, 192, 39 L. Ed. 390.

51. Dunbar *v.* United States, 156 U. S. 185, 192, 39 L. Ed. 390.

Invalid because too general.—Moore *v.* United States, 160 U. S. 268, 276, 40 L. Ed. 422.

52. Form prescribed by statute.—Ex parte Reggel, 114 U. S. 642, 29 L. Ed. 250; Davis *v.* Utah, 151 U. S. 262, 266, 38 L. Ed. 153; Bergemann *v.* Backer, 157 U. S. 655, 658, 39 L. Ed. 845; Caldwell *v.* Texas, 137 U. S. 692, 697, 34 L. Ed. 816.

tion and the indictment seem naturally to form but one instrument,[53] the former is no part of the instrument found by the grand jury.[54]

2. Requisites and Sufficiency—a. *Names of Court and Parties.*—The failure of an indictment in its caption to show the organization of the court or who composed it or who were present as constituent parties thereto when the indictment was returned, is a mere formal defect, and is cured by § 1025 of the Revised Statutes.[55]

b. *Finding by Grand Jury.*—The failure of the caption to show that an indictment was found by the concurrence of at least twelve grand jurors, does not tend to prejudice the accused and is within § 1025 of the Revised Statutes.[56]

D. Conclusion.—So far as respects the objection that the count does not conclude that the offense charged was "contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the United States," it is sufficient to say that such allegation, which is one of a mere conclusion of law, is not of the substance of the charge, and the omission is of a matter of form, which does not tend to the prejudice of the defendant, and is, therefore, within the rule of § 1025, Rev. Stat. and to be disregarded.[57] Though considering that the conclusion may be necessary in some cases,[58] the court had formerly held that where it is inserted at the end of a declaration or indictment, it does not, as a general rule, relate to the last preceding averments alone, but the whole subject matter before alleged to constitute an offense. It is all that misconduct which is contrary to the statute, and not the concluding part of it only, to which the conclusion relates.[59]

E. Averment of Particular Facts—1. Concurrence of Grand Jurors.—For treatment of this subject, see elsewhere in this title.[60]

2. Place of Sitting of Grand Jurors.—An indictment by a grand jury summoned in a federal district court, need not state at what particular place within such district the grand jury was sitting at the time of finding the indictment.[61]

F. Endorsement—1. By Foreman of Grand Jury—a. *In General.*—At English common law, the endorsement, "a true bill," by the foreman of the grand jury, is parcel of the indictment and the perfection thereof.[62] But the

53. Separate from body of indictment.—United States *v.* The Insurgents, 2 Dall. 335, 342, 1 L. Ed. 404.

54. "Where an inferior court," says Starkie's Criminal Pleading, 258, "in obedience to a writ of certiorari from the King's Bench, transmits the indictment to the Crown office, it is accompanied with a formal history of the proceeding, describing the court before which the indictment was found, the jurors by whom it was found, and the time and place where it was found. This instrument, termed a schedule, is annexed to the indictment, and both are sent to the Crown office. The history of the proceedings, as copied or extracted from the schedule, is called the caption, and is entered of record immediately before the indictment." It will be seen that, as thus explained, the caption is no part of the instrument found by the grand jury. Ex parte Bain, 121 U. S. 1, 7, 30 L. Ed. 849.

55. Requisites—Name of court and parties.—Caha *v.* United States, 152 U. S. 211, 221, 38 L. Ed. 415.

"Clearly, there was nothing in any of these matters which tended to the prejudice of the defendant, or rendered it doubtful by what body he was charged with the crime, in what court he was to be tried, or the exact nature of the offense with which he was charged." Caha *v.* United States, 152 U. S. 211, 221, 38 L. Ed. 415.

Under statute of territory of Utah.—Cannon *v.* United States, 116 U. S. 55, 75, 29 L. Ed. 561.

56. Caha *v.* United States, 152 U. S. 211, 221, 38 L. Ed. 415. See ante, "Concurrence of Grand Jurors," III, C.

57. Conclusion—Contra forma statute.—Frisbie *v.* United States, 157 U. S. 160, 168, 39 L. Ed. 657. See post, "Effect of Averring as Contrary to Statute," VIII, C, 7, o, (6).

58. It was formerly held that the expression, "contrary to the statute" follows the concluding portion of the count, and may be necessary in a penal declaration. Jones *v.* Van Zandt, 5 How. 215, 229, 12 L. Ed. 122.

59. Conclusion relates to all preceding counts.—Jones *v.* Van Zandt, 5 How. 215, 229, 12 L. Ed. 122.

60. Averment of concurrence of grand jurors.—See ante, "Concurrence of Grand Jurors," III, C.

61. Place of sitting of grand jurors.—Rosencrans *v.* United States, 165 U. S. 257, 263, 41 L. Ed. 708. See the title GRAND JURY, ante, p. 570.

62. Indorsement "a true bill."—Frisbie

endorsement is no part of the charge.[63]

b. *In England.*—The necessity for the formal endorsement at ancient English common law grew out of the practice of presenting formal indictments or accusations to the grand jury who either merely approved or disapproved thereof, and indicated their action by the endorsement, which became the evidence, if not the only evidence, of the action of the grand jury.[64]

c. *In United States.*—But in this country the common practice is for the grand jury to investigate any alleged crime, no matter how or by whom suggested to them, and after determining that the evidence is sufficient to justify putting the party suspected on trial, to direct the preparation of the formal charge or indictment. Thus they return into court only those accusations which they have approved, and the fact that they thus return them into court is evidence of such approval, and the formal endorsement loses its essential character.[65] The omission of the endorsement is a mere formal defect not tending to the prejudice of the accused, and is within § 1025 of the Revised Statutes.[66] There is in the federal statutes no mandatory provision requiring such endorsement or authentication, and the matter must, therefore, be determined on general principles.[67] As it is not an unvarying rule for the grand jury to return into court only the indictments which they have found, it is advisable, at least, that the indictment be endorsed according to the ancient practice, for such endorsement is a short, convenient, and certain method of informing the court of their action.[68]

2. By Prosecuting Attorney.—Under a statute requiring an indictment to be endorsed by "the prosecutor," such endorsement is necessary only in case there is in fact an existing prosecutor.[69] Where an indictment was found by the grand jury, endorsed as a true bill by the foreman, and filed in open court according to law, the fact that it was not signed by the district attorney of the United States is not such error as goes to the jurisdiction of the court.[70] It is not a material defect, prejudicial to the rights of the accused, that an indictment is signed by the assistant United States district attorney instead of by the district attorney himself.[71]

3. Of Names of Witnesses.—This subject is treated elsewhere.[72]

G. Of Separate Counts.—Each count in an indictment is in form a distinct

v. United States, 157 U. S. 160, 163, 39 L. Ed. 657.

63. No part of charge.—Frisbie *v.* United States, 157 U. S. 160, 165, 39 L. Ed. 657.

64. In England.—Frisbie *v.* United States, 157 U. S. 160, 163, 39 L. Ed. 657.

65. In United States generally.—Frisbie *v.* United States, 157 U. S. 160, 163, 39 L. Ed. 657.

It has been held by some American courts that this omission is simply an omission of a form only and is immaterial and unimportant, and not necessarily and under all circumstances fatal to the indictment. Frisbie *v.* United States, 157 U. S. 160, 163, 39 L. Ed. 657; Caha *v.* United States, 152 U. S. 211, 221, 38 L. Ed. 415.

In 1 Bish. Crim. Proc., § 700, it is said: "In the absence of a mandatory statute, it is the better view that both the words 'a true bill' and the signature of the foreman may be dispensed with, if the fact of the jury's finding appears in any other form in the record." Frisbie *v.* United States, 157 U. S. 160, 163, 39 L. Ed. 657.

Does not raise federal question.—The objection that the indictment in a prosecution in a state court was not indorsed a "true bill" does not raise a federal question. Whitten *v.* Tomlinson, 160 U. S. 231, 243, 40 L. Ed. 406. See the title HABEAS CORPUS, ante, p. 610.

66. Within § 1025, Rev. Stat.—Caha *v.* United States, 152 U. S. 211, 221, 38 L. Ed. 415.

67. In federal courts.—Frisbie *v.* United States, 157 U. S. 160, 163, 39 L. Ed. 657.

68. Advisable practice.—Frisbie *v.* United States, 157 U. S. 160, 164, 39 L. Ed. 657.

69. By prosecuting attorney.—And as no person in the present case is proved to be active in carrying on the prosecution, the defendant must plead to the indictment, without any indorsement. The defendant was not permitted to prove by his own testimony that there really was a prosecutor. The court held that such proof must be made by indifferent witnesses. King *v.* Lukens, 1 Dall. 5, 6, 1 L. Ed. 13.

70. Omission not jurisdictional defect.—In re Lane, 135 U. S. 443, 449, 34 L. Ed. 219.

71. By assistant district attorney.—Caha *v.* United States, 152 U. S. 211, 221, 38 L. Ed. 415.

72. Of names of witnesses.—See the title CRIMINAL LAW, vol. 5, p. 110.

charge of a separate offense.[73]

H. Of Information—1. In Admiralty.—Rule 22 of the Rules in Admiralty prescribes regulations for the form of informations and libels of information on seizures for the breach of the laws of the United States on land or water.[74]

2. Verification.—The fact that an information for contempt in a proceeding in a state court was not supported by an affidavit until after it had been filed, cannot be reviewed in the federal supreme court.[75]

I. Raising Objection.—It is too late after a demurrer, plea of not guilty, motion for a new trial, and motion in arrest of judgment, to object to an indictment for mere formal matters.[76]

VIII. Requisites and Sufficiency of Charge.

A. Charge Defined—What Constitutes.—A definition of the word "charge" is not easy to furnish. An accused person is usually charged with crime by a complaint made before a committing magistrate, which has fully performed its office when the party is committed or held to bail, and it is quite unnecessary to the finding of an indictment by a grand jury; or by an information of the district attorney, which is of no legal value in prosecutions for felony; or by a presentment usually made, as in this case, for an offense committed in the presence of the jury; or by an indictment which, as often as not, is drawn after the grand jury has acted upon the testimony.[77]

B. As Affected by Form of Accusation—1. Indictments and Presentments.—There is nothing peculiar in regard to the sufficiency of these two forms of accusation aside from the general treatment in this title.

2. Informations.—An information need not be more technical in its language, or specific in its description of the offense, than an indictment.[78]

3. Complaints—a. *In General.*—The technicalities of an indictment are not requisite in a complaint.[79]

b. *Upon Information and Belief.*—A complaint, verified on the information and belief of an affiant, must set forth the sources and grounds of the affiant's information and belief.[80]

C. Designation of the Offense—1. In General.—The accused is entitled

73. Of separate courts.—Dealy *v.* United States, 152 U. S. 539, 542, 38 L. Ed. 545; Ingraham *v.* United States, 155 U. S. 434, 436, 39 L. Ed. 213; United States *v.* The Pirates, 5 Wheat. 184, 5 L. Ed. 64; Selvester *v.* United States, 170 U. S. 262, 267, 42 L. Ed. 1029; Rice *v.* Ames, 180 U. S. 371, 376, 45 L. Ed. 577; Blitz *v.* United States, 153 U. S. 308, 316, 38 L. Ed. 725; Coffin *v.* United States, 156 U. S. 432, 449, 39 L. Ed. 481.

The different counts may be considered to be separate indictments. Dimmick *v.* Tompkins, 194 U. S. 540, 48 L. Ed. 1110.

74. Informations in admiralty.—Coffey *v.* United States, 116 U. S. 427, 435, 29 L. Ed. 681. See the title ADMIRALTY, vol. 1, p. 164.

75. Verification.—Patterson *v.* Colorado, 205 U. S. 454, 460, 51 L. Ed. 879.

76. Raising objection to formal defects.—Frisbie *v.* United States, 157 U. S. 160, 165, 39 L. Ed. 657.

The want of an indorsement "a true bill" cannot be so objected to. Frisbie *v.* United States, 157 U. S. 160, 164, 165, 39 L. Ed. 657.

77. What constitutes "charge."—Hale *v.* Henkel, 201 U. S. 43, 59, 50 L. Ed. 652.

78. Information need not be more specific than indictment.—United States *v.* Brig Neurea, 19 How. 92, 94, 15 L. Ed. 531; United States *v.* Mann, 95 U. S. 580, 585, 24 L. Ed. 531; The Confiscation Cases, 20 Wall. 92, 104, 22 L. Ed. 320. See the title ADMIRALTY, vol. 1, p. 164.

79. Complaint.—Rice *v.* Ames, 180 U. S. 371, 379, 45 L. Ed. 577.

"It may be conceded that the offense is not stated with the fullness and technical accuracy required in an indictment, but we do not think that the complaint can be treated as an absolute nullity." Southworth *v.* United States, 151 U. S. 179, 184, 38 L. Ed. 119.

Complaint in extradition.—Grin *v.* Shine, 187 U. S. 181, 47 L. Ed. 130. See the title EXTRADITION, ante, p. 215.

80. Rice *v.* Ames, 180 U. S. 371, 374, 45 L. Ed. 577.

Upon information and belief.—Under the extradition treaty with Great Britain, a complaint before a commissioner, if made solely on information and belief with no attempt to set forth the sources of such information or the grounds that find belief, is insufficient. Rice *v.* Ames, 180 U. S. 371, 374, 45 L. Ed. 577.

Complaint in extradition cases.—Grin *v.* Shine, 187 U. S. 181, 186, 47 L. Ed. 130.

to a formal and substantial statement of the grounds upon which he is questioned,[81] but not to such strictness in averment as might defeat the ends of justice.[82] The pleader is at liberty to use any form of expression, provided only that he thereby fully and accurately describes the offense.[83] The true test of the sufficiency of an indictment is, not whether it may be made more certain and full by additional, or different allegations, or so drawn as to be beyond the hypercriticism of astute counsel,[84] but whether it contains every element of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.[85] And the entire indictment is to be considered in determining whether the offense is fully stated.[86]

2. Constitutional Provisions.—In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right "to be informed of the nature and cause of the accusation."[87] The due process clause requires that the indictment or other process must give full notice of all material facts constituting the offense charged.[88]

3. At Common Law.—At common law, in certain descriptions of offenses, and especially of capital offenses, great nicety and particularity are often necessary.[89]

See the title EXTRADITION, ante, p. 215.

81. **Designation of offense.**—United States *v.* Simmons, 96 U. S. 360, 364, 24 L. Ed. 819; Evans *v.* United States, 153 U. S. 584, 594, 38 L. Ed. 830.

82. "The particularity required in an indictment or in the statutory description of offenses has at times been extreme, the distinctions almost ridiculous. I cannot but think that in some cases good sense is sacrificed to technical nicety, and a sound principle carried to an extravagant extent." United States *v.* Reese, 92 U. S. 214, 243, 23 L. Ed. 563, Hunt, J., dissenting.

83. **Form of expression.**—Dunbar *v.* United States, 156 U. S. 185, 190, 39 L. Ed. 390.

84. **Test of sufficiency.**—Cochran *v.* United States, 157 U. S. 286, 290, 39 L. Ed. 704; Fitzpatrick *v.* United States, 178 U. S. 304, 310, 44 L. Ed. 1078.

85. Cochran *v.* United States, 157 U. S. 286, 290, 39 L. Ed. 704; Evans *v.* United States, 153 U. S. 584, 587, 588, 38 L. Ed. 830; Batchelor *v.* United States, 156 U. S. 426, 39 L. Ed. 478. See the title BANKS AND BANKING, vol. 3, p. 107.

Where the averments of the indictment were sufficient to enable the defendant to prepare his defense, and in the event of acquittal or conviction, the judgment could have been pleaded in bar of a second prosecution for the same offense, and the accused was informed with reasonable certainty by the indictment of the nature and cause of the accusation against him, he was not entitled to more, nor could he demand that all the special or particular means employed in the commission of the offense should be more fully set out in the indictment. Burton *v.* United States, 202 U. S. 344, 372, 50 L. Ed. 1057.

86. **Construed as a whole.**—Dunbar *v.* United States, 156 U. S. 185, 190, 39 L. Ed. 390.

87. **Constitutional provision.**—United States *v.* Cruikshank, 92 U. S. 542, 557, 23 L. Ed. 588. See United States Constitution, Amendment, VI.

"In United States *v.* Mills, 7 Pet. 138, 142, 8 L. Ed. 636, this was construed to mean, that the indictment must set forth the offense 'with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged.'" United States *v.* Cruikshank, 92 U. S. 542, 558, 23 L. Ed. 588. See, also, Rosen *v.* United States, 161 U. S. 29, 40, 40 L. Ed. 606.

"And in United States *v.* Cook, 17 Wall. 168, 174, 21 L. Ed. 638, that 'every ingredient of which the offense is composed must be accurately and clearly alleged.'" United States *v.* Cruikshank, 92 U. S. 542, 558, 23 L. Ed. 588. See, also, Rosen *v.* United States, 161 U. S. 29, 40, 40 L. Ed. 606; Ex parte Virginia, 100 U. S. 339, 352, 25 L. Ed. 676, Field, J., dissenting; Ball *v.* United States, 140 U. S. 118, 136, 35 L. Ed. 377. See the title CONSTITUTIONAL LAW, vol. 4, p. 495.

88. **Due process clause.**—The authorities abundantly show that whatever process—indictment, information or what not—brings a man into court for trial, it must be one giving him full notice of all the material facts constituting the offense charged. There can be no "due process of law" without this. Caldwell *v.* Texas, 141 U. S. 209, 210, 35 L. Ed. 718. See the title DUE PROCESS OF LAW, vol. 5, p. 499.

89. **Particularity at common law.**—United States *v.* Gooding, 12 Wheat. 460, 474, 6 L. Ed. 693.

4. Under Statute.—The common law strictness has been relaxed in many cases by statutes, which the courts are to heed.[90]

5. Manner of Averment—a. *Completeness.*—Offenses, whether of statutory,[91] or common-law origin, consist of more than one ingredient, and in most cases of many;[92] and the rule is universal, that every ingredient of which the offense is composed must be accurately and clearly alleged in the indictment,[93] to show prima facie the guilt of the accused,[94] and to enable him to prepare his

90. Under statute.—Fitzpatrick *v.* United States, 178 U. S. 304, 310, 44 L. Ed. 1078.

Utah statute.—Cannon *v.* United States, 116 U. S. 55, 76, 29 L. Ed. 561.

"In respect to the description of the offense, an indictment is sufficient, under the laws of Utah, if the act or omission charged as the offense is clearly and distinctly set forth, without repetition, and in such manner as to enable the court to understand what is intended, and to pronounce judgment upon conviction according to the right of the case. Comp. Laws of Utah, vol. 2, § 4938." Davis *v.* Utah, 151 U. S. 262, 266, 38 L. Ed. 153.

Oregon statute.—Fitzpatrick *v.* United States, 178 U. S. 304, 44 L. Ed. 1078. See the title HOMICIDE, ante, p. 695.

91. Completeness—Statutory offenses.—United States *v.* Carll, 105 U. S. 611, 612, 26 L. Ed. 1135; Blitz *v.* United States, 153 U. S. 308, 315, 38 L. Ed. 725; United States *v.* Hess, 124 U. S. 483, 486, 31 L. Ed. 516; United States *v.* Cook, 17 Wall. 168, 174, 21 L. Ed. 638; United States *v.* Mann, 95 U. S. 580, 583, 24 L. Ed. 531. See post, "In General," VIII, C, 7, o, (2), (c), aa; "Where All Elements of Offense Are Not Expressed," VIII, C, 7, o, (2), (c), cc.

92. Offenses consist of more than one element.—United States *v.* Cook, 17 Wall. 168, 174, 21 L. Ed. 638; United States *v.* Mann, 95 U. S. 580, 583, 24 L. Ed. 531; United States *v.* Reese, 92 U. S. 214, 225, 23 L. Ed. 563, Clifford, J., dissenting.

A crime is made up of acts and intent; and these must be set forth in the indictments with reasonable particularity of time, place, and circumstances. United States *v.* Hess, 124 U. S. 483, 487, 31 L. Ed. 516; United States *v.* Cruikshank, 92 U. S. 542, 543, 558, 23 L. Ed. 588.

93. Every essential to be alleged.—United States *v.* Cook, 17 Wall. 168, 174, 21 L. Ed. 638; Ball *v.* United States, 140 U. S. 118, 136, 35 L. Ed. 377; United States *v.* Mann, 95 U. S. 580, 583, 24 L. Ed. 531; United States *v.* Reese, 92 U. S. 214, 225, 232, 23 L. Ed. 563, Clifford, J., dissenting; Fitzpatrick *v.* United States, 178 U. S. 304, 310, 44 L. Ed. 1078; United States *v.* Staats, 8 How. 41, 12 L. Ed. 979; United States *v.* Hess, 124 U. S. 483, 486, 487, 488, 31 L. Ed. 516; The Hoppet, 7 Cranch 389, 392, 3 L. Ed. 380; Evans *v.* United States, 153 U. S. 584, 587, 590, 38 L. Ed. 830; Coffey *v.* United States, 116 U. S. 427, 435, 29 L. Ed. 681; United States *v.* Simmons, 96 U. S. 360, 24 L. Ed. 819; United States *v.* Carll, 105 U. S. 611, 26 L. Ed. 1135; United States *v.* Britton, 107 U. S. 655, 667, 27 L. Ed. 520, approved in United States *v.* Britton, 108 U. S. 193, 27 L. Ed. 701; United States *v.* Cruikshank, 92 U. S. 542, 558, 23 L. Ed. 588; Ledbetter *v.* United States, 170 U. S. 606, 610, 42 L. Ed. 1162; Pettibone *v.* United States, 148 U. S. 197, 37 L. Ed. 419.

Illustrative case.—"It is not sufficient, for example, to charge in an indictment that the defendant has been guilty of murder, without stating the time and place of the offense, and the name of the person murdered, or, if his name be unknown, giving such a description as to identify him. An indictment without such specification would be merely a collection of pointless words." Ex parte Virginia, 100 U. S. 339, 352, 25 L. Ed. 676, Field, J., dissenting.

Facts and circumstances embraced in definition.—The general rule with few exceptions is, that all the material facts and circumstances embraced in the definition of the offense must be stated, or the indictment will be defective. United States *v.* Hess, 124 U. S. 483, 486, 31 L. Ed. 516; Pettibone *v.* United States, 148 U. S. 197, 202, 37 L. Ed. 419.

Substance of offense.—Dunbar *v.* United States, 156 U. S. 185, 192, 39 L. Ed. 390; Markham *v.* United States, 160 U. S. 319, 320, 40 L. Ed. 441.

Indictment for perjury.—Markham *v.* United States, 160 U. S. 319, 323, 40 L. Ed. 441. See Rev. Stat., § 5396. And see the title PERJURY.

In conspiracy cases.—Pettibone *v.* United States, 148 U. S. 197, 202, 37 L. Ed. 419; United States *v.* Hirsch, 100 U. S. 33, 25 L. Ed. 539; United States *v.* Britton, 108 U. S. 193, 199, 27 L. Ed. 701. See the title CONSPIRACY, vol. 4, p. 1103.

For false entry in bank report under Rev. Stat., §§ 5209, 5211, see Cochran *v.* United States, 157 U. S. 286, 288, 39 L. Ed. 704. And see the title BANKS AND BANKING, vol. 3, p. 118.

Intent.—Evans *v.* United States, 153 U. S. 584, 594, 38 L. Ed. 830. See post, "Necessity for Averment," VIII, C, 7, l, (1), (a).

Under Utah statute.—Davis *v.* Utah, 151 U. S. 262, 265, 38 L. Ed. 153; Cannon *v.* United States, 116 U. S. 55, 65, 76, 29 L. Ed. 561.

94. Prima facie case to be alleged.—According to Mr. Bishop, there must be

defense,[95] and avail himself of his acquittal or conviction against any further prosecution for the same cause,[96] or the indictment will be bad on demurrer, or it may be quashed on motion, or the judgment may be arrested before sentence, or be reversed on writ of error.[97] An indictment is sufficient if it directly and without ambiguity discloses all the essential elements to the commission of the offense charged.[98] But no essential element of the crime can be omitted without destroying the whole pleading.[99] Such particulars are matters of substance and not of form, and their omission is not admitted on demurrer,[1] aided by averments of particular facts,[2] nor aided or cured by verdict.[3] Nor can such omission be supplied by intendment of implication.[4] Ingredients or elements not set forth in the information or other criminal accusation cannot be incorporated into the charge against the defendant after he is served with process.[5] The constitutional guaranty, that the accused shall be entitled to be informed of the nature and cause of the accusation against him in all criminal cases, has been construed to require that every ingredient of the offense be alleged,[6] and the due process clause requires that the indictment shall give full notice of all material facts constituting the offense charged.[7]

such an averment of facts as shows prima facie guilt in the defendant; and if, supposing all the facts set out to be true, there is, because of the possible nonexistence of some fact not mentioned, room to escape from the prima facie conclusion of guilt, the indictment is insufficient. 1 Bishop, Cr. Pro., 2d Ed., § 325. United States *v.* Reese, 92 U. S. 214, 233, 23 L. Ed. 563, Clifford, J., dissenting.

95. To enable accused to make defense.—Ball *v.* United States, 140 U. S. 118, 136, 35 L. Ed. 377.

"The information which he is to receive is that which will acquaint him with the essential particulars of the offense, so that he may appear in court prepared to meet every feature of the accusation against him. As said by Chief Justice Gibson of the supreme court of Pennsylvania in Hartmann *v.* Commonwealth, 5 Penn. St. 60, 66: 'Precision in the description of the offense is of the last importance to the innocent; for it is that which marks the limits of the accusation and fixes the proof of it. It is the only hold he has on the jurors, judges as they are of the fact and the law.'" O'Neil *v.* Vermont, 144 U. S. 323, 366, 36 L. Ed. 450.

96. To plead former jeopardy.—Ball *v.* United States, 140 U. S. 118, 136, 35 L. Ed. 377.

97. Objections.—United States *v.* Mann, 95 U. S. 580, 583, 24 L. Ed. 531; United States *v.* Cook, 17 Wall. 168, 174, 21 L. Ed. 638; United States *v.* Reese, 92 U. S. 214, 225, 23 L. Ed. 563, Clifford, J., dissenting.

98. When sufficient.—"If certain facts make out the crime, it is sufficient to charge those facts, and it is obviously unnecessary to state that which is not essential." Dealy *v.* United States, 152 U. S. 539, 543, 38 L. Ed. 545; Burton *v.* United States, 202 U. S. 344, 372, 50 L. Ed. 1057; Coffin *v.* United States, 156 U. S. 432, 449, 39 L. Ed. 481.

"The words of the indictment directly and without ambiguity disclosed all the elements essential to the commission of the offense charged, and, therefore, within the meaning of the constitution and according to the rules of pleading, the defendant was informed of the nature and cause of the accusation against him." Burton *v.* United States, 202 U. S. 344, 372, 50 L. Ed. 1057; United States *v.* Simmons, 96 U. S. 360, 362, 24 L. Ed. 819; United States *v.* Carll, 105 U. S. 611, 26 L. Ed. 1135; Blitz *v.* United States, 153 U. S. 308, 315, 38 L. Ed. 725.

99. Indictment invalid of any element omitted.—United States *v.* Hess, 124 U. S. 483, 486, 31 L. Ed. 516; United States *v.* Cook, 17 Wall. 168, 174, 21 L. Ed. 638; Fitzpatrick *v.* United States, 178 U. S. 304, 310, 44 L. Ed. 1078.

"The general, and, with few exceptions, of which the present is not one, the universal rule, on this subject, is, that all the material facts and circumstances embraced in the definition of the offense must be stated, or the indictment will be defective." United States *v.* Hess, 124 U. S. 483, 486, 31 L. Ed. 516.

1. Not admitted on demurrer.—United States *v.* Reese, 92 U. S. 214, 225, 23 L. Ed. 563, Clifford, J., dissenting.

2. Not aided by averment of particular facts.—Pettibone *v.* United States, 148 U. S. 197, 203, 37 L. Ed. 419.

3. Nor cured by verdict.—United States *v.* Hess, 124 U. S. 483, 488, 31 L. Ed. 516.

4. Cannot be supplied by intendment.—Pettibone *v.* United States, 148 U. S. 197, 202, 37 L. Ed. 419. See post, "Positiveness," VIII, C, 5, c.

5. Cannot be incorporated after service of process.—United States *v.* Mann, 95 U. S. 580, 585, 24 L. Ed. 531.

6. Constitutional requirement.—United States *v.* Cruikshank, 92 U. S. 542, 558, 23 L. Ed. 588. See the title CONSTITUTIONAL LAW, vol. 4, p. 495.

7. Under due process clause.—Caldwell *v.* Texas, 141 U. S. 209, 210, 35 L. Ed. 718.

b. *Accuracy and Certainty*—(1) *Necessity for.*—In all cases, the offense must be set forth with clearness, and all necessary certainty, to apprise the accused of the crime with which he stands charged.[8] The defendant must be notified exactly of the case he is to meet.[9] An indictment should charge the offense with accuracy and certainty and not by inference.[10] An indictment may be too uncertain on account of duplicity.[11]

(2) *Degree Required*—(a) *In General.*—An indictment is good if sufficiently accurate and certain to enable all persons to come to the same conclusion as to its meaning.[12] The description in the indictment does not need to be any more definite and precise than the proof of the crime.[13] A defendant is informed of "the nature and cause of the accusation against him" if the indictment contains such description of the offense charged as will enable him to make his defense and to plead the judgment in bar of any further prosecution for the same crime.[14]

(b) *Reasonable Certainty.*—It is essential that the indictment apprise the accused, with reasonable certainty, of the nature and cause of the accusation against him.[15] No greater degree of certainty is necessary.[16]

8. Accuracy and certainty.—United States *v.* Mills, 7 Pet. 138, 142, 8 L. Ed. 636; Hodgson *v.* Vermont, 168 U. S. 262, 271, 42 L. Ed. 461; United States *v.* Gooding, 12 Wheat. 460, 474, 6 L. Ed. 693; Batchelor *v.* United States, 156 U. S. 426, 432, 39 L. Ed. 478; United States *v.* Cruikshank, 92 U. S. 542, 558, 23 L. Ed. 588. See post, "In General," VIII, C, 7, o, (2), (c), aa; "Where Statute Is Not Clear and Certain," VIII, C, 7, o, (2), (c), dd.

Fully and accurately.—Dunbar *v.* United States, 156 U. S. 185, 190, 39 L. Ed. 390.

Offenses against election laws.—United States *v.* Hess, 124 U. S. 483, 487, 31 L. Ed. 516. See the title ELECTIONS, vol. 5, p. 721.

Offenses against banking laws.—United States *v.* Britton, 107 U. S. 655, 662, 27 L. Ed. 520. See the title BANKS AND BANKING, vol. 2, p. 108.

For false entry in banker's report.—Cochran *v.* United States, 157 U. S. 286, 288, 39 L. Ed. 704. See the title BANKS AND BANKING, vol. 2, p. 118.

That stills and vessels were used for stilling.—United States *v.* Simmons, 96 U. S. 360, 363, 24 L. Ed. 819; United States *v.* Mills, 7 Pet. 138, 8 L. Ed. 636. See the title REVENUE LAWS.

For disturbance of homestead entry.—United States *v.* Waddell, 112 U. S. 76, 78, 28 L. Ed. 673. See the title PUBLIC LANDS.

9. Notice of cause to be met on defense.—Caldwell *v.* Texas, 141 U. S. 209, 211, 35 L. Ed. 718; Foster *v.* Kansas, 112 U. S. 201, 28 L. Ed. 629; Blitz *v.* United States, 153 U. S. 308, 315, 38 L. Ed. 725; Davis *v.* Utah, 151 U. S. 262, 265, 38 L. Ed. 153; Cannon *v.* United States, 116 U. S. 55, 76, 29 L. Ed. 561.

10. Charge should not be by inference.—Blitz *v.* United States, 153 U. S. 308, 315, 38 L. Ed. 725.

11. Uncertain from duplicity.—See post, "In General," IX, B, 1.

12. Degree of certainty required.—Price *v.* United States, 165 U. S. 311, 315, 41 L. Ed. 727; Dunbar *v.* United States, 156 U. S. 185, 191, 39 L. Ed. 390.

Where the acts constituting the crime are set forth in the indictment with such clearness and distinctness that both the defendants and the court understood the character of the offense charged, and the court was enabled to pronounce judgment according to the right of the case, such indictment sufficiently charges the crime. Davis *v.* Utah, 151 U. S. 262, 269, 38 L. Ed. 153.

13. Allegation need not be more certain than proof.—Dealy *v.* United States, 152 U. S. 539, 543, 38 L. Ed. 545.

14. Sufficient certainty.—Rosen *v.* United States, 161 U. S. 29, 34, 40 L. Ed. 606.

15. Reasonable certainty.—Blitz *v.* United States, 153 U. S. 308, 315, 38 L. Ed. 725; United States *v.* Simmons, 96 U. S. 360, 362, 24 L. Ed. 819; United States *v.* Hess, 124 U. S. 483, 488, 31 L. Ed. 516; Markham *v.* United States, 160 U. S. 319, 325, 40 L. Ed. 441; United States *v.* Gooding, 12 Wheat. 460, 474, 6 L. Ed. 693; Rosen *v.* United States, 161 U. S. 29, 40, 40 L. Ed. 606; Caha *v.* United States, 152 U. S. 211, 221, 38 L. Ed. 415; Potter *v.* United States, 155 U. S. 438, 445, 39 L. Ed. 214; Cannon *v.* United States, 116 U. S. 55, 77, 29 L. Ed. 561; United States *v.* Waddell, 112 U. S. 76, 79, 28 L. Ed. 673; Ex parte Yarbrough, 110 U. S. 651, 28 L. Ed. 274; Stokes *v.* United States, 157 U. S. 187, 191, 39 L. Ed. 667.

"A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances." United States *v.* Cruikshank, 92 U. S. 542, 558, 23 L. Ed. 588, quoted in United States *v.* Hess, 124 U. S. 483, 487, 31 L. Ed. 516.

16. No greater degree required.—Burton *v.* United States, 202 U. S. 344, 372, 50 L. Ed. 1057; Rosen *v.* United States, 161 U. S. 29, 40, 40 L. Ed. 606; United States

c. *Positiveness.*—The charge in an indictment must be made directly and positively,[17] not by way of inference,[18] recital,[19] nor conclusion.[20]

d. *Particularity*—(1) *Necessity for.*—It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute,[21] includes generic terms.[22] It is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition, but it must state the species, it must descend to particulars.[23] But an indictment is

v. Britton, 107 U. S. 655, 663, 27 L. Ed. 520.

Indictment of senator.—An indictment, under Rev. Stat., § 1781, which makes it a misdemeanor for a senator of the United States to receive compensation for services rendered before any department of the government in any matter in which the United States is a party or interested, avers that the defendant is a senator of the United States and has received compensation for services rendered for inducing a decision of a postoffice department in favor of his client in an order pending before that department, and in which the United States is interested, sufficiently charges an offense under the above-named statute. Burton *v.* United States, 202 U. S. 344, 372, 50 L. Ed. 1057. See, also, Burton *v.* United States, 196 U. S. 283, 49 L. Ed. 482.

17. **Positiveness.**—United States *v.* Hess, 124 U. S. 483, 486, 31 L. Ed. 516.

18. **Not by inference.**—United States *v.* Hess, 124 U. S. 483, 486, 31 L. Ed. 516; United States *v.* Staats, 8 How. 41, 44, 12 L. Ed. 979; Pettibone *v.* United States, 148 U. S. 197, 202, 37 L. Ed. 419. See post, "Consequence of Criminal Act," VIII, C, 7, k; "Knowledge," VIII, C, 7, l, (2).

19. **Nor recital.**—United States *v.* Hess, 124 U. S. 483, 486, 31 L. Ed. 516. See post, "Effect of Averring as Contrary to Statute," VIII, C, 7, o, (6).

20. **Nor conclusion.**—"Facts are to be stated, not conclusive of law alone." United States *v.* Cruikshank, 92 U. S. 542, 558, 23 L. Ed. 588; United States *v.* Hess, 124 U. S. 483, 487, 31 L. Ed. 516; Bannon *v.* United States, 156 U. S. 464, 466, 39 L. Ed. 494; Pettibone *v.* United States, 148 U. S. 197, 203, 37 L. Ed. 419. See post, "Effect of Averment by Legal Effect of Statute," VIII, C, 7, o, (7).

Indictment for aiding and abetting crime.—United States *v.* Gooding, 12 Wheat. 460, 475, 6 L. Ed. 693. See the title ACCOMPLICES AND ACCESSORIES, vol. 1, p. 65.

21. **Particularity—Statutory offenses.**—United States *v.* Cruikshank, 92 U. S. 542, 558, 23 L. Ed. 588; Ledbetter *v.* United States, 170 U. S. 606, 611, 42 L. Ed. 1162; Ex parte Virginia, 100 U. S. 339, 352, 25 L. Ed. 676, Field, J., dissenting. See post, "Statutory Offenses," VIII, C, 7, o.

22. **Offense defined in general terms.**—United States *v.* Hess, 124 U. S. 483, 487, 31 L. Ed. 516.

23. **Necessity for averment of particulars.**—United States *v.* Cruikshank, 92 U. S. 542, 558, 23 L. Ed. 588, quoting 1 Arch. Cr. Pr. & Pl. 291, and quoted in Ex parte Virginia, 100 U. S. 339, 352, 25 L. Ed. 676, Field, J., dissenting; United States *v.* Hess, 124 U. S. 483, 487, 31 L. Ed. 516.

"The indictment should state the particulars, to inform the court as well as the accused." United States *v.* Cruikshank, 92 U. S. 542, 559, 23 L. Ed. 588.

The counts of an indictment which, in general language, charge the defendants with an intent to hinder and prevent citizens of the United States, of African descent, therein named, in the free exercise and enjoyment of the rights, privileges, immunities, and protection, granted and secured to them respectively as citizens of the United States, and of the state of Louisiana, because they were persons of African descent, and with the intent to hinder and prevent them in the several and free exercise and enjoyment of every, each, all, and singular the several rights and privileges granted and secured to them by the constitution and laws of the United States, do not specify any particular right the enjoyment of which the conspirators intended to hinder or prevent, are too vague and general, lack the certainty and precision required by the established rules of criminal pleading, and are therefore not good and sufficient in law. United States *v.* Cruikshank, 92 U. S. 542, 23 L. Ed. 588. See the title CONSPIRACY, vol. 3, p. 1105.

For offenses against postal laws.—Grimm *v.* United States, 156 U. S. 604, 609, 39 L. Ed. 550; Durland *v.* United States, 161 U. S. 306, 315, 40 L. Ed. 709; Dunbar *v.* United States, 156 U. S. 185, 191, 39 L. Ed. 390; United States *v.* Hess, 124 U. S. 483, 31 L. Ed. 516; Keck *v.* United States, 172 U. S. 434, 437, 43 L. Ed. 505. See the title POSTAL LAWS.

Offenses against revenue laws.—Coffey *v.* United States, 116 U. S. 427, 434, 29 L. Ed. 681; United States *v.* Simmons, 96 U. S. 360, 24 L. Ed. 819. See the title REVENUE LAWS.

In bigamy cases.—Cannon *v.* United States, 116 U. S. 55, 77, 29 L. Ed. 561. See the title BIGAMY AND POLYGAMY, vol. 3, p. 227.

Facts showing materiality of statement in perjury cases.—Markham *v.* United States, 160 U. S. 319, 323, 40 L. Ed. 441. See the title PERJURY.

Under statute in territory of Utah.—

sufficient if it charges the offense in general words which have a well-understood and definite meaning.[24]

(2) *Degree of Particularity Required.*—While the rules of criminal pleading require that the accused shall be fully apprised of the charge made against him, it should, after all, be borne in mind that the object of criminal proceedings is to convict the guilty, as well as to shield the innocent, and no impracticable standards of particularity should be set up, whereby the government may be entrapped into making allegations which it would be impossible to prove.[25] It is a well-settled rule that where an offense is made up of a number of minute acts, which cannot be enumerated upon the record, without great prolixity and inconvenience, and the danger of variance, such acts need not be particularly set out in an indictment.[26] Every possible theory consistent with an innocent perpetration of the act need not be negatived.[27]

(3) *Effect of Unnecessary Particularity.*—It is generally true as claimed that where an indictment is unnecessarily descriptive, even the unnecessary description must be proved as laid.[28] In an indictment for perjury or libel, the sworn statements alleged to be false or the writing alleged to be libelous, must be proved substantially as averred in the indictment.[29] But such is not the case where an indictment, containing all the necessary averments to constitute a statutory offense, also avers unnecessary and immaterial matters.[30]

Cannon *v.* United States, 116 U. S. 55, 76, 29 L. Ed. 561.

24. Where words have fixed, legal meaning.—Dunbar *v.* United States, 156 U. S. 185, 193, 39 L. Ed. 390; United States *v.* Gooding, 12 Wheat. 460, 473, 6 L. Ed. 693.

It is sufficient to charge a defendant with smuggling without alleging that it was a fraudulent and intentional violation of the revenue laws. Dunbar *v.* United States, 156 U. S. 185, 193, 39 L. Ed. 390.

"Embezzle."—The word "embezzle" has a fixed meaning in law. Grin *v.* Shine, 187 U. S. 181, 190, 47 L. Ed. 130; Batchelor *v.* United States, 156 U. S. 426, 459, 39 L. Ed. 478. See the titles BANKS AND BANKING, vol. 3, p. 108; EMBEZZLEMENT, vol. 5, p. 742.

"Steal, take and carry away."—So do the words "steal, take and carry away." Batchelor *v.* United States, 156 U. S. 426, 429, 39 L. Ed. 478.

"Willfully misapplied."—But the words "willfully misapplied" have no settled technical meaning. Batchelor *v.* United States, 156 U. S. 426, 429, 39 L. Ed. 478; United States *v.* Britton, 107 U. S. 655, 661, 669, 27 L. Ed. 520; United States *v.* Northway, 120 U. S. 327, 332, 334, 30 L. Ed. 664; Evans *v.* United States, 153 U. S. 584, 587, 588, 38 L. Ed. 830. See the title BANKS AND BANKING, vol. 3, p. 108.

"Cohabit."—"The word 'cohabit' has, in the statute, a definite meaning, including every element of the offense created, as before defined. The allegation of cohabiting with the two women as wives is not an extrinsic fact, but is covered by the allegation of cohabiting with them." Cannon *v.* United States, 116 U. S. 55, 79, 29 L. Ed. 561.

Offenses created by statute.—See post, "Where Offense Is Described in Technical Terms," VIII, C, 7, o, (2), (b), aa.

25. Degree of particularity required.—Evans *v.* United States, 153 U. S. 584, 590, 38 L. Ed. 830.

Unnecessary particularity.—Connors *v.* United States, 158 U. S. 408, 410, 411, 39 L. Ed. 1033.

26. Offense made up of many acts.—In an indictment under the slave-trade act of the 20th of April, 1818, ch. 373, against the owner of the ship, it is not necessary to specify the particulars of the fitting out. The particular preparations are matters of evidence, and not of averment. Every man may well be presumed to know what are the fitments of a vessel for a voyage, without more particularity. The present case is a fit illustration of the rule; the fitting out is a compound of various minute acts, almost incapable of exact specification. United States *v.* Gooding, 12 Wheat. 460, 473, 475, 6 L. Ed. 693.

27. Need not negative every theory consistent with innocence.—Evans *v.* United States, 153 U. S. 584, 590, 38 L. Ed. 830.

28. Effect of unnecessary particularity.—Potter *v.* United States, 155 U. S. 438, 445, 39 L. Ed. 214; Hall *v.* United States, 168 U. S. 632, 639, 42 L. Ed. 607. See post, "Indecent and Obscene Matters," VIII, C, 7, h.

But unnecessary matter of description may be proved otherwise than as it is stated. Potter *v.* United States, 155 U. S. 438, 445, 39 L. Ed. 214.

29. Indictments for perjury and libel.—Hall *v.* United States, 168 U. S. 632, 639, 42 L. Ed. 607.

30. Statutory offenses.—Hall *v.* United States, 168 U. S. 632, 639, 42 L. Ed. 607.

(4) *Bill of Particulars.*—The accused can of right call upon the prosecutor to specify more fully what is claimed to be included under general terms.[31] If an indictment be not demurrable upon its face, it would not become so by the addition of a bill of particulars.[32]

e. *Multifariousness.*—For treatment of this subject, see elsewhere in this title.[33]

f. *Repugnancy.*—Repugnancy in an indictment cannot arise from a contrariety or inconsistency of charges in different counts. It only occurs where the inconsistent charges are within the same count.[34]

g. *Duplicity.*—For treatment of this subject, see elsewhere in this title.[35]

h. *Alternative Allegations.*—Both at common law and under penal statutes, it is the usual practice to allege offenses cumulatively and not alternatively.[36]

i. *By Reference*—(1) *To Another Part of Same Count.*—Where every element of an offense is set forth in an earlier part of a count, there is no necessity of repeating it when a particular act is described.[37]

(2) *To Different Count.*—Though every count should appear upon the face of it to charge the defendant with a distinct offense,[38] yet one count may refer

31. Bill of particulars.—Hodgson *v.* Vermont, 168 U. S. 262, 271, 42 L. Ed. 461; Dunbar *v.* United States, 156 U. S. 185, 39 L. Ed. 390; Rosen *v.* United States, 161 U. S. 29, 40 L. Ed. 606; Bannon *v.* United States, 156 U. S. 464, 468, 39 L. Ed. 494. See the title BILL OF PARTICULARS, vol. 2, p. 243. And see post, "Matters Unknown," VIII, C, 7, c.

"This is analogous to the common counts in assumpsit in civil cases, which grew up under the common law. The defendant in a civil case is entitled to notice of what he is called upon to meet, as much as a respondent in a criminal case, and for the same reasons. Under these common counts it has always been held that the plaintiff might show any number of claims of the class described, and for this reason, that the defendant was entitled, as a matter of right, to a bill of particulars, or specifications, and that such specifications supplied what was lacking by the generality of the count, in regard to the particulars and number of similar claims which the plaintiff would call upon the defendant to litigate." Hodgson *v.* Vermont, 168 U. S. 262, 271, 42 L. Ed. 461.

32. Not made demurrable by bill of particulars.—Dunlop *v.* United States, 165 U. S. 486, 491, 41 L. Ed. 799.

33. Multifariousness.—See post, "Before Verdict," XV, D, 2.

34. Repugnancy.—Where there were two counts in an indictment, the one charging the offenses as committed on the high seas, the other in a haven, basin or bay, a general verdict of guilty could be sustained. No objection can be made on account of repugnancy and inconsistency. Each count is a distinct, substantive charge. Internal repugnancy in any one is a good exception, but non constat as to the whole, taken severally, but each may be for a distinct offense. United States *v.* The Pirates, 5 Wheat. 184, 5 L. Ed. 64. See ante, "Accuracy and Certainty," VIII, C, 5, b; post, "To Another Part of Same Count," VIII, C, 5, i, (1). And see the title HOMICIDE, ante, p. 695.

35. Duplicity.—See post, "Duplicity," IX.

36. Alternative allegations.—As that the defendant published and caused to be published a certain libel; that he forged and caused to be forged a certain document. Crain *v.* United States, 162 U. S. 625, 635, 40 L. Ed. 1097.

"It may be conceded that an indictment or a criminal information which charges the person accused, in the disjunctive, with being guilty of one or of another of several offenses, would be destitute of the necessary certainty, and would be wholly insufficient. It would be so for two reasons. It would not give the accused definite notice of the offense charged, and thus enable him to defend himself, and neither a conviction nor an acquittal could be pleaded in bar to a subsequent prosecution for one of the several offenses." The Confiscation Cases, 20 Wall. 92, 104, 22 L. Ed. 320.

The indictment should allege the offense conjunctively in a single count, although the statute on which founded states the offense disjunctively. Wiborg *v.* United States, 163 U. S. 632, 647, 41 L. Ed. 289.

Where it is uncertain whether the crime of homicide was committed by shooting or drowning, the indictment may charge the offense conjunctively in one count instead of alternatively in two separate counts. Andersen *v.* United States, 170 U. S. 481, 500, 42 L. Ed. 1116.

37. By reference to another part of same count.—Evans *v.* United States, 153 U. S. 584, 590, 38 L. Ed. 830; St. Clair *v.* United States, 154 U. S. 134, 146, 38 L. Ed. 936. See the title HOMICIDE, ante, p. 695.

38. To different count.—See ante, "Of Separate Counts," VII, G.

to matter in any other count so as to avoid unnecessary repetitions.[39] But averments in one count cannot aid defects in another,[40] and, by parity of reason, it follows that defects in one count ought not to impair the sufficiency of another.[41] If the previous count be defective or is rejected, that circumstance will not vitiate the remaining counts, if the reference be sufficiently full to incorporate the matter going before with that in the count in which the reference is made.[42] The reference should be sufficiently full to incorporate the matter going before with that in the count in which reference is made.[43]

j. *By Innuendo.*—If accounts set out in an indictment are unintelligible to persons not accountants, they may be explained by innuendoes.[44]

k. *Grammar and Etymology.*—A name need not be correctly spelled in an indictment, if substantially the same sound is preserved.[45]

6. General Rules of Sufficiency—a. *To Show Nature and Cause of Accusation*—(1) *In General.*—The accused is entitled to be informed of the nature and cause of the accusation against him,[46] and it is essential to a valid indictment that it should set forth the offense, with such particulars of time, place, and person, that the accused may know the nature of the charge.[47]

(2) *To Inform Court.*—It is necessary to the validity of an indictment that the court may see therein with judicial eyes that the fact, alleged to have been committed, is an offense against the laws, and may also discern the punishment annexed by law to the specific offense.[48]

39. Blitz *v.* United States, 153 U. S. 308, 316, 38 L. Ed. 725; Coffin *v.* United States, 156 U. S. 432, 449, 39 L. Ed. 481; Crain *v.* United States, 162 U. S. 625, 633, 40 L. Ed. 1097; Batchelor *v.* United States, 156 U. S. 426, 432, 39 L. Ed. 478.

In an indictment for an election offense, where the previous count set out the nature and date of the election, it is permissible, in a subsequent count, to refer to the election as "the said election," instead of again repeating the nature and date of the election; for the election named in the first count is the only one specifically prescribed in the indictment. Blitz *v.* United States, 153 U. S. 308, 316, 38 L. Ed. 725.

40. Defects not aided by reference.—Rice *v.* Ames, 180 U. S. 371, 376, 45 L. Ed. 577.

41. Sufficiency not impaired by reference.—Thus, an indictment which is void in one count for want of proper verification, is not rendered void in another properly verified count. Rice *v.* Ames, 180 U. S. 371, 376, 45 L. Ed. 577.

42. Crain *v.* United States, 162 U. S. 625, 633, 40 L. Ed. 1097; Blitz *v.* United States, 153 U. S. 308, 317, 38 L. Ed. 725.

"And this reference was not affected by the fact that the first count was defective, or by the fact that judgment upon that count was arrested." Crain *v.* United States, 162 U. S. 625, 633, 40 L. Ed. 1097.

43. Sufficiency of reference.—Blitz *v.* United States, 153 U. S. 308, 317, 38 L. Ed. 725.

44. By innuendo.—United States *v.* Britton, 107 U. S. 655, 663, 27 L. Ed. 520.

45. Spelling of name.—Faust *v.* United States, 163 U. S. 452, 454, 41 L. Ed. 224.

Language in designation of offense.—See ante, "In General," VIII, C, 1.

46. General rules of sufficiency—Nature and cause of accusation to be shown.—Ball *v.* United States, 140 U. S. 118, 136, 35 L. Ed. 377; Ex parte Virginia, 100 U. S. 339, 352, 25 L. Ed. 676; Caha *v.* United States, 152 U. S. 211, 221, 38 L. Ed. 415; Caldwell *v.* Texas, 137 U. S. 692, 698, 34 L. Ed. 816; United States *v.* Cruikshank, 92 U. S. 542, 558, 23 L. Ed. 588. See the title CONSTITUTIONAL LAW, vol. 4, p. 495.

General character of crime.—Dimmick *v.* Tompkins, 194 U. S. 540, 552, 48 L. Ed. 1110; In re Lane, 135 U. S. 443, 449, 34 L. Ed. 219. See the title RAPE.

"It is the established rule of the common law, which has prevailed in England and in this country since the revolution of 1688, if not for a period anterior to it, that in all criminal prosecutions the accused must be informed of the nature and cause of the accusation against him. It is the law of every civilized community, and in no case can there be, in criminal proceedings, due process of law where the accused is not thus informed." O'Neil *v.* Vermont, 144 U. S. 323, 366, 36 L. Ed. 450, dissenting opinion, Field, J.

Under Utah statute.—Davis *v.* Utah, 151 U. S. 262, 265, 38 L. Ed. 153; Cannon *v.* United States, 116 U. S. 55, 76, 29 L. Ed. 561.

47. To inform accused.—Caha *v.* United States, 152 U. S. 211, 221, 38 L. Ed. 415; Ex parte Virginia, 100 U. S. 339, 351, 25 L. Ed. 676, dissenting opinion of Field, J.

To fully apprised accused.—Evans *v.* United States, 153 U. S. 584, 591, 38 L. Ed. 830.

48. To inform court.—The Hoppet, 7 Cranch 389, 394, 3 L. Ed. 380; United States *v.* Hess, 124 U. S. 483, 487, 31 L. Ed. 516; United States *v.* Cruikshank, 92 U. S. 542, 558, 23 L. Ed. 588.

(3) *To Enable Accused to Prepare Defense.*—It is essential to the validity of an indictment that it should so allege the offense that the accused will be enabled to prepare and direct his defense.[49]

(4) *To Enable Accused to Plead Jeopardy on Subsequent Trial.*—It is essential to the validity of an indictment that it be of sufficient accuracy, certainty and completeness that, in the event of acquittal or conviction, the judgment rendered thereon can be pleaded in bar of a second prosecution for the same offense.[50]

b. *To Support Conviction.*—It must be made to appear from the indictment, without going further, that the acts charged will, if proved, support a conviction for the offense alleged.[51]

7. AVERMENT OF PARTICULAR MATTERS—a. *Matters of Evidence.*—It is never necessary to set forth matters of evidence in an indictment.[52]

b. *Matters of Defense.*—Neither in criminal nor in civil pleading is it required to anticipate or negative a defense. This must be shown by the accused.[53]

c. *Matters Unknown.*—If a matter is unknown to the grand jurors, it is proper to be so alleged in the indictment, and, in the absence of any evidence to the contrary, it will be presumed to have been in fact, unknown to them.[54] When necessary to avoid prejudicing the case of the accused, the prosecution may be compelled to give a more particular description, in the nature of the specification or bill of particulars.[55]

49. To enable accused to prepare defense.—The Hoppet, 7 Cranch 389, 394, 3 L. Ed. 380; Ex parte Virginia, 100 U. S. 339, 352, 25 L. Ed. 676, Field, J., dissenting; Dunbar *v.* United States, 156 U. S. 185, 191, 39 L. Ed. 390; Batchelor *v.* United States, 156 U. S. 426, 429, 39 L. Ed. 478; Potter *v.* United States, 155 U. S. 438, 445, 39 L. Ed. 214; United States *v.* Hess, 124 U. S. 483, 486, 31 L. Ed. 516; United States *v.* Gooding, 12 Wheat. 460, 474, 6 L. Ed. 693; United States *v.* Cook, 154 U. S. 555, 18 L. Ed. 835; United States *v.* Cruikshank, 92 U. S. 542, 558, 23 L. Ed. 588; Fitzpatrick *v.* United States, 178 U. S. 304, 309, 44 L. Ed. 1078; The Confiscation Cases, 20 Wall. 92, 104, 22 L. Ed. 320; Blitz *v.* United States, 153 U. S. 308, 315, 38 L. Ed. 725; Southworth *v.* United States, 151 U. S. 179, 184, 38 L. Ed. 119.

Under postal laws.—Durland *v.* United States, 161 U. S. 306, 314, 40 L. Ed. 709; Dunbar *v.* United States, 156 U. S. 185, 191, 39 L. Ed. 390.

Under Utah statute.—Cannon *v.* United States, 116 U. S. 55, 75, 29 L. Ed. 561; Davis *v.* Utah, 151 U. S. 262, 265, 38 L. Ed. 153.

50. To plead former jeopardy.—Burton *v.* United States, 202 U. S. 344, 372, 50 L. Ed. 1057; United States *v.* Gooding, 12 Wheat. 460, 474, 6 L. Ed. 693; Batchelor *v.* United States, 156 U. S. 426, 429, 39 L. Ed. 478; The Confiscation Cases, 20 Wall. 92, 104, 22 L. Ed. 320; Dunbar *v.* United States, 156 U. S. 185, 191, 39 L. Ed. 390; In re Lane, 135 U. S. 443, 448, 34 L. Ed. 219; Potter *v.* United States, 155 U. S. 438, 445, 39 L. Ed. 214; United States *v.* Simmons, 96 U. S. 360, 362, 24 L. Ed. 819; United States *v.* Hess, 124 U. S. 483, 488, 31 L. Ed. 516; Blitz *v.* United States, 153 U. S. 308, 315, 38 L. Ed. 725; United States *v.* Cruikshank, 92 U. S. 542, 558, 23 L. Ed. 588; Fitzpatrick *v.* United States, 178 U. S. 304, 310, 44 L. Ed. 1078; Ex parte Virginia, 100 U. S. 339, 352, 25 L. Ed. 676, Field, J., dissenting.

51. To support conviction.—United States *v.* Cruikshank, 92 U. S. 542, 559, 23 L. Ed. 588; The Hoppet, 7 Cranch 389, 394, 3 L. Ed. 380; United States *v.* Hess, 124 U. S. 483, 487, 31 L. Ed. 516; Davis *v.* Utah, 151 U. S. 262, 269, 38 L. Ed. 153.

52. Matters of evidence.—Bannon *v.* United States, 156 U. S. 464, 469, 39 L. Ed. 494; Evans *v.* United States, 153 U. S. 584, 594, 38 L. Ed. 830; Potter *v.* United States, 155 U. S. 438, 444, 445, 39 L. Ed. 214; United States *v.* Gooding, 12 Wheat. 460, 473, 6 L. Ed. 693; United States *v.* Simmons, 96 U. S. 360, 363, 24 L. Ed. 819; Grimm *v.* United States, 156 U. S. 604, 609, 39 L. Ed. 550. See post, "Means of Commission of Offense," VIII, C, 7, j; "Sufficiency of Averment," VIII, C, 7, l, (1), (b).

53. Matters of defense.—All matters of defense must come from the defendant and need not be anticipated by the prosecution. Evans *v.* United States, 153 U. S. 584, 590, 38 L. Ed. 830; United States *v.* Cook, 17 Wall. 168, 173, 21 L. Ed. 638.

54. Matters unknown.—Frisbie *v.* United States, 157 U. S. 160, 167, 39 L. Ed. 657; Coffin *v.* United States, 156 U. S. 432, 451, 39 L. Ed. 481.

Hence, an instruction that an indictment is invalid in the absence of evidence tending to show the facts of want of knowledge in the grand jury, was properly refused. Coffin *v.* United States, 156 U. S. 432, 451, 39 L. Ed. 481.

55. Bill of particulars.—Coffin *v.* United States, 156 U. S. 432, 452, 39 L. Ed. 481.

d. *Matters at Conference of Grand Jury.*—The defendant is not entitled to have the indictment inform him of what passed at the conference of the grand jurors.[56]

e. *Property.*—Indictments for some offenses must describe the property involved therein.[57] Any words of description which make clear to the common understanding the articles in respect to which the offense is alleged are sufficient.[58] An indictment which describes property in general terms, broad enough to conclude more than one specific article, is not invalid where other words are employed, which make clear the property in regard to which the crime was committed.[59]

f. *Ownership.*—It is necessary in some instances for the indictment to allege ownership or possession of the property involved in the offense.[60]

g. *Contents of Written Instruments*—(1) *In General.*—Where a writing is the gist of an offense, it must be set out in the indictment in hæc verba, as in cases of libel and other cases analogous thereto. And where it is not necessary to state the contents of the writing but the indictment attempts to do so, the same rule prevails.[61] An indictment for making false entries in a bank report need not set out the report with technical accuracy.[62]

(2) *Lost Instruments.*—In describing a lost instrument in an indictment it is sufficient to allege that such instrument has been destroyed and that the grand jury is unable to give any further description thereof.[63]

h. *Indecent and Obscene Matters.*—The constitutional right of the defendant to be informed of the nature and cause of the accusation against him is not infringed by the omission from the indictment of indecent and obscene matter,[64] alleged sufficiently that it may be discerned as not proper to be spread upon the

56. Matters at conference of grand jury.—"He was not entitled to show, as matter of defense, that the grand jury proceeded on insufficient grounds. He had to meet only the case made by the indictment and by the evidence adduced by the government." Rosen *v.* United States, 161 U. S. 29, 35, 40 L. Ed. 606. See the title GRAND JURY, ante, p. 570.

57. Property stolen in indictment for larceny.—United States *v.* Cruikshank, 92 U. S. 542, 558, 23 L. Ed. 588; United States *v.* Hess, 124 U. S. 483, 486, 31 L. Ed. 516. See the title LARCENY.

Land in land-fraud cases.—Dealy *v.* United States, 152 U. S. 539, 543, 38 L. Ed. 545. See the title PUBLIC LANDS.

58. Sufficiency of description.—Dunbar *v.* United States, 156 U. S. 185, 191, 39 L. Ed. 390.

59. In generic terms.—"Thus, an indictment charging the larceny of 'a horse, the property of A B,' is not overthrown by proof that A B is the owner of many horses, any one of which will satisfy the mere words of description. Yet, to make available a judgment on such an indictment in bar of a subsequent prosecution, something beside the record might be required to identify the property mentioned in the two indictments." Dunbar *v.* United States, 156 U. S. 185, 191, 39 L. Ed. 390.

And an indictment charging a defendant with smuggling "prepared opium," under a statute which reads "opium prepared for smoking," and which contains other words which clearly limit any generality in the term "prepared opium," is sufficiently certain. "There can be no doubt that the defendant knew exactly what he was charged with having smuggled, and that the description was so precise and full that he could easily use a judgment under these indictments in bar of any subsequent prosecution. It is true some parol testimony might be required to show the absolute identity of the smuggled goods, but such proof is often requisite to sustain a plea of once in jeopardy." Dunbar *v.* United States, 156 U. S. 185, 191, 39 L. Ed. 390.

60. Ownership—Indictment for larceny.—United States *v.* Hess, 124 U. S. 483, 486, 31 L. Ed. 516. See the title LARCENY.

For receiving stolen goods.—Kirby *v.* United States, 174 U. S. 47, 61, 43 L. Ed. 890. See the title RECEIVING STOLEN GOODS.

61. Contents of written instruments.—Rosen *v.* United States, 161 U. S. 29, 37, 40 L. Ed. 606. See post, "Indecent and Obscene Matters," VIII, C, 7, h.

62. Banker's report under Rev. Stat., §§ 5209, 5211.—See Cochran *v.* United States, 157 U. S. 286, 288, 39 L. Ed. 704. And see the title BANKS AND BANKING, vol. 3, p. 118.

63. Lost writings.—Rosencrans *v.* United States, 165 U. S. 257, 263, 41 L. Ed. 708.

64. Indecent and obscene matters.—The omission from the indictment of a description of the pictures of female figures found in the paper was not in violation of the constitutional guaranty that the defendant in a criminal case shall be informed of the nature and cause of the

records of the court,[65] provided the crime charged, however general the language used, is yet so described as reasonably to inform the accused of the nature of the charge sought to be established against him.[66] It seems that the omitted matter must be referred to in such manner as to be identified.[67] The accused may apply to the court before the trial is entered upon for a bill of particulars, showing what part of the omitted matter will be relied on by the prosecution, which motion will be granted or refused, as the court, in the exercise of a sound legal discretion, may find necessary to the ends of justice.[68] But, whenever it is necessary to do so, or whenever the indictment undertakes to state the contents, whether necessary or not, the same rule prevails as in the case of libel, that is to say, the alleged obscene publication must be set out in the very words of which it is composed, and the indictment must undertake or profess to do so, by the use of appropriate language. The excepted cases occur whenever a publication of this character is so obscene as to render it improper that it should appear on the record; and, then, the statement of the contents may be omitted altogether, and a description thereof substituted; but, in this case, a reason for the omission must appear in the indictment, by proper averments.[69]

i. *Fact of Commission of Offense*—(1) *In Indictment against Accomplices.*—This subject is treated elsewhere.[70]

(2) *Indictment for Cheating.*—An indictment for a cheat need not allege the actual defrauding of any person.[71]

j. *Means of Commission of Offense.*—All the special or particular means em-

accusation against him. Rosen *v.* United States, 161 U. S. 29, 34, 40 L. Ed. 606.

In indictments for the offense of publishing or mailing indecent matters, it is not always necessary that the contents of the publication should be inserted. Rosen *v.* United States, 161 U. S. 29, 37, 40 L. Ed. 606.

65. Alleged sufficiently to be discerned.—It is unnecessary to spread the obscene matter in all its filthiness upon the record; it is enough to so far describe it that its obnoxious character may be discerned. Rosen *v.* United States, 161 U. S. 29, 45, 40 L. Ed. 606.

"It is unquestioned that the English rule requires, where obscene words are relied upon, that the obscene matter should be set out explicitly in the indictment, and that the averment that is too obscene to be so stated is insufficient to excuse the omission. Regina *v.* Bradlaugh, 3 Q. B. Div. 621." Rosen *v.* United States, 161 U. S. 29, 44, 40 L. Ed. 606, dissenting opinion of White and Shiras, JJ.

"But this is not the doctrine of the American courts." Rosen *v.* United States, 161 U. S. 29, 44, 40 L. Ed. 606, dissenting opinion of White and Shiras, JJ.

It is for the court to determine what is fit to be set out in the record. Dunlop *v.* United States, 165 U. S. 486, 41 L. Ed. 799.

66. Accused must be informed of charge.—Rosen *v.* United States, 161 U. S. 29, 40, 40 L. Ed. 606; Grimm *v.* United States, 156 U. S. 604, 608, 39 L. Ed. 550.

67. Omitted matter must be identified.—Where the publication or mailing of obscene matter is charged by a grand jury, such matter need not be stated in the indictment, provided in that instrument it be referred to and identified. Rosen *v.* United States, 161 U. S. 29, 47, 40 L. Ed. 606, dissenting opinion of White and Shiras, JJ.

"Under the ruling now announced, it seems to us that the exception is made to destroy the rule, and that an indictment is held to be valid even although it makes no reference whatever to the matter relied on to show guilt. Thus the qualification as to the identifying reference by which alone the exception is justified disappears, and the result logically leads to the recognition of the right of a grand jury to present without stating or referring to the facts upon which its presentment is made, and also concedes the power of a prosecuting officer to supply matter in an indictment, and thus make that which is absolutely void a valid instrument." Rosen *v.* United States, 161 U. S. 29, 47, 40 L. Ed. 606, dissenting opinion of White and Shiras, JJ.

68. Objections—Bill of particulars.—It is the duty of the defendant to make an objection to such indictment before the trial is entered upon. Rosen *v.* United States, 161 U. S. 29, 34, 40, 40 L. Ed. 606.

69. If attempted to be set out must be set out in full.—Rosen *v.* United States, 161 U. S. 29, 37, 40 L. Ed. 606. See ante, "In General," VIII, C, 7, g, (1).

70. Fact of commission of crime.—See the titles ACCOMPLICES AND ACCESSORIES, vol. 1, p. 65; CONSPIRACY, vol. 3, p. 1103; POSTAL LAWS.

71. Respublica *v.* Sweers, 1 Dall. 41, 1 L. Ed. 29.

ployed in the commission of an offense need not be fully set forth in an indictment.[72] But in some offenses it is necessary to set out the special means by which the commission of the offense was effected.[73] This is usually matter of evidence.[74] But it has been held that in states where it is a crime for two or more persons to conspire to cheat and defraud another out of his property, that an indictment for such an offense must contain allegations setting forth the means proposed to be used to accomplish the purpose.[75] Such are the cases of indictments for false pretenses, and sending threatening letters, where the pretenses and the letters are required to be set forth, from the close analogy to indictments for perjury and forgery.[76] The course has been to leave every class of cases to be decided very much upon its own peculiar circumstances.[77]

72. Burton *v.* United States, 202 U. S. 344, 372, 50 L. Ed. 1057; United States *v.* Hess, 124 U. S. 483, 488, 31 L. Ed. 516; United States *v.* Simmons, 96 U. S. 360, 363, 24 L. Ed. 819; Connors *v.* United States, 158 U. S. 408, 411, 39 L. Ed. 1033; Coffin *v.* United States, 156 U. S. 432, 448, 39 L. Ed. 481; Coffin *v.* United States, 162 U. S. 664, 40 L. Ed. 1109; United States *v.* Gooding, 12 Wheat. 460, 6 L. Ed. 693; Evans *v.* United States, 153 U. S. 584, 38 L. Ed. 830.

It is not necessary to state, in an indictment for an offense by which the United States was defrauded of a revenue tax, the particular means by which the fraud was committed. United States *v.* Simmons, 96 U. S. 360, 363, 24 L. Ed. 819; Evans *v.* United States, 153 U. S. 584, 594, 38 L. Ed. 830. See the title REVENUE LAWS.

An indictment which alleges that the defendant inflicted a mortal wound upon the deceased of which mortal wound the deceased "did languish and languishing did then and there instantly die," distinctly and unequivocally alleges that the victim died of the mortal wound alleged to have been inflicted by the defendant. United States *v.* Ball, 163 U. S. 662, 663, 41 L. Ed. 300. See the title HOMICIDE, ante, p. 695.

"It is unnecessary to aver that the poison was taken into the stomach of the deceased." Westmoreland *v.* United States, 155 U. S. 545, 549, 39 L. Ed. 255.

"The indictment need not specify in detail the mode in which the poison affected the body, or the particular organ upon which its operation was had. It is enough to charge that poison was administered, and that such poison, so administered, caused the death." Westmoreland *v.* United States, 155 U. S. 545, 549, 39 L. Ed. 255.

Land frauds.—Dealy *v.* United States, 152 U. S. 539, 544, 38 L. Ed. 545.

"**And in endeavors to commit a revolt,** which is, by statute, in England, made a capital offense, it has always been deemed sufficient to allege the offense in the words of the statute, without setting forth any particulars of the manner or the means." United States *v.* Gooding, 12 Wheat. 460, 475, 6 L. Ed. 693.

"**So, in cases of solicitation** to commit crimes, it has been held sufficient, to state the act of solicitation, without any averment of the special means." United States *v.* Gooding, 12 Wheat. 460, 475, 6 L. Ed. 693.

"It is laid down as a general rule, that 'in an indictment for soliciting or inciting to the commission of a crime, or for aiding or assisting in the commission of it, it is not necessary to state the particulars of the incitement or solicitation, or of the aid or assistance.' 2 Wharton, § 1281." United States *v.* Simmons, 96 U. S. 360, 363, 24 L. Ed. 819. See the title ACCOMPLICES AND ACCESSORIES, vol. 1, p. 65.

73. "The case of treason stands upon a peculiar ground; there, the overt acts must, by statute, be specially laid in the indictment, and must be proved as laid. The very act, and mode of the act, must, therefore, be laid as it is intended to be proved." United States *v.* Gooding, 12 Wheat. 460, 475, 6 L. Ed. 693.

An indictment for treason charged to have been committed by sending intelligence of the enemy, it is not necessary to set forth the particulars of the intelligence communicated. Respublica *v.* Carlisle, 1 Dall. 35, 1 L. Ed. 26. See the title TREASON.

74. Usually matter of evidence.—United States *v.* Simmons, 96 U. S. 360, 363, 24 L. Ed. 819. See ante, "Matters of Evidence," VIII, C, 7, a.

75. Indictments for frauds and cheats.—United States *v.* Cruikshank, 92 U. S. 542, 558, 23 L. Ed. 588.

76. United States *v.* Gooding, 12 Wheat. 460, 474, 6 L. Ed. 693.

"This, because, to make such a purpose criminal, the conspiracy must be to cheat and defraud in a mode made criminal by statute; and as all cheating and defrauding has not been made criminal, it is necessary for the indictment to state the means proposed, in order that the court may see that they are in fact illegal." United States *v.* Cruikshank, 92 U. S. 542, 558, 23 L. Ed. 588. See the titles ATTEMPTS AND SOLICITATIONS TO COMMIT CRIME, vol. 2, p. 702; CONSPIRACY, vol. 3, p. 1105.

77. In this regard each case determined by particular circumstances. — United

k. *Consequence of Criminal Act.*—Words charging the doing of a criminal act import the criminal consequence thereto.[78]

l. *Intent or Knowledge*—(1) *Intent*—(a) *Necessity for Averment.*—Where the intent is a material ingredient of the crime, it is necessary to be averred,[79] as in a case of assault with intent to kill.[80]

(b) *Sufficiency of Averment.*—The averment may always be made in general terms,[81] without the particular means of affecting the criminal intent or the circumstances evincive of the design with which the act was done.[82] These are considered to be matters of evidence to go to the jury to demonstrate the intent, and not necessary to be incorporated in an indictment.[83]

(c) *Averment of Felonious Intent*—aa. *In Common-Law Felonies.*—In all felonies at common law, the felonious intent is deemed an essential ingredient in the constitution of the offense, and must be alleged in the indictment. Its omission is a substantial defect, not cured by verdict.[84]

bb. *In Statutory Felonies.*—Where, in felonies created by statute, the felo-

States *v.* Gooding, 12 Wheat. 460, 474, 6 L. Ed. 693.

78. Consequences of criminal act.—Potter *v.* United States, 155 U. S. 438, 444, 39 L. Ed. 214.

79. Intent—Necessity for averment.—United States *v.* Staats, 8 How. 41, 44, 12 L. Ed. 979; United States *v.* Carll, 105 U. S. 611, 26 L. Ed. 1135, distinguished in Dunbar *v.* United States, 156 U. S. 185, 193, 39 L. Ed. 390; Coffin *v.* United States, 156 U. S. 432, 448, 39 L. Ed. 481.

Where the gravamen of the offense consists in the evil design with which the act is committed, an indictment failing to allege it to have been done with evil intent is clearly bad. Evans *v.* United States, 153 U. S. 584, 594, 38 L. Ed. 830.

Where a statute uses words which are not absolutely inconsistent with an honest purpose, such as was held by the federal supreme court in United States *v.* Britton, 107 U. S. 655, 669, 27 L. Ed. 520, and United States *v.* Britton, 108 U. S. 193, 27 L. Ed. 701, were the words "willfully misapplied," the allegation of an intent to defraud becomes material in the highest degree. In fact, the gravamen of the offense consists in the evil design with which the misapplication is made, and a count which should omit the words "willfully," etc., and "with intent to defraud," would be clearly bad. Evans *v.* United States, 153 U. S. 584, 593, 38 L. Ed. 830; Spurr *v.* United States, 174 U. S. 728, 735, 43 L. Ed. 1150.

Under postal laws.—Grimm *v.* United States, 156 U. S. 604, 609, 39 L. Ed. 550. See the title POSTAL LAWS.

In charging offense against banking laws.—Evans *v.* United States, 153 U. S. 584, 592, 38 L. Ed. 830; United States *v.* Britton, 108 U. S. 193, 27 L. Ed. 701; United States *v.* Britton, 107 U. S. 655, 665, 27 L. Ed. 520. See the title BANKS AND BANKING, vol. 3, pp. 117, 118.

Offenses against law of nations.—United States *v.* Quincy, 6 Pet. 445, 8 L. Ed. 458. See the title INTERNATIONAL LAW.

80. See the title HOMICIDE, ante, p. 695.

81. May be averred in general terms.—Evans *v.* United States, 153 U. S. 584, 594, 38 L. Ed. 830.

82. Evans *v.* United States, 153 U. S. 584, 594, 38 L. Ed. 830; United States *v.* Simmons, 96 U. S. 360, 364, 24 L. Ed. 819, both quoting from 1 Wharton's Cr. Law, § 292.

The intent may be manifested by so many acts upon the part of the accused, covering such a long period of time, as to render it difficult, if not wholly impracticable, to aver, with any degree of certainty, all essential facts from which it may be fairly inferred. Evans *v.* United States, 153 U. S. 584, 594, 38 L. Ed. 830.

There is no greater need of setting out the evidence to prove such intent than there would be of averring in detail the evidence of a scienter, or of any other fact material to the offense. Evans *v.* United States, 153 U. S. 584, 594, 38 L. Ed. 830.

"It is laid down, that 'when the charge is not the absolute perpetration of an offense, but its primary characteristic lies in the intent, instigation, or motives of the party towards its perpetration, the acts of the accused, important only as developing the mala mens, and not constituting of themselves the crime, need not be spread upon the record.' United States *v.* Almeida, Whart. Prec. 1061, 1062, note." United States *v.* Reese, 92 U. S. 214, 243, 23 L. Ed. 563, Hunt, J., dissenting.

83. Matters of evidence.—United States *v.* Simmons, 96 U. S. 360, 364, 24 L. Ed. 819.

84. Felonious intent—Common-law felonies.—United States *v.* Staats, 8 How. 41, 44, 12 L. Ed. 979, quoted in Bannon *v.* United States, 156 U. S. 464, 466, 39 L. Ed. 494. See note to United States *v.* Staats, 8 How. 41, 12 L. Ed. 979.

In an indictment for murder, it is necessary to aver that the killing was done "willfully, feloniously, and of malice aforethought." Evans *v.* United States, 153 U. S. 584, 594, 38 L. Ed. 830; Davis *v.* Utah,

nious intent is an essential ingredient in the constitution of the offense, the act must be alleged to have been committed feloniously, or with felonious intent;[85] but, in cases where this felonious intent constitutes no part of the crime, that being complete, under the statute, without it, and depending upon another and different criminal intent, the rule can have no application in reason, however it may be upon authority.[86] And it has also been stated, that an indictment for an offense which is not a felony at common law, but made so by statute, need not allege that the offense was committed feloniously.[87]

(2) *Knowledge.*—Whenever knowledge is an essential ingredient of the offense, it must be alleged, unless it is implied in the statement of the act itself.[88] It has been held that the failure to allege that the accused knew the instrument to be false, forged and counterfeit, in an indictment for the uttering of such instrument, is a substantial defect;[89] but, in an indictment for sending improper matter through the mails which alleges that the defendant deposited such matter in the mails, the failure to allege knowledge of the contents thereof, after verdict, was held to be a defect of form only, coming within the Revised Statutes, § 1025.[90] An indictment which charges the accused with having administered

151 U. S. 262, 270, 38 L. Ed. 153; Respublica *v.* Honeyman, 2 Dall. 228, 1 L. Ed. 359. See the title HOMICIDE, ante, p. 693.

85. Statutory felonies—Intent essential element of offense.—The rule has been adhered to with great strictness; and properly so, where this intent is a material element of the crime. United States *v.* Staats, 8 How. 41, 44, 12 L. Ed. 979, and note.

This view accounts for the necessity of the averment of a felonious intent in many felonies by statute; because, if it is used, in the sense of the law, to denote the actual crime itself, the felonious intent becomes an essential ingredient to constitute it. United States *v.* Staats, 8 How. 41, 45, 12 L. Ed. 979. See the title HOMICIDE, ante, p. 695.

86. Where intent not element.—United States *v.* Staats, 8 How. 41, 45, 12 L. Ed. 979.

"Where the offense is created by statute, and the statute does not use the word 'feloniously,' there is a difference of opinion among state courts whether the word must be put into the indictment. 1 Bish. Crim. Proc., § 535. But under the decision in United States *v.* Staats, 8 How. 41, 12 L. Ed. 979, we are clearly of the opinion that it need not be done." Bannon *v.* United States, 156 U. S. 464, 467, 39 L. Ed. 494.

Where an act of congress declared, that, if any person "shall transmit to, or present at, or cause or procure to be transmitted to, or presented at, any office or officer of the government of the United States, any deed, power of attorney, order, certificate, receipt or other writing, in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited; every such person shall be deemed and adjudged guilty of felony," etc., it was sufficient that the indictment charged the act to have been done "with intent to defraud the United States," without also charging that it was done feloniously, or with a "felonious intent." United States *v.* Staats, 8 How. 41, 46, 12 L. Ed. 979; Bannon *v.* United States, 156 U. S. 464, 466, 39 L. Ed. 494.

Where charge follows statute.—Where the indictment follows the precise words of the statute, neither the word "unlawful" or any other word showing a wrongful intent need be added. United States *v.* Staats, 8 How. 41, 12 L. Ed. 979.

In an indictment under the slave trade act of the 20th of April, 1818, ch. 373, against the owner of the ship, an averment that the ship was fitted out, etc., "with intent that the said vessel should be employed" in the slave trade, is fatally defective, the words of the statute being, "with intent to employ" the vessel in the slave trade, and exclusively referring to the intent of the party causing the act. United States *v.* Gooding, 12 Wheat. 460, 6 L. Ed. 693.

87. Common-law offense raised to felony by statute.—"That a conspiracy 'to commit any offense against the United States' is not a felony at common law, is too clear for argument; and even if it were made a felony by statute, the indictment would not necessarily be defective for failing to aver that the act was feloniously done." Bannon *v.* United States, 156 U. S. 464, 466, 39 L. Ed. 494.

88. Knowledge.—Pettibone *v.* United States, 148 U. S. 197, 205, 37 L. Ed. 419.

89. Indictment for uttering forged instrument.—"The omission is of matter of substance, and not a 'defect or imperfection in matter of form only,' within the meaning of § 1025 of the Revised Statutes." United States *v.* Carll, 105 U. S. 611, 613, 26 L. Ed. 1135. See the title FORGERY AND COUNTERFEITING, ante, p. 380.

90. For sending improper matter through mails.—Rosen *v.* United States, 161 U. S. 29, 32, 40 L. Ed. 606. See the title POSTAL LAWS.

strychnine and other poisons, and with the unlawful and felonious intent to take the life of the deceased, is sufficient although it does not allege that the accused knew that that which he administered was a deadly poison.[91] The words "knowingly" or "well knowing" will supply the place of a positive averment that the defendant knew the fact subsequently stated.[92]

m. *Included Offenses.*—It is provided by the Revised Statutes that a party may be found guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charged.[93] The minor offense must be an ingredient of the major and substantially included in the charges of the former.[94] The lesser offense may be sufficiently charged although the indictment is insufficient as to the greater.[95]

n. *Degrees of Crime.*—Where under the law of a state a crime is defined as being of different degrees, the accused may be tried and convicted of the highest degree under an indictment which charged the offense in a general way without distinguishing between the grades of the offense, or specifically charging it in the highest degree.[96]

o. *Statutory Offenses*—(1) *In General.*—The general rule is, that the charge must be laid in the indictment so as to bring the case within the description of the offense as given in the statute,[97] alleging every ingredient of which it is constituted,[98] and which would be necessary to a conviction if proved,[99] with such degree of certainty and accuracy as to leave no doubt in the words of the accused and the court of the exact offense charged.[1] Nothing is to be left to

91. For administering poison.—"It matters not whether he knew the exact character of the strychnine or other poisons." Westmoreland *v.* United States, 155 U. S. 545, 549, 39 L. Ed. 255. See the title HOMICIDE, ante, p. 695.

92. Sufficiency of averment.—Dunbar *v.* United States, 156 U. S. 185, 192, 39 L. Ed. 390.

93. Included offenses.—Ball *v.* United States, 140 U. S. 118, 136, 35 L. Ed. 377; Sparf *v.* United States, 156 U. S. 51, 63, 39 L. Ed. 343; Wallace *v.* United States, 162 U. S. 466, 40 L. Ed. 1039. See Rev. Stat., § 1035. And see the titles ATTEMPTS AND SOLICITATIONS TO COMMIT CRIME, vol. 2, p. 702; VERDICT.

An indictment for a capital offense usually includes an offense less than capital, and the defendant may be convicted of either. For instance, one indicted of murder may be convicted of manslaughter, or of an assault only. Logan *v.* United States, 144 U. S. 263, 307, 36 L. Ed. 429.

94. Union offense must be ingredient of major.—Moore *v.* Missouri, 159 U. S. 673, 678, 40 L. Ed. 301.

It is a matter for the state courts to determine whether in a given case an indictment is sufficient in that regard. Moore *v.* Missouri, 159 U. S. 673, 678, 40 L. Ed. 301. See BURGLARY AND HOUSEBREAKING, vol. 3, p. 544.

95. Where major not sufficiently charged.—An indictment which charges an assault with a loaded gun, and the infliction of mortal wounds by the discharge of its contents, of which mortal wounds the victim "did languish and languishing died," is not valid as an indictment for homicide, because it fails to aver either the time or place of the death; but the indictment sufficiently charges an assault. Ball *v.* United States, 140 U. S. 118, 136, 35 L. Ed. 377; United States *v.* Ball, 163 U. S. 662, 664, 41 L. Ed. 300.

96. Degrees of crime.—Bergemann *v.* Backer, 157 U. S. 655, 39 L. Ed. 845; Davis *v.* Utah, 151 U. S. 262, 266, 38 L. Ed. 153; Kohl *v.* Lehlback, 160 U. S. 293, 296, 40 L. Ed. 432; Moore *v.* Missouri, 159 U. S. 673, 679, 40 L. Ed. 301. See BURGLARY AND HOUSEBREAKING, vol. 3, p. 544. And see the title HOMICIDE, ante, p. 695.

97. Statutory offenses.—United States *v.* Staats, 8 How. 41, 44, 12 L. Ed. 979; Ledbetter *v.* United States, 170 U. S. 606, 610, 42 L. Ed. 1162; Frisbie *v.* United States, 157 U. S. 160, 166, 39 L. Ed. 657; United States *v.* Britton, 107 U. S. 655, 662, 27 L. Ed. 520; United States *v.* Mann, 95 U. S. 580, 586, 24 L. Ed. 531; Dunbar *v.* United States, 156 U. S. 185, 191, 39 L. Ed. 390; United States *v.* Carll, 105 U. S. 611, 26 L. Ed. 1135; Cannon *v.* United States, 116 U. S. 55, 78, 29 L. Ed. 561; Moore *v.* United States, 160 U. S. 268, 270, 40 L. Ed. 422.

A charge which brings the accused clearly within the scope and requirements of the statute creating the offense, and so identifies the offense as to enable the accused to fully prepare his defense, is sufficient. Frisbie *v.* United States, 157 U. S. 160, 166, 39 L. Ed. 657.

98. See ante, "Completeness," VIII, C, 5, a.

99. The Samuel, 1 Wheat. 9, 14, 4 L. Ed. 23.

1. See ante, "In General," VIII, C, 5, b, (2), (a).

implication or intendment.[2]

(2) *In Words of Statute*—(a) *The General Rule.*—Where an offense is purely statutory, having no relation to the common law, it is, as a general rule, sufficient in an indictment thereon to charge the defendant with acts coming fully within the statutory description, in the substantial words of the statute,[3] without any further expansion of the matter.[4]

(b) *Applications of General Rule*—aa. *Where Offense Is Described in Technical Terms.*—It is sufficient in charging a statutory offense to use the terms of the statute, where such terms have a settled, technical and well understood meaning;[5] and, where words or terms of art are used in the description, that have a technical meaning at common law, these should be followed, being the only terms to express in apt and legal language the nature and character of the crime.[6] While all offenses of which the courts of the United States have jurisdiction are created by the constitution, laws or treaties of the United States, the common law is to be resorted to for the definitions of the terms by which such offenses are designated.[7]

bb. *Where All Elements of Offense Are Set Out*—(aa) *In General.*—Where the words of the statute themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished, a charge in the words of such statute is sufficient,[8] and it need not be made more complete by specifying particulars else-

2. Nothing to be left to implication.—United States *v.* Staats, 8 How. 41, 44, 12 L. Ed. 979.

3. In words of statute.—Blitz *v.* United States, 153 U. S. 308, 315, 38 L. Ed. 725; Ledbetter *v.* United States, 170 U. S. 606, 609, 42 L. Ed. 1162; United States *v.* Simmons, 96 U. S. 360, 362, 24 L. Ed. 819; United States *v.* Britton, 107 U. S. 655, 661, 27 L. Ed. 520; Potter *v.* United States, 155 U. S. 438, 444, 39 L. Ed. 214; United States *v.* Carll, 105 U. S. 611, 612, 26 L. Ed. 1135; United States *v.* Quincy, 6 Pet. 445, 8 L. Ed. 458; United States *v.* Britton, 108 U. S. 193, 199, 27 L. Ed. 701; United States *v.* Northway, 120 U. S. 327, 330, 30 L. Ed. 664; Claassen *v.* United States, 142 U. S. 140, 35 L. Ed. 966; Evans *v.* United States, 153 U. S. 584, 589, 38 L. Ed. 830; Pounds *v.* United States, 171 U. S. 35, 38, 43 L. Ed. 62; United States *v.* Gooding, 12 Wheat. 460, 473, 6 L. Ed. 693; United States *v.* Staats, 8 How. 41, 44, 12 L. Ed. 979; Durland *v.* United States, 161 U. S. 306, 315, 40 L. Ed. 709; Hodgson *v.* Vermont, 168 U. S. 262, 270, 42 L. Ed. 461; United States *v.* Hess, 124 U. S. 483, 488, 31 L. Ed. 516.

"As a general rule, an indictment for a statute offense is sufficient, if it describe the offense in the very words of the statute." United States *v.* Brig Neurea, 19 How. 92, 94, 15 L. Ed. 531; United States *v.* Gooding, 12 Wheat. 460, 474, 6 L. Ed. 693.

In indictments it is often sufficient to state the offense in the very terms of the prohibitory statute. The Palmyra, 12 Wheat. 1, 13, 6 L. Ed. 531.

In an indictment under the slave trade act of the 20th of April, 1818, ch. 373, against the owner of the ship, it is not necessary to specify the particulars of the fitting out; it is sufficient to allege the offense in the words of the statute. United States *v.* Gooding, 12 Wheat. 460, 6 L. Ed. 693. See the title ADMIRALTY, vol. 1, pp. 163, 164.

4. United States *v.* Simmons, 96 U. S. 360, 362, 24 L. Ed. 819, quoted in United States *v.* Britton, 107 U. S. 655, 661, 27 L. Ed. 520; United States *v.* Hess, 124 U. S. 483, 488, 31 L. Ed. 516; Pounds *v.* United States, 171 U. S. 35, 38, 43 L. Ed. 62.

Rule not affected by exceptions thereto.—Notwithstanding the cases making exceptions to it, the general rule still holds good that upon an indictment for a statutory offense, the offense may be described in the words of the statute. Ledbetter *v.* United States, 170 U. S. 606, 611, 42 L. Ed. 1162.

Averment of felonious intent.—See ante, "In Statutory Felonies," VIII, C, 7, l, (1), (c), bb.

5. Where terms have technical meaning.—United States *v.* Britton, 107 U. S. 655, 671, 27 L. Ed. 520; Dealy *v.* United States, 152 U. S. 539, 545, 38 L. Ed. 545. See post, "Where Offense Is Not Described in Technical Terms," VIII, C, 7, o, (2), (c), bb.

6. Terms of art.—United States *v.* Staats, 8 How. 41, 44, 12 L. Ed. 979.

7. Common-law definition of statutory terms.—Pettibone *v.* United States, 148 U. S. 197, 203, 37 L. Ed. 419. See the title COMMON LAW, vol. 3, p. 975.

8. Where all elements of offense set out.—Blitz *v.* United States, 153 U. S. 308, 315, 38 L. Ed. 725; United States *v.* Northway, 120 U. S. 327, 334, 30 L. Ed. 664; United States *v.* Carll, 105 U. S. 611, 26 L. Ed. 1135; United States *v.* Cook, 17 Wall. 168, 21 L. Ed. 638; United States *v.* Britton, 107 U. S. 655, 665, 27 L. Ed. 520.

where obtained.[9]

(bb) *Where Offense Better Defined in Another Section of Statute.*—An indictment under one section of a statute which fully sets forth all essentials of the offense is sufficient if it follows the words of such section, although there is another section of the statute which defines the offense more fully.[10]

(cc) *Misdemeanor Cases.*—A rule of criminal pleading, which at one time obtained in some of the circuits, and perhaps received a qualified sanction from the federal supreme court,[11] that an indictment for a statutory misdemeanor is sufficient, if the offense be charged in the words of the statute, must, under more recent decisions, be limited to cases where the words of the statute themselves, fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.[12]

(c) *Exceptions to General Rule*—aa. *In General.*—The exceptions to the above rule are firmly settled and well recognized.[13] These exceptions arise either from the obvious intention of the legislature,[14] or from the application of known principles of law.[15] Most of the exceptions result from the rule that every ingredient of the offense must be accurately and certainly expressed.[16]

9. Ledbetter *v.* United States, 170 U. S. 606, 612, 42 L. Ed. 1162; United States *v.* Staats, 8 How. 41, 44, 12 L. Ed. 979. See post, "Where All Elements of Offense Are Not Expressed," VIII, C, 7, o, (2), (c), cc.

10. **Where offense better defined in another section of statute.**—United States *v.* Carll, 105 U. S. 611, 26 L. Ed. 1135; Ledbetter *v.* United States, 170 U. S. 606, 611, 42 L. Ed. 1162.

11. **In misdemeanor cases—Former rule.**—"In United States *v.* Mills, 7 Pet. 138, 142, 8 L. Ed. 636, it was said by this court: 'The general rule is, that, in indictments for misdemeanors created by statute, it is sufficient to charge the offense in the words of the statute. * * * But in all cases the offense must be set forth with clearness, and all necessary certainty to apprise the accused of the crime with which he stands charged.'" Cannon *v.* United States, 116 U. S. 55, 78, 29 L. Ed. 561.

"There is not that technical nicety required as to form which seems to have been adopted and sanctioned by long practice in cases of felony, and with respect to some crimes, where particular words must be used, and no other words, however synonymous they may seem, can be substituted." United States *v.* Britton, 107 U. S. 655, 661, 27 L. Ed. 520; United States *v.* Mills, 7 Pet. 138, 142, 8 L. Ed. 636.

12. **Present rule.**—Evans *v.* United States, 153 U. S. 584, 587, 38 L. Ed. 830.

"Even in the cases of misdemeanors, the indictment must be free from all ambiguity, and leave no doubt in the minds of the accused and the court of the exact offense intended to be charged, not only that the former may know what he is called upon to meet, but that, upon a plea of former acquittal or conviction, the record may show with accuracy the exact offense to which the plea relates." Evans *v.* United States, 153 U. S. 584, 587, 38 L. Ed. 830; Ledbetter *v.* United States, 170 U. S. 606, 610, 42 L. Ed. 1162.

13. **Exceptions to general rule.**—United States *v.* Mann, 95 U. S. 580, 585, 24 L. Ed. 531; United States *v.* Carll, 105 U. S. 611, 26 L. Ed. 1135; Potter *v.* United States, 155 U. S. 438, 444, 39 L. Ed. 214.

"Examples of the kind, where it has been held that it is not sufficient to follow the words of the statute, are quite numerous, and they show that many of the exceptions are as extensively recognized and as firmly settled as any other rule of pleading in such cases." United States *v.* Mann, 95 U. S. 580, 586, 24 L. Ed. 531; United States *v.* Reese, 92 U. S. 214, 233, 23 L. Ed. 563, Clifford, J., dissenting.

14. **Result from intention of legislature.**—United States *v.* Gooding, 12 Wheat. 460, 474, 6 L. Ed. 693.

15. **Or from rules of law.**—United States *v.* Gooding, 12 Wheat. 460, 474, 6 L. Ed. 693.

The exceptions to this rule are, where the offenses created by statute are analogous to certain common-law felonies or misdemeanors, where the precedents require certain technical language, or where special averments are necessary in the description of the particular offense, in order that the defendant may afterwards protect himself under the plea of autrefois, acquit or convict. United States *v.* Brig Neurea, 19 How. 92, 94, 15 L. Ed. 531.

16. **Result from certainty and completeness rules.**—Most of the exceptions result from another rule of criminal pleading, which, in framing indictments founded upon statutes, is paramount to all others, and is one of universal aplication—that every ingredient of the offense must be accurately and clearly expressed; or, in other words, that the indictment must contain an allegation of every fact

bb. *Where Offense Is Not Described in Technical Terms.*—It is not sufficient to charge an offense in the words of a statute, where the words have no settled technical meaning.[17]

cc. *Where All Elements of Offense Are Not Expressed.*—In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished;[18] and the fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the

which is legally essential to the punishment to be inflicted. United States *v.* Reese, 92 U. S. 214, 232, 23 L. Ed. 563, Clifford, J., dissenting, citing United States *v.* Cook, 17 Wall. 168, 174, 21 L. Ed. 638. See ante, "Completeness," VIII, C, 5, a; "Accuracy and Certainty," VIII, C, 5, b.

17. **Where offense not described in technical terms.**—United States *v.* Britton, 107 U. S. 655, 699, 27 L. Ed. 520; United States *v.* Northway, 120 U. S. 327, 334, 30 L. Ed. 664. See ante, "Where Offense Described in Technical Terms," VIII, C, 7, o, (2), (b), aa.

The words "willfully misapplied" found in § 5209 Rev. Stat. are new in statutes creating offenses, and they are not used in describing any offense at common law. They have no settled technical meaning like the word "embezzle" as used in the statutes, or the words "steal, take and carry away," as used at common law. They do not, therefore, of themselves fully and clearly set forth every element of the offense charged. It would not be sufficient simply to aver that the defendant "willfully misapplied" the funds of the association. There must be averments to show how the application was made and that it was an unlawful one. United States *v.* Britton, 107 U. S. 655, 669, 27 L. Ed. 520; Batchelor *v.* United States, 156 U. S. 426, 429, 39 L. Ed. 478; Potter *v.* United States, 155 U. S. 438, 446, 39 L. Ed. 214; Evans *v.* United States, 153 U. S. 584, 594, 38 L. Ed. 830. See the title BANKS AND BANKING, vol. 3, p. 108.

"Abstract."—"Unlike the word 'misapply,' as used in the same section, the word 'abstract' (in the same section) is not ambiguous, because it does not appear from other parts of the statute that there are two or more kinds of abstracting, both unlawful, but only one described as a criminal offense. The word 'abstract,' as used in the statute, therefore, has but one meaning, being that which is attached to it in its ordinary and popular use. It is to be accepted with that meaning in framing an indictment under the section, which is not required, in order to be sufficient, to contain more than those allegations which are necessary, when added to the allegation of abstracting, to complete the description of the offense intended by the statute." United States *v.* Northway, 120 U. S. 327, 334, 30 L. Ed. 664. See ABSTRACT, vol. 1, p. 50.

18. **Elements not expressed.**—United States *v.* Carll, 105 U. S. 611, 612, 26 L. Ed. 1135; Blitz *v.* United States, 153 U. S. 308, 315, 38 L. Ed. 725; Ledbetter *v.* United States, 170 U. S. 606, 610, 42 L. Ed. 1162; Moore *v.* United States, 160 U. S. 268, 270, 40 L. Ed. 422; Evans *v.* United States, 153 U. S. 584, 587, 38 L. Ed. 830; United States *v.* Mann, 95 U. S. 580, 586, 24 L. Ed. 531. See ante, "Where All Elements of Offense Are Set Out," VIII, C, 7, o, (2), (b), bb.

"Offenses created by statute as well as offenses at common law consist, with rare exceptions, of more than one ingredient; and the rule is universal, that every ingredient of which the offense is composed must be accurately and clearly expressed in the indictment or information, or the pleading will be held bad on demurrer." United States *v.* Mann, 95 U. S. 580, 583, 24 L. Ed. 531; United States *v.* Cook, 17 Wall. 168, 21 L. Ed. 638.

This exception obtains in cases where the statute is elliptical, or where by necessary implication other constituents are component parts of the offense. United States *v.* Mann, 95 U. S. 580, 583, 24 L. Ed. 531.

"The cases wherein it is held that an indictment in the exact language of the statute is not sufficient are those wherein the statute does not contain all the elements of the offense." Ledbetter *v.* United States, 170 U. S. 606, 611, 42 L. Ed. 1162.

Where statute omits intent.—An indictment on § 5431 of the Revised Statutes, alleging, in the words of the statute, that the defendant feloniously, and with intent to defraud, did pass, utter, and publish a falsely made, forged, counterfeited, and altered obligation of the United States, but not further alleging that the defendant knew it to be false, forged, counterfeited, and altered, is insufficient, even after verdict. United States *v.* Carll, 105 U. S. 611, 26 L. Ed. 1135; Pettibone *v.* United States, 148 U. S. 197, 204, 37 L. Ed. 419.

case within that intent.[19] If the statute upon which the indictment is founded only describes the general nature of the offense prohibited, the indictment, in repeating its language without averments disclosing the particulars of the alleged offense, states no matters upon which issue could be formed for submission to a jury.[20] Where the general terms used in the statute refer to some other statutory provisions for the essentials of the offense, an indictment in such terms is insufficient.[21] It is for the defendant to show that greater particularity is required by reason of the omission from the statute of some element of the offense.[22]

dd. *Where Statute Is Not Clear and Certain.*—To the general rule there is the qualification that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him.[23] Offenses created by statute, as well as offenses at common law, must be accurately and clearly described in an indictment.[24] If the offense cannot be so described without expanding the allegations beyond the mere words of the statute, then it is clear that the allegations of the accusation must be expanded to that extent.[25]

ee. *Where Legislative Intent Requires Fuller Statement.*—The fact that the statute in question, read in the light of the common law and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent.[26]

ff. *Where Offense Described Disjunctively.*—For treatment of this subject, see elsewhere in this title.[27]

(3) *In Words Other than Those of Statute.*—In charging a statutory offense the exact words of the statute need not necessarily be used. The pleader is at liberty to use any form of expression, provided he thereby fully and exactly describes the offense.[28]

19. United States *v.* Carll, 105 U. S. 611, 612, 26 L. Ed. 1135; United States *v.* Cruikshank, 92 U. S. 542, 23 L. Ed. 588; United States *v.* Simmons, 96 U. S. 360, 24 L. Ed. 819; United States *v.* Britton, 107 U. S. 655, 661, 27 L. Ed. 520; Pettibone *v.* United States, 148 U. S. 197, 204, 37 L. Ed. 419.

20. Description in general terms.—United States *v.* Hess, 124 U. S. 483, 486, 31 L. Ed. 516; Keck *v.* United States, 172 U. S. 434, 437, 43 L. Ed. 505.

"Undoubtedly the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged." United States *v.* Hess, 124 U. S. 483, 487, 31 L. Ed. 516.

21. Reference to other statute.—Keck *v.* United States, 172 U. S. 434, 437, 43 L. Ed. 505.

22. Defendant must show necessity for greater particularity.—Ledbetter *v.* United States, 170 U. S. 606, 612, 42 L. Ed. 1162.

23. Where statute not clear and certain.—United States *v.* Simmons, 96 U. S. 360, 362, 24 L. Ed. 819, quoted in United States *v.* Britton, 107 U. S. 655, 661, 27 L. Ed. 520, in Blitz *v.* United States, 153 U. S. 308, 315, 38 L. Ed. 725, and in United States *v.* Hess, 124 U. S. 483, 488, 31 L. Ed. 516; United States *v.* Mills, 7 Pet. 138, 142, 8 L. Ed. 636; Ledbetter *v.* United States, 170 U. S. 606, 610, 42 L. Ed. 1162.

24. United States *v.* Cook, 17 Wall. 168, 174, 21 L. Ed. 638. See ante, "Necessity for," VIII, C, 5, b, (1).

25. It is universally true that no pleading in such a case can be sufficient which does not accurately and clearly allege all the ingredients of which the charge is composed, so as to bring the accused within the true intent and meaning of the statute defining the accusation. United States *v.* Mann, 95 U. S. 580, 585, 24 L. Ed. 531.

26. Where legislative intent requires fuller statement.—Evans *v.* United States, 153 U. S. 584, 587, 38 L. Ed. 830; United States *v.* Carll, 105 U. S. 611, 612, 26 L. Ed. 1135; United States *v.* Britton, 107 U. S. 655, 661, 27 L. Ed. 520; United States *v.* Mann, 95 U. S. 580, 586, 24 L. Ed. 531.

27. Where offense described distinctively.—See ante, "Alternative Allegations," VIII, C, 5, h.

28. Words other than those of statute.—Dunbar *v.* United States, 156 U. S. 185, 190, 39 L. Ed. 390; United States *v.* Staats, 8 How. 41, 12 L. Ed. 979; Davis *v.* Utah, 151 U. S. 262, 265, 38 L. Ed. 153; Cannon *v.* United States, 116 U. S. 55, 76, 29 L. Ed. 561.

Thus, where other words are used which make the indictment sufficiently clear to be well understood, it is sufficient though it charge the defendant with smuggling "prepared opium," though it be founded upon a statute which reads "opium prepared for smoking." Dunbar *v.* United

(4) *Where Statute Punishes Common-Law Offense.*—Statutes sometimes merely prescribe a punishment of a common-law crime without defining it. In such cases it is well held that the common-law requirements in charging it must be met.[29]

(5) *Where Statute Contains Exceptions or Provisos*—(a) *Necessity for Negation.*—If the exception is so incorporated with the substance of the clause defining the offense as to constitute a material part of the description of the acts, omissions, or other ingredients which constitute the offense, and constitutes a material part of the definition of the offense, it cannot be omitted in the pleading.[30] But if the language of the section defining the offense is so entirely separable from the exception that the ingredients constituting the of-

States, 156 U. S. 185, 190, 39 L. Ed. 390. See the title REVENUE LAWS.

This decision was rendered under § 1025 of the Revised Statutes, and distinguished from United States *v.* Carll, 105 U. S. 611, 26 L. Ed. 1135. Dunbar *v.* United States, 156 U. S. 185, 192, 39 L. Ed. 390.

Where a statute reads, "to effect the object of the conspiracy," and the indictment charges the act to have done "according to and in pursuance of said conspiracy, it is sufficient." Dealy *v.* United States, 152 U. S. 539, 546, 38 L. Ed. 545.

29. Where statute prescribes punishment of common-law offense.—Hodgson *v.* Vermont, 168 U. S. 262, 270, 42 L. Ed. 461.

30. Where statute contains exceptions and provisos.—United States *v.* Cook, 17 Wall. 168, 176, 21 L. Ed. 638; 200 Chests of Tea, 9 Wheat. 430, 436, 6 L. Ed. 128.

Results from completeness and certainty rules.—"Offenses created by statute, as well as offenses at common law, must be accurately and clearly described in an indictment, and if they cannot be, in any case, without an allegation that the accused is not within an exception contained in the statute defining the offense, it is clear that no indictment founded upon the statute can be a good one which does not contain such an allegation, as it is universally true that no indictment is sufficient if it does not accurately and clearly allege all the ingredients of which the offense is composed." United States *v.* Cook, 17 Wall. 168, 174, 21 L. Ed. 638.

Exception in enacting clause.—"Where a statute defining an offense contains an exception, in the enacting clause of the statute, which is so incorporated with the language defining the offense that the ingredients of the offense cannot be accurately and clearly described if the exception is omitted, the rules of good pleading require that an indictment founded upon the statute must allege enough to show that the accused is not within the exception." United States *v.* Cook, 17 Wall. 168, 173, 21 L. Ed. 638.

In subsequent clause.—"Text-writers and courts of justice have sometimes said, that if the exception is in the enacting clause, the party pleading must show that the accused is not within the exception, but where the exception is in a subsequent section or statute, that the matter contained in the exception is matter of defense and must be shown by the accused. Undoubtedly that rule will frequently hold good, and in many cases prove to be a safe guide in pleading, but it is clear that it is not a universal criterion, as the words of the statute defining the offense may be so entirely separable from the exception that all the ingredients constituting the offense may be accurately and clearly alleged without any reference to the exception." United States *v.* Cook, 17 Wall. 168, 174, 21 L. Ed. 638.

"Cases have also arisen, and others may readily be supposed, where the exception, though in a subsequent clause or section, or even in a subsequent statute, is nevertheless clothed in such language, and is so incorporated as an amendment with the words antecedently employed to define the offense that it would be impossible to frame the actual statutory charge in the form of an indictment with accuracy, and the required certainty, without an allegation showing that the accused was not within the exception contained in the subsequent clause, section, or statute. Obviously such an exception must be pleaded, as otherwise the indictment would not present the actual statutory accusation, and would also be defective for the want of clearness and certainty." United States *v.* Cook, 17 Wall. 168, 174, 21 L. Ed. 638.

Where the exception itself is incorporated in the general clause, as is supposed in the alternative rule there laid down, then it is correct to say, that unless the exception in the general clause is negatived in pleading the clause, no offense will appear in the indictment when compared with the statute or contract, but when the exception or proviso is in a subsequent substantive clause, the case contemplated in the enacting or general clause may be fully stated without negativing the exception or proviso, as a prima facie case is stated, and it is for the party for whom matter of excuse is furnished by the statute or contract to bring it forward in his defense. United States *v.* Cook, 17 Wall. 168, 175, 21 L. Ed. 638.

An indictment under Revised Statutes, § 5201 which declares that no banking as-

fense may be accurately and clearly defined without any reference to the exception, the pleader may safely omit any such reference.[31] It has been held to be a general rule, that while the pleader is not bound to negative a proviso, he is bound to aver that the defendant is not within any of the exceptions contained in the enacting clause of the statute.[32]

(b) *Sufficiency of Negation.*—An indictment under Rev. Stat., § 2146, which confers jurisdiction upon United States courts, but contains the exception that such jurisdiction does not "extend to crimes committed by one Indian against the person or property of another Indian," etc., and which also provides that no indictment can be held sufficient which does not expressly negative this exception, is sufficient where the defendant and deceased are described as "white persons, and not Indians, nor citizens of the Indian Territory."[33]

(6) *Effect of Averring as Contrary to Statute.*—The allegation that the act charged was committed in violation of law, or of the provisions of a particular statute, forms no part of the description of the offense.[34]

(7) *Effect of Averment by Legal Effect of Statute.*—The pleader should regard the substance and legal effect of the enactment.[35]

(8) *Certainty of Averment.*—In certain classes of statutes, the rule of very strict certainty has sometimes been applied, where the common law furnished a close and appropriate analogy.[36]

(9) *Averment of Matters of Defense.*—The indictment need not, by way of negative, introduce matter of defense when it is drawn on a statute any

sociation shall be a purchaser of its own shares, and contains the exception, "unless such purchaser shall be necessary to prevent the loss of a debt previously contracted in good faith," should negative the offense coming within the exception. United States *v.* Britton, 107 U. S. 655, 671, 27 L. Ed. 520.

31. **When negation not necessary.**—United States *v.* Cook, 17 Wall. 168, 173, 21 L. Ed. 638.

32. **Distinction between exceptions and provisos.**—Ledbetter *v.* United States, 170 U. S. 606, 611, 42 L. Ed. 1162; United States *v.* Cook, 17 Wall. 168, 21 L. Ed. 638; Maxwell Land Grant Co. *v.* Dawson, 151 U. S. 586, 604, 38 L. Ed. 279.

"Doubtless there is a technical distinction between an exception and a proviso, as an exception ought to be of that which would otherwise be included in the category from which it is excepted, and the office of a proviso is either to except something from the enacting clause or to qualify or restrain its generality, or to exclude some ground of misinterpretation of it, as extending to cases not intended to be brought within its operation, but there are a great many examples where the distinction is disregarded and where the words are used as if they were of the same signification." United States *v.* Cook, 17 Wall. 168, 177, 21 L. Ed. 638.

"Where an exception is incorporated in the body of the clause, he who pleads the clause ought also to plead the exception, but when there is a clause for the benefit of the pleader, and afterwards follows a proviso which is against him, he shall plead the clause and leave it to the adversary to show the proviso." United States *v.* Cook, 17 Wall. 168, 177, 21 L. Ed. 638.

33. **Sufficiency of negation.**—Westmoreland *v.* United States, 155 U. S. 545, 548, 39 L. Ed. 255; Wheeler *v.* United States, 159 U. S. 523, 524, 40 L. Ed. 244.

"At least, as no challenge was made of the indictment prior to the trial, and the question as only raised by motion in arrest, and as, further, that which was intended is obvious, it is fair to rule that any merely technical defect in this language was cured by the verdict." Westmoreland *v.* United States, 155 U. S. 545, 548, 39 L. Ed 255. See the title INDIANS, ante, p. 906.

34. **Effect of averring as contrary to statute.**—The reference to the statute may direct the attention of the court, and of the accused, to the particular statute by which the prosecution is to be sustained, but forms no part of the description of the offense. The importance of this principle to a fair administration of justice to that certainty introduced and demanded by the free genius of our institutions in all prosecutions for offenses against the laws, is too apparent to require elucidation, and the principle itself is too familiar not to suggest itself to every gentleman of the profession. The Hoppet, 7 Cranch 389, 393, 3 L. Ed. 380. See, also, Keck *v.* United States, 172 U. S. 434, 437, 43 L. Ed. 505.

35. **Averment of legal effect.**—United States *v.* Staats, 8 How. 41, 44, 12 L. Ed. 979.

36. **Certainty of averments.**—United States *v.* Gooding, 12 Wheat. 460, 474, 6 L. Ed. 693. See ante, "Accuracy and Certainty," VIII, C, 5, b; "Where Statute Is

more than when it is at common law.[37]

8. In Felony and Misdemeanor Cases.—There is not that technical nicety required as to form, which seems to have been adopted and sanctioned by long practice, in cases of felony, and with respect to some crimes, where particular words must be used, and no other words, however synonymous they may seem, can be substituted, in cases of misdemeanors.[38] At the common law, in certain descriptions of offenses, and especially of capital offenses, great nicety and particularity are often necessary.[39]

D. Designation of Persons—1. Of Accused—a. *By Name.*—If known to the grand jurors, the name of the defendant must be averred.[40] A name need not be correctly spelled in an indictment, if substantially the same sound is preserved.[41]

b. *As Unknown.*—Where the name of the accused or of any other person involved in the description of the offense is unknown, it is sufficient to describe such person as unknown.[42] An allegation that such person is unknown to the grand jurors, is, in the absence of evidence to the contrary, presumed to be true.[43]

c. *Descriptions and Additions.*—Under a statute which reads "agent, attorney, or other person engaged in preparing," etc., it is sufficient to describe the defendant as a "lawyer."[44] An indictment for an offense which can be committed only by a male person is not insufficient for not alleging defendant is a male person, after plea in bar.[45] Under an old Pennsylvania statute of additions, in

Not Clear and Certain," VIII, C, 7, o, (2), (c), dd.

37. Matters of defense.—Evans *v.* United States, 153 U. S. 584, 590, 38 L. Ed. 830. See, also, United States *v.* Cook, 17 Wall. 168, 173, 21 L. Ed. 638.

38. In felony and misdemeanor cases.—United States *v.* Mills, 7 Pet. 138, 142, 8 L. Ed. 636. See ante, "Misdemeanor Cases," VIII, C, 7, o, (2), (b), bb, (cc).

"Even in cases of misdemeanors, the indictment must be free from all ambiguity, and leave no doubt in the minds of the accused and the court of the exact offense intended to be charged, not only that the former may know what he is called upon to meet, but that, upon a plea of former acquittal or conviction, the record may show with accuracy the exact offense to which the plea relates." Evans *v.* United States, 153 U. S. 584, 587, 38 L. Ed. 830; United States *v.* Simmons, 96 U. S. 360, 24 L. Ed. 819; United States *v.* Hess, 124 U. S. 483, 31 L. Ed. 516; Pettibone *v.* United States, 148 U. S. 197, 37 L. Ed. 419.

39. United States *v.* Gooding, 12 Wheat. 460, 474, 6 L. Ed. 693. See the title HOMICIDE, ante, p. 695.

40. Designation of defendant—By name.—An indictment under § 3266 of the Revised Statutes, charging the defendant with causing or procuring some other person to use a still, boiler, or other vessel, for the purpose of distilling, within the intent and meaning of the internal revenue laws of the United States, is bad, unless it states the name of such person or avers that the same is unknown. United States *v.* Simmons, 96 U. S. 360, 24 L. Ed. 819.

41. Incorrect spelling.—In the indictment the defendant was described as W. J. Faust. He filed a plea of misnomer, in which he averred that he had been baptized in the name of W. J. Foust, and that he had always been known and called by that name, and prayed that the indictment might be quashed. This plea was overruled, as was likewise a motion to quash the indictment on the ground that defendant's name was W. J. Foust, and not W. J. Faust, as it appeared in the indictment. Held, not to be error. Faust *v.* United States, 163 U. S. 452, 454, 41 L. Ed. 224.

42. As unknown.—Coffin *v.* United States, 156 U. S. 432, 451, 39 L. Ed. 481.

This has always been the correct procedure at common law. Hodgson *v.* Vermont, 168 U. S. 262, 270, 42 L. Ed. 461; United States *v.* Simmons, 96 U. S. 360, 24 L. Ed. 819.

In territory of Utah.—Cannon *v.* United States, 116 U. S. 55, 76, 29 L. Ed. 561.

43. Coffin *v.* United States, 156 U. S. 432, 434, 451, 39 L. Ed. 481.

44. Descriptions and additions.—Frisbie *v.* United States, 157 U. S. 160, 166, 39 L. Ed. 657.

45. "The defendant, having pleaded to the indictment and not demurred, must be held to have understood distinctly that the charge was against a male person, as guilty of the offense complained of, the offense being one which only a male person could commit; and the omission from the indictment of the allegation that he was a male person could not have prejudiced him, or tended to his prejudice, in respect to a substantial right." Cannon *v.* United States, 116 U. S. 55, 77, 29 L. Ed. 561.

an indictment for outlawry, the addition must extend to the town or hamlet, the name, degree or mystery. But a description of either the name, degree or mystery is alone sufficient.[46]

d. *Where Accused Resides in Indian Country.*—An indictment for an offense committed within the territory of the Indian tribes which describes the defendant and the deceased as "white persons, and not Indians, nor citizens of the Indian Territory," is sufficient to show that such persons are nonresidents.[47]

e. *Where Accused Indicted on Joint Indictment.*—An indictment against several persons, charging them with the commission of an offense jointly, need not show which one or more of the defendants actually committed the offense, where the offense was one which in its nature might be committed by any one or more of the defendants.[48]

f. *Repetition of Description.*—In an indictment containing more than one count, a defendant, in all counts after the first, need not be specifically designated by words therein, but reference may be had back to the first count.[49]

2. Of Other Persons.—A description of persons other than the accused is necessary where its omission would work him an injustice or deprive him of a substantial right.[50] If the victim in a murder case is unknown, the indictment should describe him so that he can be identified.[51]

E. Designation of Time.—By the common law, the time of the commission of an offense is required to be alleged in the indictment.[52] And good pleading, undoubtedly, requires an allegation that the offense was committed on a particular day, month and year, but it does not necessarily follow that the omission to state a particular day is necessarily fatal.[53] The time of the of-

46. Respublica *v.* Steele, 2 Dall. 92, 93, 1 L. Ed. 303.

47. "The term 'Indian' in § 2146 (Rev. Stat.) is one descriptive of race, and therefore the defendant, described as a white man and not an Indian, is shown to be outside the first two clauses of § 2146." Westmoreland *v.* United States, 155 U. S. 545, 548, 39 L. Ed. 255. See the title INDIANS, ante, p. 906.

48. On joint indictment.—St. Clair *v.* United States, 154 U. S. 134, 145, 38 L. Ed. 936. See the title HOMICIDE, ante, p. 695.

49. Repetition of description.—In all the subsequent counts the defendants may be designated as, "the said A B." Blitz *v.* United States, 153 U. S. 308, 315, 38 L. Ed. 725.

50. Of other persons.—Kirby *v.* United States, 174 U. S. 47, 64, 43 L. Ed. 890.

Owner of stolen goods—Larceny.—United States *v.* Hess, 124 U. S. 483, 486, 31 L. Ed. 516. See the title LARCENY.

Same—Receiving stolen goods.—Kirby *v.* United States, 174 U. S. 47, 64, 43 L. Ed. 890; Coffin *v.* United States, 156 U. S. 432, 452, 39 L. Ed. 481; Rosen *v.* United States, 161 U. S. 29, 35, 40 L. Ed. 606. See the title RECEIVING STOLEN GOODS.

Person to whom intoxicating liquors is sold.—See the title INTOXICATING LIQUORS.

Persons defrauded. — Respublica *v.* Sweers, 1 Dall. 41, 1 L. Ed. 29.

Persons to whom mail addressed under postal laws.—Durland *v.* United States, 161 U. S. 306, 314, 40 L. Ed. 709; Dunbar *v.* United States, 156 U. S. 185, 191, 39 L. Ed. 390. See the title POSTAL LAWS.

Woman in bigamy cases.—Miles *v.* United States, 103 U. S. 304, 26 L. Ed. 481. See the title BIGAMY AND POLYGAMY, vol. 2, p. 227.

Accomplices and accessories.—See the title ACCOMPLICES AND ACCESSORIES, vol. 1, p. 65.

51. Victim in homicide case.—Ex parte Virginia, 100 U. S. 339, 352, 25 L. Ed. 676.

52. Designation by time.—Ball *v.* United States, 140 U. S. 118, 133, 35 L. Ed. 377; United States *v.* Ball, 163 U. S. 662, 664, 41 L. Ed. 300.

53. "Neither is it necessary to prove that the offense was committed upon the day alleged, unless a particular day be made material by the statute creating the offense. Ordinarily, proof of any day before the finding of the indictment, and within the statute of limitations, will be sufficient." Ledbetter *v.* United States, 170 U. S. 606, 612, 42 L. Ed. 1162.

"In the case under consideration the indictment was found on the 28th day of April, 1896, and the allegation is that the crime was committed 'on the —— day of April, 1896,' which must necessarily have been a day preceding the finding of the indictment. Under such circumstances, the defendant could not possibly have been misled by the allegation, particularly in view of the fact that the carrying on of a business is in the nature of a continuing offense; and while it is true that a business can be carried on only for a single day, the ordinary inference would be that it was carried on for a longer period. It would seem illogical to hold that, if the offense had been charged to have been committed upon a particular

fense should be alleged as previous to the finding of the indictment and during the time within which such offense may be prosecuted.[54] Where the act must be committed at a particular time in order to constitute a criminal offense, time is material and must be accurately averred.[55] An indictment, which alleges that the defendant inflicted a mortal wound upon the victim and that the latter did then instantly die, sufficiently alleges the time of death.[56] Time may be stated under a videlicet in an indictment.[57]

F. Designation of Place—1. NECESSITY FOR AVERMENT.—By the common law, it is necessary to allege the place of the commission of a crime.[58]

2. SUFFICIENCY OF AVERMENT—a. *In General.*—An indictment which alleges that the defendant inflicted a mortal wound upon the deceased of which mortal wound the deceased "did languish and languishing did then and there instantly die," distinctly and unequivocally alleges that the deceased died at the place at which the mortal wound was inflicted.[59]

b. *Within Jurisdiction of Court.*—An averment of the place of the commission of a crime as within the jurisdiction of the court is sufficient.[60]

c. *Within Particular County or Town*—(1) *In General.*—Properly speaking, the indictment should state not only the county, but the township, city or other municipality within which the crime is alleged to have been committed.[61] But the authorities in this particular are much less rigid than formerly.[62]

(2) *English Practice.*—Under the early English law, where the jurymen were

day in April, evidence could have been given of any day within the statute of limitations, and yet to hold that the defendant could be misled by an averment that the offense was committed on the —— day of the month in which the indictment was found." Ledbetter *v.* United States, 170 U. S. 606, 612, 42 L. Ed. 1162.

54. Previous to finding of indictment.—Hardy *v.* United States, 186 U. S. 224, 46 L. Ed. 1137; Matthews *v.* United States, 161 U. S. 500, 40 L. Ed. 786.

It was necessary at common law to allege in homicide cases that the death transpired within a year and a day. Ball *v.* United States, 140 U. S. 118, 133, 35 L. Ed. 377. See the title HOMICIDE, ante, p. 695.

55. Where time material.—An averment that a still, boiler, or other vessel, for the purpose of distilling were used "in a certain building and on certain premises where vinegar was manufactured and produced" is not sufficient, as it does not state that vinegar was manufactured or produced there at the time the still and other vessels were used for the purpose of distilling. United States *v.* Simmons, 96 U. S. 360, 24 L. Ed. 819.

56. Sufficiency of allegation.—United States *v.* Ball, 163 U. S. 662, 663, 41 L. Ed. 300. See the title HOMICIDE, ante, p. 695.

57. Under videlicet.—Matthews *v.* United States, 161 U. S. 500, 502, 40 L. Ed. 786.

58. Designation of place.—Ball *v.* United States, 140 U. S. 118, 133, 35 L. Ed. 377; United States *v.* Ball, 163 U. S. 662, 664, 41 L. Ed. 300.

In homicide cases it is essentially necessary to allege the place of death. Ball *v.* United States, 140 U. S. 118, 136, 35 L. Ed. 377; United States *v.* Ball, 163 U. S. 662, 664, 41 L. Ed. 300.

59. Sufficiency of averment.—An indictment alleging that the defendants, in Pickens county in the Indian Territory, on June 26, 1889, by shooting with a loaded gun, inflicted upon the body of Box "a mortal wound, of which mortal wound the said William T. Box did languish, and languishing did then and there instantly die," distinctly and unequivocally alleges that Box died of the mortal wound alleged to have been inflicted by the defendants, and that he died at the time and place at which the mortal wound was inflicted. United States *v.* Ball, 163 U. S. 662, 673, 41 L. Ed. 300.

But where the indictment charges an assault by the defendant upon one William T. Box with a loaded gun, and the infliction of mortal wounds by the discharge of its contents, "of which mortal wounds the said William T. Box did languish, and languishing died," this fails to aver either the time or place of the death. Ball *v.* United States, 140 U. S. 118, 136, 35 L. Ed. 377.

60. Within jurisdiction of court.—Ledbetter *v.* United States, 170 U. S. 606, 614, 42 L. Ed. 1162; Respublica *v.* Steele, 2 Dall. 92, 93, 1 L. Ed. 303.

In an indictment under the slave trade act of the 20th of April, 1818, ch. 373, against the owner of the ship, it is necessary, that the indictment should aver, that the vessel was built, fitted out, etc., or caused to sail, or be sent away, within the jurisdiction of the United States. United States *v.* Gooding, 12 Wheat. 460, 6 L. Ed. 693.

61. Within particular county, etc.—Ledbetter *v.* United States, 170 U. S. 606, 613, 42 L. Ed. 1162.

62. Ledbetter *v.* United States, 170 U. S. 606, 613, 42 L. Ed. 1162.

also witnesses and were summoned from the vicinage, it was necessary that the locality of the crime should be stated with great particularity in order that the sheriff might be informed from what vicinage he should summon the jury.[63] But this requirement was long since abolished in England by statute, and it is not now necessary there to state any venue in the body of any indictment, but the county, city or other jurisdiction named in the margin thereof shall be taken to be the venue for all the facts stated in the body of such indictment.[64]

(3) *American Practice.*—While in this country it is usual to state the town as well as the county, it has not been generally deemed necessary to do so, and most of the authorities assume that an allegation is sufficient after verdict which shows that the act was done within the jurisdiction of the court.[65] Indeed, an indictment charging the offense to have been committed in one town is supported by proof that it was committed in a different town within the same county, and within the jurisdiction of the court.[66]

3. Where Offense Committed within State by Person Without.—If a person while without a state does any act which results in the accomplishment of a crime within it, the indictment may aver place as within such state.[67]

4. Where Offense Committed on High Seas.—The doctrine of venue in indictments at the common law is inapplicable to cases of this sort.[68] An indictment for an offense committed upon the high seas need not allege on what part of the high seas it was committed; but is sufficient, if it alleges that the offense was committed on board of an American vessel, within the jurisdiction of the court and within the admiralty and maritime jurisdiction of the United States, and not within the jurisdiction of any particular state.[69]

G. Determination of Sufficiency—1. Question of Law.—Whether the indictment sets forth, in comprehensive terms, the offense which the statute describes and forbids, and for which it prescribes a punishment, is in every case a question of law, which must necessarily be decided by the court in which the case originates.[70]

2. By What Law Determined.—The sufficiency of an indictment is to be determined by the law in force at the time of its return.[71]

3. Jurisdiction—a. *In General.*—The determination of the sufficiency of an indictment is within the jurisdiction of the court in which the prosecution originates.[72] Whether an indictment in a state court sufficiently charges the offense is for that court to determine, and its decision in that respect presents

63. **English practice—Ancient.**—Ledbetter *v.* United States, 170 U. S. 606, 613, 42 L. Ed. 1162.

64. **Modern.**—Ledbetter *v.* United States, 170 U. S. 606, 613, 42 L. Ed. 1162. See 1 Bish. Crim. Proc., § 368.

65. **American practice.**—The averment of place was simply "in the county of Appanoose, in the southern district of Iowa, and within the jurisdiction of this court." The court said: "We do not wish to be understood as approving the practice that was pursued in this case, or even as holding that this indictment might not have been open to special demurrer for insufficiency as to the allegations of time and place, but upon motion in arrest of judgment we think it is sufficient." Ledbetter *v.* United States, 170 U. S. 606, 613, 42 L. Ed. 1162.

66. Ledbetter *v.* United States, 170 U. S. 606, 614, 42 L. Ed. 1162.

67. **Where offense committed within state of person without.**—Dealy *v.* United States, 152 U. S. 539, 546, 38 L. Ed. 545. See the title CONSPIRACY, vol. 3, p. 1103.

68. **Offenses committed on high seas.**—"The reason of the common law for laying the venue so particularly in offenses on land does not in any manner apply to offenses on the high seas; for no jury ever did or could come from visne or visinage on the high seas to try the cause; and no summons could issue for such a purpose." United States *v.* Gibert, 2 Sumner 19, 86; St. Clair *v.* United States, 154 U. S. 134, 145, 38 L. Ed. 936.

69. Andersen *v.* United States, 170 U. S. 481, 490, 42 L. Ed. 1116; St. Clair *v.* United States, 154 U. S. 134, 144, 38 L. Ed. 936. See the title PIRACY.

70. **Determination of sufficiency.**—Ex parte Yarbrough, 110 U. S. 651, 654, 28 L. Ed. 274. See post, "Objections to Accusation," XV.

71. **By what law determined.**—Caha *v.* United States, 152 U. S. 211, 216, 38 L. Ed. 415.

72. **Jurisdiction.**—Ex parte Yarbrough, 110 U. S. 651, 654, 28 L. Ed. 274.

no federal question.[73]

b. *In Extradition Cases.*—In extradition cases, the determination of the sufficiency of the indictment lies within the jurisdiction of the demanding state.[74]

4. On What Pleading Determined.—The question of the sufficiency of an indictment may, in the discretion of the court, be decided during the trial before the jury; but, generally speaking, it ought regularly to be determined only upon a motion to quash the indictment,[75] motion in arrest of judgment,[76] demurrer,[77] or plea in abatement.[78] Nor should it be determined when raised for the first time on a writ of error,[79] or habeas corpus.[80]

IX. Duplicity.

A. What Constitutes—1. Charge of Two or More Distinct Felonies.—It has been said that a count which charges separate and distinct felonies is defective within the rule, that two such offenses cannot be charged in the same count.[81]

2. Charge of Different Modes of Commission of Offense.—Where a statute, directed against certain defined modes of accomplishing a general object, declares that the doing of either one of certain specified things, each having reference to that object, shall be a punishable offense, the doing of the prohibited thing in each and all of the prohibited modes may be charged in one count so that there may be a verdict of guilty upon proof that the accused had done any one of the things constituting a substantive crime under the statute.[82] A count in an indictment which charges the transaction as continuous and the employment co-operatively of two lethal means by the accused to accomplish a crime, is not invalid for duplicity or repugnancy. It is not necessary to make the charge alternatively in two separate counts.[83]

B. Effect of Duplicity—1. In General.—An indictment may be invalid on the ground of duplicity.[84] Where a statute defines an offense disjunctively, the

73. Moore *v.* Missouri, 159 U. S. 673, 678, 40 L. Ed. 301; Caldwell *v.* Texas, 137 U. S. 692, 698, 34 L. Ed. 816; Howard *v.* Fleming, 191 U. S. 126, 135, 48 L. Ed. 121; Barrington *v.* Missouri, 205 U. S. 483, 487, 51 L. Ed. 890; Bergemann *v.* Backer, 157 U. S. 655, 656, 39 L. Ed. 845.

The constitution of Texas secures to the accused the right to demand the nature and cause of the accusation against him, and it is within the province of the state court to determine that this demand was satisfied by the indictment in question. Caldwell *v.* Texas, 137 U. S. 692, 698, 34 L. Ed. 816. See the title DUE PROCESS OF LAW, vol. 5, p. 499.

74. In extradition cases.—Pearce *v.* Texas, 155 U. S. 311, 39 L. Ed. 164. See the title EXTRADITION, ante, p. 219; HABEAS CORPUS, ante, p. 610.

75. On what pleadings determined.—United States *v.* Gooding, 12 Wheat. 460, 6 L. Ed. 693. See post, "Motion to Quash," XV, C, 1; "Time of Making Objections," XV, D.

76. Motion in arrest.—See post, "Motion in Arrest of Judgment," XV, C, 4.

77. Demurrer.—See post, "Demurrer," XV, C, 2.

78. Plea in abatement.—See post, "Plea in Abatement," XV, C, 3.

79. On writ of error.—See the title APPEAL AND ERROR, vol. 2, pp. 91, 118, 263.

On certificate of division of opinion.—See the title APPEAL AND ERROR, vol. 2, p. 42.

80. On habeas corpus.—See the title HABEAS CORPUS, ante, p. 610.

81. Duplicity—Two or more felonies.—Crain *v.* United States, 162 U. S. 625, 634, 40 L. Ed. 1097.

82. Charge of different modes of commission of crime.—In this case the objection was sought to be raised on motion in arrest of judgment. Some stress was laid upon this fact. Crain *v.* United States, 162 U. S. 625, 635, 40 L. Ed. 1097.

"And this is a view altogether favorable to an accused, who pleads not guilty to the charge contained in a single count; for a judgment on a general verdict of guilty upon that count will be a bar to any further prosecution in respect of any of the matters embraced by it." Crain *v.* United States, 162 U. S. 625, 636, 40 L. Ed. 1097.

83. The defendant may be charged with the commission of homicide by shooting and drowning, as the means employed are not inconsistent and of the same species. Andersen *v.* United States, 170 U. S. 481, 492, 42 L. Ed. 1116, following St. Clair *v.* United States, 154 U. S. 134, 144, 38 L. Ed. 936. See, also, United States *v.* Holmes, 5 Wheat. 412, 5 L. Ed. 122. See the title HOMICIDE, ante, p. 695.

84. Effect of duplicity.—Blitz *v.* United States, 153 U. S. 308, 315, 38 L. Ed. 725.

indictment charges the offense conjunctively and the defendant does not seek to compel an election or otherwise raise the question of duplicity, and the trial judge instructs the jury that the evidence would not justify a conviction of more than one of the statutory offenses, the appellate court will not disturb the verdict on the ground that more than one offense was included in the same count of the indictment.[85]

2. When Mere Surplusage.—Where the duplicitous description is matter of surplusage, it may be rejected and the count be good.[86]

X. Joinder of Offenses.

A. In Same Count.—This subject is treated elsewhere in this title.[87]

B. In Separate Counts—1. In General.—While conceding that regularity or usually an indictment should not include more than one felony, the authorities concur in holding that a joinder in one indictment, in separate counts, of different felonies, at least of the same class or grade, provable by the same evidence, and subject to the same punishment, is not necessarily fatal to the indictment upon demurrer, or upon motion to quash, or on motion in arrest of judgment, and does not, in every case, by reason alone of such joinder, make it the duty of the court, upon motion of the accused, to compel the prosecutor to elect, before the trial has commenced.[88] And after the trial has progressed the court still exercises a discretion whether or not to proceed upon the indictment.[89]

2. Object and Purpose.—It is familiar law that separate counts are united in one indictment, either because entirely separate and distinct offenses are intended to be charged, or because the pleader, having in mind but a single offense, varies the statement in the several counts as to the manner or means of its commission in order to avoid at the trial an acquittal by reason of any foreseen lack of harmony between the allegations and the proofs.[90]

3. Statutory Provision.—Section 1024 of the Revised Statutes is as follows: "When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated."[91] This statute does not determine the propriety of joinder or consolidation in every particular case, but permits the trial court to exercise the discretion.[92]

4. In Felony Cases.—Ordinarily, an indictment should not include more than one felony,[93] and at common law, in such cases, no more than one distinct offense or criminal transaction at one time can be regularly charged upon the

85. **Offense charged conjunctively.**—Wiborg *v.* United States, 163 U. S. 632, 647, 41 L. Ed. 289; Crain *v.* United States, 162 U. S. 625, 40 L. Ed. 1097.

86. **When mere surplusage.**—In re Lane, 135 U. S. 443, 448, 34 L. Ed. 219. See the title RAPE.

87. **Joinder—In same count.**—See ante, "Duplicity," IX.

88. **In separate counts.**—Pointer *v.* United States, 151 U. S. 396, 404, 38 L. Ed. 208.

The general rule is that counts for several felonies of the same general nature, requiring the same mode of trial and punishment, may be joined in the same indictment, subject to the power of the court to quash the indictment or to compel an election. McElroy *v.* United States, 164 U. S. 76, 81, 41 L. Ed. 355.

89. Pointer *v.* United States, 151 U. S. 396, 404, 38 L. Ed. 208.

90. **Purpose of joinder.**—Dealy *v.* United States, 152 U. S. 539, 542, 38 L. Ed. 545, quoting 1 Bishop on Criminal Procedure, § 422.

91. **Statutory provision.**—McElroy *v.* United States, 164 U. S. 76, 77, 41 L. Ed. 355; Pointer *v.* United States, 151 U. S. 396, 400, 38 L. Ed. 208; Williams *v.* United States, 168 U. S. 382, 390, 42 L. Ed. 509; Logan *v.* United States, 144 U. S. 263, 296, 36 L. Ed. 429.

92. **Statute does not inhibit exercise of discretion.**—Pointer *v.* United States, 151 U. S. 396, 400, 38 L. Ed. 208.

93. **Joinder of felonies.**—Pointer *v.* United States, 151 U. S. 396, 403, 38 L. Ed. 208.

prisoner in one indictment, lest it should confound or prejudice the prisoner in his defense.[94]

5. In Misdemeanor Cases.—The practice of not permitting a joinder of two or more crimes or transactions in the same indictment has not been extended to misdemeanors.[95]

6. Offenses of Same Nature.—Charges against a person for two or more acts or transactions of the same class of crimes or offenses may be joined in the same indictment.[96] Under the Revised Statutes, § 5511, making it a crime to interfere at elections for members of congress, a count in an indictment, which charges the accused with having unlawfully and with force and arms seized, carried away, and secreted the ballot box containing the ballots cast at the election named, may be joined with one charging him with having aided and assisted in the forcible and unlawful seizure, carrying away and secreting of such ballot box, and with one time having counselled, advised and procured the seizure, carrying away and secreting of the ballots at said election.[97] Substantive offenses, separate and distinct, complete in themselves and independent of each other, committed at different times and not provable by the same evidence, are not of the same class of crimes or offenses.[98]

7. Offenses Arising from Same Transaction.—Two or more offenses

94. Pointer *v.* United States, 151 U. S. 396, 401, 38 L. Ed. 208.

"In (all) cases of felony, the multiplication of distinct charges has been considered so objectionable as tending to confound the accused in his defense, or to prejudice him as to his challenges, in the matter of being held out to be habitually criminal, in the distraction of the attention of the jury, or otherwise, that it is the settled rule in England and in many of our states, to confine the indictment to one distinct offense or restrict the evidence to one transaction." McElroy *v.* United States, 164 U. S. 76, 80, 41 L. Ed. 355.

95. **Joinder of misdemeanors.**—Pointer *v.* United States, 151 U. S. 396, 402, 38 L. Ed. 208.

96. **Offenses of same nature.**—In re Henry, 123 U. S. 372, 374, 31 L. Ed. 174; Pointer *v.* United States, 151 U. S. 396, 400, 38 L. Ed. 208; Ingraham *v.* United States, 155 U. S. 434, 436, 39 L. Ed. 213; Williams *v.* United States, 168 U. S. 382, 390, 42 L. Ed. 509, citing Pointer *v.* United States, 151 U. S. 396, 400, 38 L. Ed. 208, and distinguishing McElroy *v.* United States, 164 U. S. 76, 41 L. Ed. 355. See Rev. Stat. § 1024.

Under the third clause of § 1024, Rev. Stat., relating to several charges "for two or more acts or transactions of the same class of crimes or offenses," it is only when they "may be properly joined" that the joinder is permitted, the statute thus leaving it for the court to determine whether in any given case a joinder of two or more offenses in one indictment against the same person "is consistent with the settled principles of criminal law." McElroy *v.* United States, 164 U. S. 76, 80, 41 L. Ed. 355.

In the first count of an indictment, the defendant was charged with the murder of V. by "cutting," etc.; in the second with the murder of B. with "beating," etc.; in the third with the murder of B. on the same day and by the same means as with the murder of V.; the fourth count differed from the third only as the second from the first. The defendant moved to quash the indictment on the ground that it charged two distinct felonies. The two murders in question are alleged to have been committed by the defendant on the same day, and in the county and district, but it does not appear that they were the result of one transaction or that they were connected together. But the offenses are in the same class or grade of crimes and subject to the same punishment. The court held that where two murders are committed at the same place, on the same occasion, and under such circumstances, that the proof in respect of one necessarily threw light upon the other, there is such a close connection between the two killings in respect to time, place, occasion, and means of proof, that it is clear that the accused will not be confounded in his defense, nor prejudiced by the refusal to compel the prosecutor to elect, and that the accused may be tried on the indictment. And that the trial court was justified in refusing, at the beginning of the trial, and before the disclosure of the facts to compel an election. Pointer *v.* United States, 151 U. S. 396, 404, 38 L. Ed. 208.

In its general effect, § 5480 of Revised Statutes punishing offenses against postal laws is not materially different from that of § 1024 of the Revised Statutes, which allows the joinder in one indictment of charges against a person "for two or more acts or transactions of the same class of crimes or offenses," and the consolidation of two or more indictments found in such cases. In re Henry, 123 U. S. 372, 374, 31 L. Ed. 174.

97. Connors *v.* United States, 158 U. S. 408, 410, 39 L. Ed. 1033.

98. **Distinct substantive offenses.**—Mc-

arising out of the same transaction may be charged in one indictment.[99] But offenses committed at different times and unconnected with each other cannot be joined in the same indictment.[1]

8. Offenses Sustainable by Same Evidence.—Where two or more offenses were committed on the same occasion, and under such circumstances that the proof in respect of one necessarily throws light upon the other, the two offenses may be set out in the same indictment.[2]

9. Offenses Subject to Same Punishment.—There may be a joinder in one indictment, in separate counts, of different felonies, of the same class or grade, and subject to the same punishment.[3]

10. Offenses against Same Defendant.—While the general rule is that counts for several felonies of the same general nature, requiring the same mode of trial and punishment, may be joined in the same indictment, such joinder cannot be sustained where the parties are not the same. Counts against a number of defendants cannot be coupled with another count against only a part of them, and the offenses charged to have been committed by all at one time cannot be joined with another and distinct offense committed by part of them at a different time.[4] It cannot be said in such case that all the defendants may not have been embarrassed and prejudiced in their defense, or that the attention of the jury may not have been distracted to their injury in passing upon distinct and independent transactions.[5]

11. Acts Constituting One Offense.—A defendant may in the same indictment be charged with violation of a statute in receiving a certain compensation prohibited therein, and for agreeing to receive the same. The two acts constitute but one offense.[6]

Elroy *v.* United States, 164 U. S. 76, 79, 41 L. Ed. 355.

99. Arising from same transaction.—McElroy *v.* United States, 164 U. S. 76, 79, 41 L. Ed. 355; Pointer *v.* United States, 151 U. S. 396, 420, 38 L. Ed. 208; Bucklin *v.* United States, No. 2, 159 U. S. 682, 40 L. Ed. 305.

"As the charges against the defendants, respectively, grew out of the same transaction, both the court and the defendants may have deemed it convenient to have all the cases tried at the same time and by the same jury." Bucklin *v.* United States, No. 2, 159 U. S. 682, 685, 40 L. Ed. 305.

1. McElroy *v.* United States, 164 U. S. 76, 79, 41 L. Ed. 355; In re Henry, 123 U. S. 372, 375, 31 L. Ed. 174.

2. Sustainable by same evidence.—McElroy *v.* United States, 164 U. S. 76, 78, 41 L. Ed. 355; Pointer *v.* United States, 151 U. S. 396, 403, 38 L. Ed. 208; Williams *v.* United States, 168 U. S. 382, 390, 42 L. Ed. 509.

3. Subject to same punishment.—Pointer *v.* United States, 151 U. S. 396, 403, 38 L. Ed. 208; McElroy *v.* United States, 164 U. S. 76, 78, 41 L. Ed. 355; In re Henry, 123 U. S. 372, 375, 31 L. Ed. 174.

4. Several defendants.—McElroy *v.* United States, 164 U. S. 76, 79, 41 L. Ed. 355, distinguishing Pointer *v.* United States, 151 U. S. 396, 403, 38 L. Ed. 208. See, also, Logan *v.* United States, 144 U. S. 263, 296, 36 L. Ed. 429; Ingraham *v.* United States, 155 U. S. 434, 436, 39 L. Ed. 213.

"It is clear that the statute does not authorize the consolidation of indictments in such a way that some of the defendants may be tried at the same time with other defendants charged with a crime different from that for which all are tried." McElroy *v.* United States, 164 U. S. 76, 80, 41 L. Ed. 355.

A, B, C, D, E, and F were indicted for assault with intent to kill G on April 16, in one indictment; also with intent to kill H on the same day in a second indictment; also for arson of dwelling house of I on May 1st. Three of the defendants, A, B, and C, were also indicted for arson of the dwelling house of J on April 16. F was never tried. The court ordered the four indictments consolidated for trial, to which each of the other five defendants duly excepted, the trial was then had and resulted in separate verdicts finding the defendants guilty. The court held in consequence of this order the defendants D and C were tried on indictments against him and three other defendants, consolidated with indictments against the other defendants for an offense with which D and C were not charged. Therefore, the court held that the consolidation was not authorized under § 1024, Rev. Stat. McElroy *v.* United States, 164 U. S. 76, 41 L. Ed. 355. See Logan *v.* United States, 144 U. S. 263, 296, 36 L. Ed. 429.

5. McElroy *v.* United States, 164 U. S. 76, 81, 41 L. Ed. 355. See the title SEPARATE TRIALS.

6. Acts constituting one offense.—Under the Revised Statutes, § 1782, making

12. Same Offense Charged in Different Ways.—Where two counts of an indictment differ from each other only in the manner of stating how the offense was committed, the question whether the prosecution shall be compelled to elect is purely a matter within the discretion of the court.[7]

13. Where Defendant Prejudiced.—Where the defendant will be prejudiced thereby, two or more charges will not be joined in the same indictment.[8]

14. Where Jury Confused.—Joinder will not be permitted in cases where it would result in a confusion of the jury in passing upon a multiplicity of distinct and independent transactions.[9]

15. Discretion of Court.—At common law,[10] and under the federal statute,[11] the trial court possesses a discretion, to determine whether in a given case a joinder of two or more offenses in one indictment against the same person is consistent with the settled principles of criminal law,[12] and to quash the indictment, or to compel an election between two or more transactions charged in one indictment, at the beginning of the trial and before introduction of evidence, and after beginning of the trial and during progress thereof.[13]

XI. Consolidation of Indictments.

It is provided by statute that, when two or more offenses joined in different counts in the same indictment are charged in two or more indictments, the court may in its discretion order such indictments consolidated.[14] An order of a court

it unlawful for a United States senator to receive or to agree to receive any compensation for services rendered in relation to any proceeding or matter in which the United States is interested before any department of the government, a defendant may be charged in one count with agreeing to receive such compensation and in another count for receiving it. Burton *v.* United States, 202 U. S. 344, 377, 50 L. Ed. 1057.

7. Different charges of some offense.—Pierce *v.* United States, 160 U. S. 355, 356, 40 L. Ed. 454; Caha *v.* United States, 152 U. S. 211, 213, 38 L. Ed. 415.

8. Where defendant prejudiced.—McElroy *v.* United States, 164 U. S. 76, 79, 41 L. Ed. 355; Pointer *v.* United States, 151 U. S. 396, 403, 38 L. Ed. 208; Connors *v.* United States, 158 U. S. 408, 411, 39 L. Ed. 1033; Bucklin *v.* United States, 159 U. S. 682, 40 L. Ed. 305; Williams *v.* United States, 168 U. S. 382, 391, 42 L. Ed. 509.

It is a fundamental principle of criminal law that the court must not permit the defendant to be embarrassed in his defense by a multiplicity of charges embraced in one indictment. Pointer *v.* United States, 151 U. S. 396, 403, 38 L. Ed. 208.

9. Confusion of jury.—McElroy *v.* United States, 164 U. S. 76, 81, 41 L. Ed. 355.

10. Discretion of court.—Pointer *v.* United States, 151 U. S. 396, 403, 38 L. Ed. 208.

11. The discretion possessed by the judge under the common law has not been taken away by § 1024 of the Revised Statutes. On the contrary, that section is consistent with the settled rule that the court, in its discretion, may compel an election when it appears from the indictment, or from the evidence, that the prisoner may be embarrassed in his defense, if that course be not pursued. Pointer *v.* United States, 151 U. S. 396, 403, 38 L. Ed. 208.

If the common-law principles permit the joinder of two or more felonies in the same indictment, in separate counts, then the joinder in question here was proper. Pointer *v.* United States, 151 U. S. 396, 400, 38 L. Ed. 208.

12. Pointer *v.* United States, 151 U. S. 396, 400, 402, 38 L. Ed. 208; Lewis *v.* United States, 146 U. S. 370, 36 L. Ed. 1011; Pierce *v.* United States, 160 U. S. 355, 356, 40 L. Ed. 454; Connors *v.* United States, 158 U. S. 408, 411, 39 L. Ed. 1033.

13. Pointer *v.* United States, 151 U. S. 396, 404, 38 L. Ed. 208.

"The court is invested with such discretion as enables it to do justice between the government and the accused. If it be discovered at any time during a trial that the substantial rights of the accused may be prejudiced by a submission to the same jury of more than one distinct charge of felony among two or more of the same class, the court, according to the established principles of criminal law, can compel an election by the prosecutor." Pointer *v.* United States, 151 U. S. 396, 403, 38 L. Ed. 208; McElroy *v.* United States, 164 U. S. 76, 77, 41 L. Ed. 355.

14. Consolidation of indictments.—Pointer *v.* United States, 151 U. S. 396, 404, 38 L. Ed. 208. See Rev. Stat., § 1024.

"If the offenses could be joined in one indictment, it would follow, under the statute, that separate indictments could, in the discretion of the court, be consolidated and tried at the same time and before the same jury, where nothing in the record shows that the consolidation

for the consolidation of charges in several indictments, puts each of the indictments in the same category as if they were separate counts of one indictment.[15]

XII. Election.

A. Election Defined.—By what is technically termed "putting the prosecutor to his election," is meant that the trial judge, in his discretion, in felony cases, may require the counsel for the prosecution to select one of the several felonies charged in the indictment, and confine himself to that.[16]

B. Propriety of Election—1. In General.—The question of the propriety of compelling an election between distinct charges has always seemed to depend upon the special circumstances of the case in which it has arisen.[17]

2. In Felony Cases.—If several felonies or misdemeanors are charged in the same indictment in several counts, no objection can be made on that account in point of law; but, in felony cases, the judge may exercise his discretion to require the prosecutor to proceed with the trial on one of the charges only.[18]

3. Discretion of Court.—A motion to compel an election is made to the discretion of the trial judge, founded on the supposition that the case extends to more than one charge, and may tend to embarrass or prejudice the defendant in his defense.[19]

XIII. Validity of Accusation.

A. Presumption of Validity.—An indictment is presumed to be valid.[20]

B. Validity of Part of Counts.—Each count in an indictment or information is a substantive charge; and, if the verdict of the jury conforms to any one of the counts, which, in itself, will support the verdict, a general verdict will be sustained, and judgment may be given thereon, although all other counts in the indictment are invalid.[21] In the absence of anything in the record to show the

of these cases worked or could work any prejudice to the defendant." Williams *v.* United States, 168 U. S. 382, 391, 42 L. Ed. 509.

As to the offenses that may be joined in the same indictment, see ante, "Joinder of Offenses," X.

15. Effect of consolidation.—McElroy *v.* United States, 164 U. S. 76, 77, 41 L. Ed. 355.

16. Election — Defined.—Pointer *v.* United States, 151 U. S. 396, 402, 38 L. Ed. 208.

17. Property of election.—Pointer *v.* United States, 151 U. S. 396, 402, 38 L. Ed. 208.

18. In felony cases.—Pointer *v.* United States, 151 U. S. 396, 402, 38 L. Ed. 208. See the title HOMICIDE, ante, p. 695.

19. Discretion of court.—Pointer *v.* United States, 151 U. S. 396, 402, 38 L. Ed. 208; Pierce *v.* United States, 160 U. S. 355, 356, 40 L. Ed. 454.

Where a defendant was charged in one count with having seized, carried away, and secreted a ballot box, and for having assisted and procured others to do so, at an election for members of congress, the trial judge may at his discretion compel the prosecutor to elect which of the distinct offenses he will proceed under. Connors *v.* United States, 158 U. S. 408, 411, 39 L. Ed. 1033.

20. Presumption of validity.—Tarrance *v.* Florida, 188 U. S. 519, 520, 47 L. Ed. 572; Coffin *v.* United States, 156 U. S. 432, 451, 39 L. Ed. 481. See the title GRAND JURY, ante, p. 570. And see ante, "As Unknown," VIII, D, 1, b.

21. Validity of part of counts.—United States *v.* The Pirates, 5 Wheat. 184, 5 L. Ed. 64; Dunbar *v.* United States, 156 U. S. 185, 192, 39 L. Ed. 390; Coffey *v.* United States, 116 U. S. 427, 435, 29 L. Ed. 681; Clifton *v.* United States, 4 How. 242, 250, 11 L. Ed. 957; Snyder *v.* United States, 112 U. S. 216, 217, 28 L. Ed. 697; United States *v.* Sixty-Seven Packages, 17 How. 85, 94, 15 L. Ed. 54; Goode *v.* United States, 159 U. S. 663, 669, 40 L. Ed. 297; Claassen *v.* United States, 142 U. S. 140, 35 L. Ed. 966; Evans *v.* United States, 153 U. S. 584, 38 L. Ed. 830; Ex parte Wilson, 114 U. S. 417, 421, 29 L. Ed. 89; United States *v.* Reese, 92 U. S. 214, 256, 23 L. Ed. 563, Hunt, J., dissenting; Friedenstein *v.* United States, 125 U. S. 224, 231, 31 L. Ed. 736; Ingraham *v.* United States, 155 U. S. 434, 436, 39 L. Ed. 213; United States *v.* Carll, 105 U. S. 611, 26 L. Ed. 1135; Dealy *v.* United States, 152 U. S. 539, 542, 38 L. Ed. 545. See the title VERDICT.

"A general verdict of guilty was rendered upon all the counts of this indictment upon which a nolle prosequi was not entered, and as such verdict should stand if any one of the counts is good, it will not be necessary to consider them in any further detail." Evans *v.* United States, 153 U. S. 584, 594, 595, 38 L. Ed. 830.

Informations in revenue cases.—"It has been adjudged by this court, that informa-

contrary, the presumption of law is that the court awarded sentence on the good count only.[22]

XIV. Construction of Accusation.

The words used in an indictment are to be construed according to their usual acceptation in common language,[23] except such words and phrases as are defined by law, and they are to be construed according to their legal meaning.[24] The entire indictment is to be considered in determining whether the offense is fully stated.[25] Clauses connected by "and" are to be construed together.[26]

XV. Objections to Accusation.

A. Right to Be Heard.—The constitutional guaranty, that he be informed of the nature and cause of the accusation against him, entitles the defendant to object to the indictment by demurrer, motion to quash or on motion in arrest of judgment.[27] But the defendant has no right to insist that such objections should be discussed or decided, during the trial of the facts by the jury.[28]

B. Jurisdiction.—Rulings in respect of the sufficiency of an indictment present no federal question.[29]

C. Manner of Making Objection—1. Motion to Quash—a. *Who May Make Motion.*—An information at the relation of a private person cannot be quashed on his motion.[30]

b. *Grounds for.*—For treatment of this subject, see elsewhere in this title.[31]

c. *Evidence in Support of Motion*—(1) *Necessity for*—(a) *In General.*—The grounds assigned for quashing an indictment should be sustained by distinct evidence introduced, or offered to be introduced, by the accused.[32]

tions under the revenue laws for the forfeiture of goods, which seek no judgment of fine or imprisonment against any person, though civil actions are not strictly criminal cases, are so far in the nature of criminal proceedings as to come within the rule, that a general verdict, upon several counts, seeking in different forms one object, must be upheld if one count is good." Coffey *v.* United States, 116 U. S. 427, 433, 29 L. Ed. 681.

22. Presumed to be rendered on valid count.—Claassen *v.* United States, 142 U. S. 140, 146, 35 L. Ed. 966.

23. Construction — Ordinary words.—Westmoreland *v.* United States, 155 U. S. 545, 548, 39 L. Ed. 255; Potter *v.* United States, 155 U. S. 438, 444, 39 L. Ed 214; Dealy *v.* United States, 152 U. S. 539, 545, 38 L. Ed. 545.

24. Technical wards.—Davis *v.* Utah, 151 U. S. 262, 265, 38 L. Ed. 153; Cannon *v.* United States, 116 U. S. 55, 76, 29 L. Ed. 561.

25. Construed as whole.—Dunbar *v.* United States, 156 U. S. 185, 190, 39 L. Ed. 390; Coffin *v.* United States, 156 U. S. 432, 449, 39 L. Ed. 481.

26. Clauses connected by "and."—St. Clair *v.* United States, 154 U. S. 134, 146, 38 L. Ed. 936. See the title HOMICIDE, ante, p. 695.

27. Objections—Right to be heard.—Rosen *v.* United States, 161 U. S. 29, 40, 40 L. Ed. 606.

28. United States *v.* Gooding, 12 Wheat. 460, 478, 6 L. Ed. 693.

29. Jurisdiction.—Barrington *v.* Missouri, 205 U. S. 483, 487, 51 L. Ed. 890; Howard *v.* Fleming, 191 U. S. 126, 135, 48 L. Ed. 121. See ante, "Jurisdiction," VIII, G, 3.

30. Motion to quash.—Respublica *v.* Griffiths, 2 Dall. 112, 1 L. Ed. 311.

31. Grounds for.—See ante, "Raising Objections," VII, I; "Determination of Sufficiency," VIII, G, "Effect or Duplicity," IX, B.

32. Evidence in support of motion.—Smith *v.* Mississippi, 162 U. S. 592, 600, 601, 40 L. Ed. 1082; Martin *v.* Texas, 200 U. S. 316, 320, 50 L. Ed. 497. To the same effect, see Tarrance *v.* Florida, 188 U. S. 519, 521, 47 L. Ed. 572; Brownfield *v.* South Carolina, 189 U. S. 426, 428, 47 L. Ed. 882; Carter *v.* Texas, 177 U. S. 442, 447, 44 L. Ed. 839; Williams *v.* Mississippi, 170 U. S. 213, 42 L. Ed. 1012.

"It is suggested that the allegations of the motion to quash not having been controverted and having been supported by the affidavit of the defendant, must be taken to be true. But a motion, although reduced to writing, is not a pleading, and does no require a written answer. It appears from the grounds on which the judge decided it, apart from anything else, that the allegations were controverted, and under such circumstances it was necessary for the defendant to make an attempt to introduce evidence." Brownfield *v.* South Carolina, 189 U. S. 426, 428, 47 L. Ed. 882.

It is error of the trial court to deny a defendant the right to introduce evidence in support of the allegations in his motion to quash the indictment, for unlawful discrimination against him in the selection of the grand jury. Carter *v.* Texas, 177 U. S. 442, 44 L. Ed. 839; Tar-

(b) *Where Motion Verified.*—The accused cannot, of right, insist that the facts stated in a motion to quash an indictment should be taken as true, simply because the motion is verified by his affidavit,[33] except with the consent of the state prosecutor,[34] or by order of the trial court.[35]

(c) *Where Motion Not Answered.*—The facts set forth in a motion to quash are not admitted, simply because not formally answered.[36]

(b) *Where Motion Demurred to.*—Where the prosecution demurs to the defendant's motion to quash an indictment, the allegations therein are admitted, and the defendant is relieved of the burden of introducing evidence in support thereof.[37] But a motion to strike out a motion to quash is not equivalent to a demurrer, and does not relieve the defendant of the burden to introduce evidence in support of the latter motion.[38]

(2) *Admission of.*—It is the duty of the trial court to admit valid evidence in support of a motion to quash an indictment.[39]

(3) *Sufficiency of.*—Whether or not a defendant has introduced sufficient evidence, in support of a motion to quash, on the ground that the indictment is invalid under the United States constitution, is a federal question.[40]

d. *Review on Writ of Error.*—A motion to quash an indictment, being addressed to the discretion of the court, the refusal thereof is not generally assignable for error.[41] To be availed of in an appellate court, the grounds for a

rance *v.* Florida, 188 U. S. 519, 521, 47 L. Ed. 572.

Offer to introduce.—Brownfield *v.* South Carolina, 189 U. S. 426, 428, 47 L. Ed. 882.

33. Where motion verified.—"The grounds assigned for quashing the indictment should have been sustained by distinct evidence introduced or offered to be introduced by the accused. He could not, of right, insist that the facts stated in the motion to quash should be taken as true simply because his motion was verified by his affidavit. The motion to quash was, therefore, unsupported by any competent evidence; consequently, it cannot be held to have been erroneously denied." Smith *v.* Mississippi, 162 U. S. 592, 600, 601, 40 L. Ed. 1082.

Facts set out in a motion for removal of a cause into a federal court under the Revised Statutes, § 641, verified by the affidavit of the defendant that the facts therein stated are true to the best of his knowledge and belief, is not evidence of such facts in support of a motion to quash the indictment. Smith *v.* Mississippi, 162 U. S. 592, 601, 40 L. Ed. 1082.

Where an accused person of African descent has been indicted by a grand jury upon which no persons of his race sat, on a motion to quash an indictment, he must offer evidence of discrimination in the selection of the grand jury on account of race, color, etc., other than the verified statements in the motion, to bring his case within the rule of Carter *v.* Texas, 177 U. S. 442, 447, 44 L. Ed. 839; Martin *v.* Texas, 200 U. S. 316, 319, 50 L. Ed. 497; Tarrance *v.* Florida, 188 U. S. 519, 521, 47 L. Ed. 572.

34. Consent of prosecutor.—Tarrance *v.* Florida, 188 U. S. 519, 520, 47 L. Ed. 572; Martin *v.* Texas, 200 U. S. 316, 319, 50 L. Ed. 497.

In Neal *v.* Delaware, 103 U. S. 370, 26 L. Ed. 567, the court held that an agreement by the attorney general, appearing for the state, was to be regarded as an admission of the truth of the facts stated in the motion and therefore waived the necessity for further evidence. Tarrance *v.* Florida, 188 U. S. 519, 522, 47 L. Ed. 572; Smith *v.* Mississippi, 162 U. S. 592, 600, 40 L. Ed. 1082.

Agreement of counsel.—Brownfield *v.* South Carolina, 189 U. S. 426, 428, 47 L. Ed. 882.

35. Order of court.—Smith *v.* Mississippi, 162 U. S. 592, 600, 601, 40 L. Ed. 1082; Martin *v.* Texas, 200 U. S. 316, 320, 50 L. Ed. 497.

36. Where motion not answered.—"The formal words of the motion were not enough." Brownfield *v.* South Carolina, 189 U. S. 426, 428, 47 L. Ed. 882; Smith *v.* Mississippi, 162 U. S. 592, 601, 40 L. Ed. 1082.

37. Where motion demurred to.—Tarrance *v.* Florida, 188 U. S. 519, 521, 522, 47 L. Ed. 572, distinguishing Neal *v.* Delaware, 103 U. S. 370, 26 L. Ed. 567; Mitchell *v.* Clark, 110 U. S. 633, 28 L. Ed. 279.

38. Motion to strike out.—Tarrance *v.* Florida, 188 U. S. 519, 521, 47 L. Ed. 572.

39. Admission of evidence.—Tarrance *v.* Florida, 188 U. S. 519, 521, 47 L. Ed. 572.

40. Sufficiency of.—Carter *v.* Texas, 177 U. S. 442, 448, 44 L. Ed. 839.

41. Review on writ of error.—Durland *v.* United States, 161 U. S. 306, 314, 40 L. Ed. 709; Logan *v.* United States, 144 U. S. 263, 282, 36 L. Ed. 429; United States *v.* Avery, 13 Wall. 251, 20 L. Ed. 610; United States *v.* Canda, 154 U. S., appx., 674, 26 L. Ed. 1069; United States *v.* Rosenburgh, 7 Wall. 580, 19 L. Ed. 263;

motion to quash an indictment must appear of record.[42]

2. Demurrer—a. *Grounds for.*—Any defect in the structure of an information may be taken advantage of by demurrer.[43]

b. *Admissions by.*—Matters not alleged in the information cannot be regarded as confessed by the defendant, as the demurrer only admits what is well pleaded.[44]

3. Plea in Abatement.—Such plea must be pleaded with strict exactness.[45]

4. Motion in Arrest of Judgment—a. *For Want of Certainty.*—A charge in an indictment which is inaccurate or imperfect, but does not amount to an omission of an essential averment, is cured by verdict and cannot be taken advantage of on motion in arrest of judgment.[46]

b. *For Duplicity.*—Duplicity in an indictment may furnish ground for a motion in arrest of judgment.[47] But it has been held that it is too late after verdict to object to an indictment on the ground that more than one offense is charged in the same count, by motion in arrest of judgment.[48]

c. *For Wrongful Consolidation.*—Wrongful consolidation of several indictments not excepted to at the time, cannot be objected to after verdict.[49]

5. Writ of Error.—This subject is treated elsewhere.[50]

6. Writ of Habeas Corpus.—This subject is treated elsewhere.[51]

D. Time of Making Objections—1. During Trial.—Objections to the form and sufficiency of the indictment may, in the discretion of the court, be discussed and decided, during the trial before the jury; but, generally speaking, they ought regularly to be considered only upon a motion to quash the indictment, or in arrest of judgment, or on demurrer.[52]

2. Before Verdict.—An objection to an indictment on the ground of multifariousness must be made before verdict.[53]

United States *v.* Hamilton, 109 U. S. 63, 27 L. Ed. 857.

The federal supreme court cannot take cognizance, under the judiciary act of 1802, of a division of opinion between the judges of the circuit court, upon a motion to quash an indictment. United States *v.* Rosenburgh, 7 Wall. 580, 19 L. Ed. 263, followed in United States *v.* Canda, 154 U. S., appx., 674, 26 L. Ed. 1069.

It is in the discretion of the trial court to hear motion and to quash upon the affidavit of the accused. Neal *v.* Delaware, 103 U. S. 370, 394, 26 L. Ed. 567.

42. Connors *v.* United States, 158 U. S. 408, 411, 39 L. Ed. 1033.

43. Grounds for demurrer.—Territory *v.* Lockwood, 3 Wall. 236, 238, 18 L. Ed. 47; United States *v.* Mann, 95 U. S. 580, 583. 24 L. Ed. 531; United States *v.* Cook, 17 Wall. 168, 21 L. Ed. 638.

After bill of particulars filed.—See ante, "Bill of Particulars," VIII, C, 5, d, (4).

44. Admissions by.—United States *v.* Mann, 95 U. S. 580, 584, 24 L. Ed. 531; United States *v.* Cook, 17 Wall. 168, 178, 21 L. Ed. 638; United States *v.* Reese, 92 U. S. 214, 225, 23 L. Ed. 563, Clifford, J., dissenting.

45. Plea in abatement.—Agnew *v.* United States, 165 U. S. 36, 44, 41 L. Ed. 624. See the title GRAND JURY, ante, p. 570.

46. Motion in arrest—For want of certainty.—Rosen *v.* United States, 161 U. S. 29, 32, 40 L. Ed. 606.

47. Duplicity.—Blitz *v.* United States, 153 U. S. 308, 316, 38 L. Ed. 725.

48. Connors *v.* United States, 158 U. S. 408, 411, 39 L. Ed. 1033.

Same — In Massachusetts. — Crain *v.* United States, 162 U. S. 625, 635, 40 L. Ed. 1097.

49. For wrongful consolidation.—Bucklin *v.* United States, 159 U. S. 682, 40 L. Ed. 305.

50. Writ of error.—See the title APPEAL AND ERROR, vol. 2, pp. 91, 118, 263.

51. Writ of habeas corpus.—See the title HABEAS CORPUS, ante, p. 610.

52. Time of making—During trial.—"It would be very inconvenient and embarrassing, to allow a discussion of such topics, during the progress of the cause before the jury, and introduce much confusion into the administration of public justice." United States *v.* Gooding, 12 Wheat. 460, 479, 6 L. Ed. 693.

"But, we think, it is not wholly incompetent for the court to entertain such questions, during the trial, in the exercise of a sound discretion. It should, however, be rarely done, and only under circumstances of an extraordinary nature. The circuit court, in the present case, did allow the introduction and discussion of these questions, during the trial, and were divided upon the propriety of the practice. We can only certify that the court possessed the authority, but that it ought not to be exercised except on very urgent occasions." United States *v.* Gooding, 12 Wheat. 460, 479, 6 L. Ed. 693.

53. Before verdict.—Durland *v.* United States, 161 U. S. 306, 315, 40 L. Ed. 709.

E. Hearing and Determination.—For treatment of this subject, see elsewhere in this title.[54]

F. Waiver and Cure of Objections—1. Waiver of Objections.—A defect which does not go to the substance of the charge, but only to the form in which it is presented, is waived if no objection is made in the first instance and before trial.[55] Any defect in the information which could have been availed of by demurrer, or by exception, or by a motion to dismiss at the trial, made on the ground of such defect, or by a motion in arrest of judgment but was not, must be regarded as having been waived, or as having been cured by the verdict.[56] If the defendant demurs to the indictment on the ground of insufficiency, he waives all questions of form and challenges only the substance.[57] And the very fact of the defendant's pleading to an indictment admits its genuineness as a record.[58]

2. Cure of Objections—a. *By Verdict.*—An inaccurate or imperfect statement of a fact in an indictment, which does not amount to an omission of an essential averment,[59] is cured by verdict,[60] and cannot be taken advantage of on motion in arrest of judgment.[61] Any merely technical defect in the language of an indictment negativing the application of a statutory exception is cured by verdict.[62]

b. *By Evidence.*—A defective information is not cured by evidence of the essential facts omitted to be averred.[63]

c. *By Statute.*—See elsewhere in this title.[64]

54. Hearing and determination.—See ante, "Determination of Sufficiency," VIII, G.

55. Waiver of objections.—Frisbie *v.* United States, 157 U. S. 160, 164, 39 L. Ed. 657.

"While it may be true that a defendant by waiting until that time does not waive the objection that some substantial element of the crime is omitted, yet he does waive all objections which run to the mere form in which the various elements of the crime are stated, or to the fact that the indictment is inartificially drawn." Dunbar *v.* United States, 156 U. S. 185, 192, 39 L. Ed. 390.

"If, for instance, the description of the property does not so clearly identify it as to enable him to prepare his defense, he should raise the question by some preliminary motion, or perhaps by a demand for a bill of particulars; otherwise it may properly be assumed as against him that he is fully informed of the precise property in respect to which he is charged to have violated the law." Dunbar *v.* United States, 156 U. S. 185, 192, 39 L. Ed. 390.

"When the indictment is presented, * * * the accused has two courses of procedure open to him. He may question the propriety of the accusation, the manner in which it has been presented, the source from which it proceeds, and have these matters promptly and properly determined; or, waiving them, he may put in issue the truth of the accusation and demand the judgment of his peers on the merits of the charge. If he omits the former and chooses the latter, he ought not, when defeated on the latter, when found guilty of the crime charged, to be permitted to go back to the former and inquire as to the manner and means by which the charge was presented." In re Wilson, 140 U. S. 575, 585, 35 L. Ed. 513.

56. Friedenstein *v.* United States, 125 U. S. 224, 230, 31 L. Ed. 736.

57. By dumurrer.—Frisbie *v.* United States, 157 U. S. 160, 165, 39 L. Ed. 657. See ante, "Raising Objections," VII, I.

58. By plea.—Frisbie *v.* United States, 157 U. S. 160, 165, 39 L. Ed. 657; United States *v.* Gale, 109 U. S. 65, 27 L. Ed. 857.

59. Cure of defects by verdict.—Defects in matters of substance are not thus cured. United States *v.* Hess, 124 U. S. 483, 31 L. Ed. 516; Friedenstein *v.* United States, 125 U. S. 224, 235, 31 L. Ed. 736, dissenting opinion of Field, and Harlan, JJ. See ante, "In Common-Law Felonies," VIII, C, 7, l, (1), (c), aa.

60. Friedenstein *v.* United States, 125 U. S. 224, 230, 31 L. Ed. 736. See ante, "Waiver of Objections," XV, F, 1.

61. Rosen *v.* United States, 161 U. S. 29, 32, 40 L. Ed. 606; Miles *v.* United States, 103 U. S. 304, 26 L. Ed. 481.

62. Westmoreland *v.* United States, 155 U. S. 545, 549, 39 L. Ed. 255.

Not cured where allegation too general.—Moore *v.* United States, 160 U. S. 268, 276, 40 L. Ed. 422. See ante, "Completeness," VIII, C, 5, a.

63. By evidence.—The Hoppet, 7 Cranch 389, 3 L. Ed. 380. See ante, "Completeness," VIII, C, 5, a.

64. By statute.—See ante, "Statutory Provision," VII, A; "In United States," VII, F, 1, c; "Completeness," VIII, C, 5, a.

XVI. Amendment of Accusation.

A. Time of Amendment.—Ingredients or elements of the offense charged, not set forth in the information or other criminal accusation, cannot be incorporated therein against the defendant after he is served with process.[65]

B. Of Indictment—1. Body of Instrument.—At common law it is beyond question that,[66] when an indictment is filed with the court, no change can be made in the body of the instrument by order of the court, or by the prosecuting attorney, without a resubmission of the case to the grand jury,[67] and the fact that the court may deem the change immaterial, as striking out of surplus words, makes no difference. The instrument, as thus changed, is no longer the indictment of the grand jury which presented it.[68] This is the uniform ruling of the American courts, except where statutes prescribe a different rule, and it is the imperative requirement of the provision of the United States constitution, which would be of little avail if an indictment once found can be changed by the prosecuting officer, with consent of the court, to conform to their views of the necessity of the case.[69] According to principles long settled in the federal supreme court the prisoner, who stands sentenced to the penitentiary on such trial, is entitled to his discharge by writ of habeas corpus.[70] Indictments are not within the statutes of jeofails.[71]

2. Caption of Instrument.—There are several cases in which it has been decided that the caption of an indictment may be amended.[72]

C. Of Information.—There is a great difference between amending indictments and amending informations. The latter are declarations in the government's suit. As the prosecuting officer has the right of framing them originally, he may, with leave, amend in like manner, as any plaintiff may do.[73]

XVII. Variance between Accusation and Proof.

A. In General.—It is a positive rule of criminal procedure that the accused shall not be charged with one crime, and convicted of another.[74] This rule may sometimes cover real guilt, but its observance is essential to the preservation of innocence.[75]

B. Where There Are Unnecessary Averments.—Where an unnecessary

65. Amendment — Time of.—United States *v.* Mann, 95 U. S. 580, 585, 24 L. Ed. 531.

66. Indictments—Body of.—Ex parte Bain, 121 U. S. 1, 6, 30 L. Ed. 849.

67. "No authority has been cited to us in the American courts which sustains the right of a court to amend any part of the body of an indictment without reassembling the grand jury, unless by virtue of a statute." Ex parte Bain, 121 U. S. 1, 8, 30 L. Ed. 849.

68. Ex parte Bain, 121 U. S. 1, 30 L. Ed. 849.

69. Ex parte Bain, 121 U. S. 1, 30 L. Ed. 849.

Upon an indictment so changed, the court can proceed no farther. There is nothing (in the language of the constitution) which the prisoner can "be held to answer." A trial on such indictment is void. There is nothing to try. Ex parte Bain, 121 U. S. 1, 30 L. Ed. 849. See Rosen *v.* United States, 161 U. S. 29, 51, 40 L. Ed. 606, dissenting opinion of White and Shiras, JJ.

70. Ex parte Bain, 121 U. S. 1, 30 L. Ed. 849.

71. Statutes of jeofails.—"Nor are indictments within the operation of the statutes of jeofails, and cannot therefore be amended; being the finding of a jury upon oath, the court cannot amend without the concurrence of the grand jury by whom the bill is found." Ex parte Bain, 121 U. S. 1, 9, 30 L. Ed. 849.

72. Caption of indictment.—Ex parte Bain, 121 U. S. 1, 7, 30 L. Ed. 849.

73. Of informations.—Ex parte Bain, 121 U. S. 1, 6, 30 L. Ed. 849.

Under revenue laws.—Coffey *v.* United States, 116 U. S. 427, 434, 29 L. Ed. 681.

74. Variance.—The Hoppet, 7 Cranch 389, 394, 3 L. Ed. 380.

"It is only a modification of this rule, that the accusation on which the prosecution is founded should state the crime which is to be proved, and state such a crime as will justify the judgment to be pronounced." The Hoppet, 7 Cranch 389, 394, 3 L. Ed. 380.

Proof and averment must correspond. Coffin *v.* United States, 156 U. S. 432, 448, 39 L. Ed. 481; United States *v.* Northway, 120 U. S. 327, 333, 30 L. Ed. 664.

75. The Hoppet, 7 Cranch 389, 394, 3 L. Ed. 380.

amount of description of an article to be identified thereby is contained in an indictment, it has been sometimes held that the description must be proved as laid, because it goes to the identification of the article described;[76] and, in an indictment of perjury or for libel, the sworn statement alleged to be false or the article alleged to be libelous must be proved substantially as averred in the indictment;[77] but, where an indictment, which contains all the necessary averments to constitute an offense created by a statute, also contains an averment wholly unnecessary and entirely immaterial to be added, the prosecution need not prove such unnecessary averment. It is sufficient to prove every fact constituting the offense provided by statute.[78]

C. Where There Are Numerous Averments.—Where an indictment charges that a defendant did, and caused to be done, a particular act, it is sufficient to prove either that the defendant did the act or caused it to be done.[79]

D. Where Means of Commission of Crime Averred.—While it was necessary at common law to allege means employed in the commission of the offense, nevertheless proof of the use of a different means was regarded as an immaterial variance.[80]

E. In Description of Persons.—The text writers state the rule to be, that where the name of a third person is used in an indictment it must be proved as laid;[81] but, where the variance is not in an integral part of the name and the name as stated in the indictment is commonly understood and cannot mislead the defendant, or fail to convey to his mind the person intended, such variance does not render the indictment void.[82]

F. In Description of Time.—Where time is not of the essence of the offense, variance between its allegation and proof is not material.[83]

76. Unnecessary averments.—Hall *v.* United States, 168 U. S. 632, 639, 42 L. Ed. 607.

77. In cases of perjury and libel.—Hall *v.* United States, 168 U. S. 632, 639, 42 L. Ed. 607.

78. Unnecessary and immaterial matter.—Thus under the postal laws of the United States, Rev. Stat., § 5467, where it is unnecessarily alleged that a decoy letter sent through mail for the purpose of entrapping the accused was "intended to be delivered by a letter carrier," the averment quoted is immaterial and unnecessary, and the prosecution need not introduce evidence in regard thereto. Hall *v.* United States, 168 U. S. 632, 639, 42 L. Ed. 607. See the title POSTAL LAWS.

79. Numerous averments.—Crain *v.* United States, 162 U. S. 625, 634, 40 L. Ed. 1097. See the title FORGERY AND COUNTERFEITING, ante, p. 380.

80. Means of commission of crime.—"'If A. be indicted for poisoning of B., it must allege the kind of poison, but if he poisoned B. with another kind of poisoning, yet it maintains the indictment, for the kind of death is the same.' 2 Hale P. C. 185." Westmoreland *v.* United States, 155 U. S. 545, 549, 39 L. Ed. 255. See ante, "Means of Commission of Offense," VIII, C, 7, j.

81. Description of persons.—Putnam *v.* United States, 162 U. S. 687, 690, 40 L. Ed. 1118.

82. Putnam *v.* United States, 162 U. S. 687, 691, 40 L. Ed. 1118; Faust *v.* United States, 163 U. S. 452, 454, 41 L. Ed. 224.

An indictment against its president for defrauding a bank, in which the bank is described "as the National Granite State Bank," and which was "then and there acting and carrying on a national banking business by the city of Exeter," is not invalid for variance between the indictment and proof, where the evidence showed that the authorized name of the bank was "the National Granite State Bank of Exeter," although the indictment omitted the words "of Exeter." The variance was held not to be material because the bank carried on its business and was as well known by the one name as the other, and that the variance was not in an integral part of the name proper. Putnam *v.* United States, 162 U. S. 687, 690, 40 L. Ed. 1118. See ante, "Designation of Persons," VIII, D.

83. Of time.—See ante, "Designation of The Offense," VIII, E.

The only difference between the allegation in the indictment and the proof in the case is that during this trial, which occupied several days, the plaintiff in error swore on the 6th of June instead of on the 7th, as alleged in the indictment, to the matter which was alleged to be false. The date upon which the evidence was given, which was alleged to have been false, appeared by the stenographer's minutes, who took the evidence on the trial, to have been the 6th of June. Such a variance as appears in this case is not material. Matthews *v.* United States, 161 U. S. 500, 502, 40 L. Ed. 786. See the title PERJURY.

XVIII. Accusation as Evidence.

Though not conclusive evidence of probable cause,[84] an indictment, found by the proper grand jury, should be accepted as prima facie evidence thereof,[85] and sufficient basis for the removal of the cause from the district where the person is held in custody to the district where he stands indicted.[86]

INDIRECT TAX.—"All taxes on expenses of consumption are indirect taxes; a tax on carriages is of this kind, and of course, is not a direct tax. Indirect taxes are circuitous modes of reaching the revenue of individuals, who generally live according to their income."[1]

INDISPENSABLE PARTIES.—As to indispensable parties in equity and at law, see the title PARTIES.

INDIVIDUAL.—See As, vol. 2, p. 545. See note 2.

INDORSEMENT.—See the titles BILL OF LADING, vol. 3, p. 240; BILLS, NOTES AND CHECKS, vol. 3, p. 340.

INEBRIATES.—See the title DRUNKENNESS, vol. 5, p. 496.

INEVITABLE ACCIDENT.—See ACT OF GOD, vol. 1, p. 115. As to inevitable accident as used in connection with collisions of vessels, see the title COLLISION, vol. 3, p. 879. See note 3.

INFAMOUS CRIME.—See the titles APPEAL AND ERROR, vol. 1, p. 455; CONSTITUTIONAL LAW, vol. 4, p. 494; WITNESSES.

INFAMY.—"There are two kinds of infamy; the one founded in the opinions of the people respecting the mode of punishment; the other in the construction of law respecting the future credibility of the delinquent."[4]

84. Accusation as evidence.—"It was held in Beavers *v.* Henkel, 194 U. S. 73, 48 L. Ed. 882; Benson *v.* Henkel, 198 U. S. 1, 49 L. Ed. 919; Hyde *v.* Shine, 199 U. S. 62, 50 L. Ed. 90, as well as Greene *v.* Henkel, 183 U. S. 249, 46 L. Ed. 177, that an indictment constituted prima facie evidence of probable cause, but not that it was conclusive." Tinsley *v.* Treat, 205 U. S. 20, 31, 51 L. Ed. 689.

"We regard that question as specifically presented in the present case and we hold that the indictment cannot be treated as conclusive under § 1014, Rev. Stat., providing for removal of a defendant from one federal court to another." Tinsley *v.* Treat, 205 U. S. 20, 31, 51 L. Ed. 689.

85. Greene *v.* Henkel, 183 U. S. 249, 258, 46 L. Ed. 177; Beavers *v.* Henkel, 194 U. S. 73, 48 L. Ed. 882; Munsey *v.* Clough, 196 U. S. 364, 373, 49 L. Ed. 515.

86. "The indictment alone was, as we have seen, a showing of probable cause sufficient to justify the issue of a warrant." Beavers *v.* Henkel, 194 U. S. 73, 87, 48 L. Ed. 882. See the titles EXTRADITION, ante, p. 215; HABEAS CORPUS, ante, p. 610; REMOVAL OF CAUSES.

1. Indirect tax.—Hylton *v.* United States, 3 Dall. 171, 180, 1 L. Ed. 556.

In Springer *v.* United States, 102 U. S. 586, 602, 26 L. Ed. 253, it was said: "Mr. Justice Story says all taxes are usually divided into two classes—those which are direct and those which are indirect—and that 'under the former denomination are included taxes on land or real property, and, under the latter, taxes on consumption.'" See the titles REVENUE LAWS; TAXATION.

2. Individual expenses.—The articles of copartnership of a firm provided that each party thereto should pay his own individual expenses. It was held that the provision was manifestly intended to apply to private or family expenses, not connected with the business of the partnership, and that it would be an unjust and forced construction of the stipulation, to extend it to extra expenses, incurred when abroad on the business of the partnership. Withers *v.* Withers, 8 Pet. 355, 358, 8 L. Ed. 972.

3. Inevitable accident.—As to inevitable accident in the law of carriers embracing losses by the act of God and the public enemy, see New Jersey Steam Nav. Co. *v.* Merchant's Bank, 6 How. 344, 381, 12 L. Ed. 465. And see the title CARRIERS, vol. 3, p. 556.

4. Ex parte Wilson, 114 U. S. 417, 422, 29 L. Ed. 89. See, generally, the titles CONSTITUTIONAL LAW, vol. 4, p. 494; WITNESSES.

INFANTS.

BY ERNEST P. STEINHAUER.

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CROSS REFERENCES.

See the titles BASTARDY, vol. 3, p. 204; GUARDIAN AND WARD, ante, p. 599; HUSBAND AND WIFE, ante, p. 716; PARENT AND CHILD.

As to infancy as a defense to a charge of desertion, see the title ARMY AND

NAVY, vol. 2, p. 528. As to what law governs the property of infants, see the title CONFLICT OF LAWS, vol. 3, p. 1021. As to sale of lands in District of Columbia, see the title COURTS, vol. 4, p. 1166. As to distribution of infant's land who dies intestate, see the title DESCENT AND DISTRIBUTION, vol. 5, p. 335. As to posthumous children, see the title DESCENT AND DISTRIBUTION, vol. 5, p. 335. As to questions of the domicile of an infant, see the title DOMICILE, vol. 5, p. 473. As to injuries received by infant from negligence of master, see the titles FELLOW SERVANTS, ante, p. 245; MASTER AND SERVANT. As to power of guardian to bind out an infant as a servant, see the title GUARDIAN AND WARD, ante, p. 599. As to appointment of guardian for infant, see the title GUARDIAN AND WARD, ante, p. 599. As to jurisdiction of a district court to issue a writ of habeas corpus to restore an infant to the custody of a father, see the title HABEAS CORPUS, ante, p. 610. As to effect of the naturalization of parents upon citizenship of children, see the title NATURALIZATION. As to recovery by infant for injuries received from turntables, see the title NEGLIGENCE. As to contributory negligence of infants, see the title NEGLIGENCE.

I. Capacities.

A. To Commit Crime.—As to capacity of an infant to commit crime, see the title CRIMINAL LAW, vol. 5, p. 60.

B. To Act as Trustee.—An infant may be a trustee, and be compelled to execute his trust.[1]

C. Contractual Capacity and Liability Thereon—1. BINDING CONTRACTS—a. *For Necessaries.*—A single bill, under seal, given by an infant for necessaries, is absolutely binding upon him.[2]

b. *Doing What Law Will Compel Him to Do.*—The act of an infant is valid, where he did what he was bound to do and would be compelled to do by a court of equity.[3]

2. VOID AND VOIDABLE CONTRACTS—a. *General Rule.*—The contracts of an infant are generally held to be voidable.[4]

b. *Sealed Instruments.*—The instruments under seal of an infant are generally held to be voidable, and not void;[5] unless they appear on their face to be to his prejudice, in which case they are deemed void.[6]

1. To act as trustee.—"An infant may undoubtedly be a trustee, and be compelled to execute his trust. Especially, if after he came of age, he affirms the trust and ratifies the acts which he did in accordance with the trust, will it be out of his power to deny that any trust ever existed." Irvine *v.* Irvine, 9 Wall. 617, 629, 19 L. Ed. 800. See the title TRUSTS AND TRUSTEES.

2. For necessaries.—Tucker *v.* Moreland, 10 Pet. 58, 66, 9 L. Ed. 345.

3. Doing what the law will compel him to do.—Tucker *v.* Moreland, 10 Pet. 58, 67, 9 L. Ed. 345.

4. General rule.—Dexter *v.* Hall, 15 Wall. 9, 21, 21 L. Ed. 73.

The result of the American decisions has been correctly stated by Mr. Chancellor Kent, in his learned commentaries (2 Com. Lect. 31), to be, that they are in favor of construing the acts and contracts of infants generally to be voidable only and not void, and subject to their election, when they become of age, either to affirm or disallow them. Tucker *v.* Moreland, 10 Pet. 58, 71, 9 L. Ed. 345.

5. Sealed instruments.—Tucker *v.* Moreland, 10 Pet. 58, 66, 9 L. Ed. 345; MacGreal *v.* Taylor, 167 U. S. 688, 698, 42 L. Ed. 326. See, generally, the title SEALS AND SEALED INSTRUMENTS.

A lease reserving rent is voidable only. Tucker *v.* Moreland, 10 Pet. 58, 66, 9 L. Ed. 345.

"While infants cannot make grants, they may accept them. A grant to an infant is voidable, not void." Palmer *v.* Low, 98 U. S. 1, 16, 25 L. Ed. 60.

The deed of an infant purporting to convey lands operates to transmit the title, and is voidable only, not void. Irvine *v.* Irvine, 9 Wall. 617, 19 L. Ed 800.

"The person who takes a deed from an infant feme covert knows that she is not sui juris, and that she will be under the control of her husband while the coverture lasts. He is bound to know, also, that she has the disability of infancy. He assumes, therefore, the risk attending both those disabilities." Sims *v.* Everhardt, 102 U. S. 300, 311, 26 L. Ed. 87.

6. MacGreal *v.* Taylor, 167 U. S. 688, 698, 42 L. Ed. 326.

Thus, an infant's bond with a penalty for necessaries is void, as apparently to

c. *Power of Attorney.*—"It has repeatedly been determined that a power of attorney made by an infant is void."[7]

3. RATIFICATION AND DISAFFIRMANCE—a. *Ratification*—(1) *In General.*—Any voluntary[8] ratification or affirmance by an infant of a clear and unequivocal character, showing an intention to affirm his contract, is sufficient;[9] and it is not necessary to the affirmance that there be an act of affirmance by him, after he comes of age, as solemn in character as the original act.[10] But the mere recognition of the fact that a conveyance has been made is not, per se, proof of a confirmation of it.[11]

(2) *Question of Law and Fact.*—Where there is evidence tending to show an affirmance of an infant's deed, it is a question for the jury, and not for the court, to decide as to its sufficiency.[12]

b. *Disaffirmance*—(1) *In General.*—An infant may avoid his act, deed or contract, by different means, according to the nature of the act, or the circumstances of the case,[13] but the general result is that where the act of the infant

his prejudice. Tucker *v.* Moreland, 10 Pet. 58, 66, 9 L. Ed. 345.

"It is apparent, then, upon the English authorities, that however true it may be that an infant may so far bind himself by deed in certain cases as that in consequence of the solemity of the instrument, it is avoidable only and not void; yet that the instrument, however solemn, is held to be void, if upon its face it is apparent that it is to the prejudice of the infant." Tucker *v.* Moreland, 10 Pet. 58, 70, 9 L. Ed. 345.

The American decisions seem generally to hold that the deed of an infant conveying lands is voidable only and not void; unless, perhaps, the deed should manifestly appear on the face of it to be the prejudice of the infant; and this upon the nature and solemnity as well as the operation of the instrument. Tucker *v.* Moreland, 10 Pet. 58, 71, 9 L. Ed. 345.

7. Power of attorney.—Dexter *v.* Hall, 15 Wall. 9, 26, 21 L. Ed. 73.

8. Ratification in general.—"And those confirmatory acts must be voluntary. As we have said, one who is under a disability to make a contract cannot confirm one that is voidable, or, what is the same thing, cannot disaffirm it. An affirmance or a disaffirmance is in its nature a mental assent, and necessarily implies the action of a free mind, exempt from all constraint or disability." Sims *v.* Everhardt, 102 U. S. 300, 312, 26 L. Ed. 87.

9. Any ratification or affirmance of a clear and unequivocal character, showing an intention to affirm the deed, is enough. Irvine *v.* Irvine, 9 Wall. 617, 19 L. Ed. 800.

The acquiescence of an infant, after coming of age, to an investment of his property in stock, effectually precludes him from maintaining a bill for an account. Hoyt *v.* Sprague, 103 U. S. 613, 636, 26 L. Ed. 585.

10. All the authorities recognize the doctrine that acts which would be insufficient to avoid an infant's deed may amount to an affirmance of it. Irvine *v.* Irvine, 9 Wall. 617, 627, 19 L. Ed. 800.

11. Tucker *v.* Moreland, 10 Pet. 58, 75, 9 L. Ed. 345.

To assume, as a matter of law, that a voluntary and deliberate recognition by a person, after his arrival at age, of an actual conveyance of his right during his nonage, amounts to a confirmation of such conveyance; or to assume that a mere acquiescence in the same conveyance, without objection, for several months after his arrival at age is also a confirmation of it, are not maintainable; the mere recognition of the fact that a conveyance has been made is not, per se, proof of a confirmation of it. Tucker *v.* Moreland, 10 Pet. 58, 9 L. Ed. 345.

Although it is not necessary to the affirmation of an infant's voidable deed that there be an act of affirmance by him, after he comes of age, as solemn in character as the original act itself, still mere acquiescence without anything else, is not generally sufficient evidence of affirmance. Irvine *v.* Irvine, 9 Wall. 617, 19 L. Ed. 800.

Sale of infant's property.—See post, "Ratification," III, C, 3.

12. Questions of law and fact.—Where the infant, having come of age and entered into partnership with third persons, took a lease for his firm of one part of the property which as an infant he had conveyed, from the person to whom he had so conveyed that part with other parts, the lease is proper to go to the jury, on a suit by the infant for these other parts alone, to show an affirmance of his deed for the whole; and with such evidence before the jury a court rightly refused to charge that the evidence showed no affirmance. Whether it did show an affirmance or not was, with this lease before them, matter for the jury to decide. Irvine *v.* Irvine, 9 Wall. 617, 19 L. Ed. 800.

13. Disaffirmance in general.—There is no doubt that an infant may avoid his act, deed or contract, by different means, according to the nature of the act, or the circumstances of the case; he may sometimes avoid it by matters in pais, as in

is by matter of record, he must avoid it by some act of record during his minority,[14] or if the act is a matter in pais, it may be avoided by an act in pais of equal solemnity or notoriety.[15] In short, the nature of the original act or conveyance of the infant generally governs, as to the nature of the act required to be done in the disaffirmance of it; if the latter be of as high and solemn a nature as the former, it amounts to a valid avoidance of it.[16]

(2) *Purpose of Privilege.*—Infants are regarded as under the protection of the law, as they are presumed to lack sufficient discretion;[17] and it is for the purpose of protecting him from the effects of his folly, rashness and misconduct that the law allows him to avoid his contracts, though it may work a fraud upon the other party.[18]

(3) *Time of Avoidance*—(a) *During Minority.*—It is settled that an infant cannot disaffirm his deed while his infancy continues. The reason is that a disaffirmance works a reinvestiture of the estate in the infant, and he is presumed not to have sufficient discretion for that.[19]

(b) *After Majority.*—The general rule is that the infant must avoid his contract within a reasonable time after obtaining his majority.[20] What is a reasonable time depends upon the circumstances of each case.[21] And while the decisions are not agreed as to the effect of mere silence,[22] the preponderance of authority

case of a feoffment, by an entry, if his entry is not tolled; sometimes by plea, as when he is sued upon his bond or other contract; sometime by suit, as when he disaffirms a contract made for the sale of his chattels, and sues for the chattels; sometimes by a writ of error, as when he has levied a fine during his nonage; sometimes by a writ of audita querela, as when he has acknowledged a recognizance, or statute staple, or merchant; sometimes, as in the case of an alienation of his estate, by a writ of entry, dum fuit infra ætatem, after his arrival at age. Tucker *v.* Moreland, 10 Pet. 58, 9 L. Ed. 345.

14. "When the act of the infant is by matter of record, he must avoid it by some act of record (as, for instances, by a writ of error or an audita querela), during his minority." Tucker *v.* Moreland, 10 Pet. 58, 72, 9 L. Ed. 345.

15. "If the act of the infant is a matter in pais, it may be avoided by an act in pais, of equal solemnity or notoriety; and this, according to some authority, either during his nonage or afterwards; and according to others, at all events, after his arrival of age." Tucker *v.* Moreland, 10 Pet. 58, 72, 9 L. Ed. 345.

16. Tucker *v.* Moreland, 10 Pet. 58, 72, 9 L. Ed. 345.

"We do not mean to say that, in all cases, the act of disaffirmance should be of the same, or of as high and solemn a nature as the original act; for a deed may be avoided by a plea. But we mean only to say that if the act of disaffirmance be of as high and solemn a nature, there is no ground to impeach its sufficiency." Tucker *v.* Moreland, 10 Pet. 58, 72, 9 L. Ed. 345.

Where a deed of land contains a warranty of title against all persons claiming under the grantor, and a covenant that he had good right and title to convey the same, it is a positive disaffirmance of a former deed, made during infancy to another person. Tucker *v.* Moreland, 10 Pet. 58, 76, 9 L. Ed. 345.

17. Dexter *v.* Hall, 15 Wall. 9, 25, 21 L. Ed. 73.

18. In many cases the disaffirmance of a deed during infancy is a fraud upon the other party; but this has never been held to be sufficient to avoid the disaffirmance, for it would otherwise take away the very protection which the law intends to throw around him to guard him from the effects of his folly, rashness and misconduct. Tucker *v.* Moreland, 10 Pet. 58, 9 L. Ed. 345.

19. Avoidance during minority.—Sims *v.* Everhardt, 102 U. S. 300, 309, 26 L. Ed. 87.

20. Avoidance after majority.—Sims *v.* Everhardt, 102 U. S. 300, 311, 26 L. Ed. 87; MacGreal *v.* Taylor, 167 U. S. 688, 689, 42 L. Ed. 326; Irvine *v.* Irvine, 9 Wall. 617, 19 L. Ed. 800.

21. What is a reasonable time for a disaffirmance of a deed by an infant is nowhere determined in such a manner as to furnish a rule applicable to all cases. The question must always be answered in view of the peculiar circumstances of each case. Sims *v.* Everhardt, 102 U. S. 300, 309, 26 L. Ed. 87.

"It must be admitted that generally the disaffirmance must be within the period limited by the statute of limitations for bringing an action of ejectment. A much less time has in some cases been held unreasonable. It is obvious that delay in some cases could have no justification, while in others it would be quite reasonable." Sims *v.* Everhardt, 102 U. S. 300, 310, 26 L. Ed. 87.

22. "The decisions respecting the disaffirmance of an infant's deed are not in entire harmony with each other. While it is generally agreed that the infant to

is that, in deeds executed by infants, mere inertness or silence, continued for a period less than that prescribed by the statute of limitations, unless accompanied by affirmative acts, manifesting an intention to assent to the conveyance, will not bar the infant's right to avoid the deed.[23]

(4) *Return of Consideration.*—The general rule is that to give effect to a disaffirmance of an infant's deed it is not necessary that the infant should first place the other party in statu quo;[24] but if the consideration can be restored, in whole or in part, the infant is treated as a trustee of the other party, and must give it up.[25]

(5) *Estoppel to Disaffirm.*—See the title ESTOPPEL, vol. 5, p. 999.

II. Liabilities.

A. For Tortious Conversion.—See the title TROVER AND CONVERSION.

B. To Taxation.—"Children have privileges and protection, but they are not assessed, unless they have goods or property separate from the heads of families."[26]

III. Property of Infant.

A. Power of Legislature Over.—The legislature possesses the power to determine by law the manner in which the estates of infants shall be preserved.

avoid it must disaffirm it within a reasonable time after his majority is attained, they differ as to what constitutes disaffirmance and as to the effect of mere silence." Sims *v.* Everhardt, 102 U. S. 300, 311, 26 L. Ed. 87.

23. Sims *v.* Everhardt, 102 U. S. 300, 312, 26 L. Ed. 87.

24. Return of consideration.—Tucker *v.* Moreland, 10 Pet. 58, 73, 9 L. Ed. 345.

"It is well settled that it is not a condition of the disaffirmance by an infant of a contract made during infancy that he shall return the consideration received by him, if, prior to such disaffirmance and during infancy, the specific thing received has been disposed of, wasted or consumed and cannot be returned." MacGreal *v.* Taylor, 167 U. S. 688, 698, 42 L. Ed. 326.

"Upon the disaffirmance of a deed made during infancy, the infant is entitled to recover the property conveyed by him, and the adult to recover such of the consideration paid by him as may remain in the hands of the infant at the time of disaffirmance." MacGreal *v.* Taylor, 167 U. S. 688, 702, 42 L. Ed. 326.

"It is the settled law of Texas that if an infant convey, and after coming of age choose to rescind, he must, as a general rule, restore what he has received, before he will be permitted to recover." Slaughter *v.* Glenn, 98 U. S. 242, 245, 25 L. Ed. 122.

25. "If the infant disaffirm an executed contract, and the specific consideration can be restored, in whole or in part, the infant is treated as a trustee of the other party, and must give it up; but where the articles received by him are consumed or the money spent, the party advancing them is without a remedy." MacGreal *v.* Taylor, 167 U. S. 688, 699, 42 L. Ed. 326.

"A court of equity will look at the real transaction, and will do justice to the adult if it can be done without disregarding or impairing the principle that allows an infant, upon arriving at majority, to disaffirm his contracts made during infancy." MacGreal *v.* Taylor, 167 U. S. 688, 700, 42 L. Ed. 326.

In MacGreal *v.* Taylor, 167 U. S. 688, 702, 42 L. Ed. 326, an infant borrowed money to pay off liens and make improvements upon a lot and gave a deed of trust on the lot as security. When she arrived at age she disaffirmed her contract and deed of trust. Held, that as the money was used to improve the property, it should be deemed as property within the rule entitling the adult party to recover the consideration remaining in an infant's hands; and that a decree of a sale of the land was proper; but a decree for the sale of the land was improper, which entitled the lender to have his entire debts first paid, even if all the proceeds of sale were required for the purpose. The decree should have directed that the proceeds be applied, first, in repaying the lender, with interest, the sums used to discharge the prior liens and taxes; second, in paying the infant an amount equal to the value of the lot at the institution of the suit (less such prior liens) without interest on that amount, and without taking into consideration the value of the improvements placed on the lot; and third, in paying to the lender such of the proceeds of sale as may have remained, not exceeding the balance due on the loan. This last sum would represent, as far as may be, the value of the improvements put upon the lot with the lender's money. Any other decree would make the disaffirmance by the infant ineffectual, if the property, upon being sold did not bring more than the debt attempted to be secured. If the property, in its improved condition, did not pay the whole debt due, the lender will be without remedy for the deficiency. Any balance left after satisfying the above claims would belong to the infant.

26. To taxation.—Dobbins *v.* Erie

and to say what kind of security shall be given by those who are intrusted with their management, and, as a necessary consequence, it has the power of altering the law on the subject, whenever in its judgment the interest of the minors or the public good requires that it should be done.[27]

B. Equity Jurisdiction.—Courts of equity have general authority over the estates of an infant, and upon proper application it will be exerted for their protection.[28]

C. Sale of Infant's Property—1. MUST BE FOR BENEFIT OF INFANT.—Before a court will order a sale of infant's lands, it must appear that the sale would be for the infant's benefit.[29]

2. EFFECT OF IRREGULARITY IN PROCEEDINGS.—Where the proceedings for the sale of an infant's lands are irregular, they should be set aside.[30]

3. RATIFICATION.—Long acquiescence of the minor, after he becomes of age, in partition proceedings had for the sale of his property, is equivalent to an express affirmance of them, even though they were affected with such irregularities as, upon his prompt application after becoming of age, would have justified the court in setting them aside.[31]

County, 16 Pet. 435, 446, 10 L. Ed. 1022. See, generally, the title TAXATION.

27. Power of legislature over infant's property.—Lobrano *v.* Nelligan, 9 Wall. 295, 296, 19 L. Ed. 694.

"The principle which allows a change of security at all, necessarily leaves the legislative power over the whole subject unabridged, and there is no right of complaint if the legislature, in varying the nature and extent of the security, takes care that the property is preserved." Lobrano *v.* Nelligan, 9 Wall. 295, 297, 19 L. Ed. 694.

The legislature has the power of parens patriæ in regard to infants. Morman Church *v.* United States, 136 U. S. 1, 34 L. Ed. 481.

28. Equity jurisdiction.—Insurance Co. *v.* Bangs, 103 U. S. 435, 438, 26 L. Ed. 580.

The statute of Maryland, 1785, providing that the chancellor may authorize the sale of an infant's lands, is construed as an enlargement of jurisdiction, and decrees for selling the lands of minors, in the cases prescribed by it, are treated as the exercise of other equity powers. United States Bank *v.* Ritchie, 8 Pet. 128, 143, 8 L. Ed. 890.

29. Sale must be for benefit of infant.—The devisee of one of the lots devised to him forever, which the court held was subject to the right to one-third in the wife of the devisor, and one-third after her decease, in fee to the son of the devisor, cannot by a proceeding in chancery compel a sale of the property devised, or a partition; unless the court are satisfied it would be for the benefit of the infant son to make such sale, and without the consent of all the other parties interested in the property. Walker *v.* Parker, 13 Pet. 166, 10 L. Ed. 109.

30. United States Bank *v.* Ritchie, 8 Pet. 128, 146, 8 L. Ed. 890.

Where a trustee exceeds his authority, given under a decree, in making a conveyance of an infant's lands, and without receiving a cent therefor, the conveyance should be set aside. United States Bank *v.* Ritchie, 8 Pet. 128, 145, 146, 8 L. Ed. 890.

Under a statute which requires that all sales of lands descending to minors, to pay the debts of the decedent, made by authority of the chancellor, shall be notified to and confirmed by the chancellor, before any conveyance of the property shall be made, a decree is erroneous that directs the conveyance to be made on the payment of the purchase money. United States Bank *v.* Ritchie, 8 Pet. 128, 145, 8 L. Ed. 890.

A decree ordering the sale of an infant's lands to pay the debts of a decedent is erroneous, if made before the amount of the debt has been judicially determined by the creditor's report. United States Bank *v.* Ritchie, 8 Pet. 128, 145, 8 L. Ed. 890.

The unsworn answer of a guardian, consenting to a decree for the sale of an infant's lands, to pay a decedent's debts, is insufficient, without other evidence, under a statute which authorizes a sale only when the personal estate is insufficient to pay the established debts, and when, upon consideration of all the circumstances, it appears to the chancellor to be just and proper that such sale should be made. United States Bank *v.* Ritchie, 8 Pet. 128, 143, 8 L. Ed. 890.

31. Ratification.—Brazee *v.* Schofield, 124 U. S. 495, 505, 31 L. Ed. 484. See ante, "Ratification," I, C, 3, a.

"For many years after they came of age no objection was made by the heirs, who were minors at the time, to any of the proceedings in partition. On the contrary, they proceeded at once, after the partition, to exercise control by themselves or guardians appointed by the probate court, over the several parts allotted to them; and some of the heirs sold and conveyed to others their respective portions. The court below expressly finds that the heirs, who were minors in 1856, after becoming of full

IV. Suits by and against Infants.

A. Duty of Courts.—The duty of watching over the interests of infants devolves, in a considerable degree, upon the courts[32] of both law and equity.[33]

B. Guardian Ad Litem or Next Friend—1. In General.—Infants are represented by guardians, appointed by the court,[34] who is usually the nearest relation, not concerned, in point of interest in the matter in question.[35] The suit must be brought in the name of the infant, and not in that of the next friend.[36]

2. Necessity to Show Authority.—It is not necessary to the jurisdiction of the court that the prochein ami should exhibit with the bill evidence of special authority to bring it as next friend.[37]

3. Filing Bond for Costs.—In Illinois it is not necessary for jurisdiction that a bond for costs be filed by the guardian ad litem although, according to the letter of the statute, the next friend may be required to give such a bond before the suit proceeds to final judgment and execution.[38]

age adopted the partition as made and assented to by their guardians in that year. The minor, Grant H. Short, whose property was sold to one of the defendants, received the benefit of the moneys obtained upon the sale; they were used to pay some just debts incurred for him, and to furnish him the necessaries of life. For eleven years after he became of age he made no objection to the proceedings, or by any act indicated his intention to disaffirm the sale or deed made by his guardian; and then, in 1878, he gave to the grantors of the appellant a deed of his interest in the donation claim. In the meantime the property had greatly increased in value by the improvements put upon it by the purchaser and his grantee, Mary Schofield." Brazee *v.* Schofield, 124 U. S. 495, 504, 31 L. Ed. 484.

32. Duty of courts.—United States Bank *v.* Ritchie, 8 Pet. 128, 143, 8 L. Ed. 890.

It is the duty of the court to protect the interests of minors. Coulson *v.* Walton, 9 Pet. 62, 9 L. Ed. 51.

33. "An infant is confessedly under the protection of courts of law as well as courts of equity." Dexter *v.* Hall, 15 Wall. 9, 21, 21 L. Ed. 73.

Court of equity have general authority over the persons and estates of infants; it may be exerted, upon proper application, for the protection of both. Insurance Co. *v.* Bangs, 103 U. S. 435, 438, 26 L. Ed. 580.

"The jurisdiction in the English courts of chancery is supposed to have originated in the prerogative of the crown, arising from its general duty as parens patriæ to protect persons who have no other rightful protector." Insurance Co. *v.* Bangs, 103 U. S. 435, 438, 26 L. Ed. 580.

34. Infants defend by guardian; to be appointed by the court.—United States Bank *v.* Ritchie, 8 Pet. 128, 143, 8 L. Ed. 890.

In Illinois, where an infant is so young as to be incapable of making a selection of a person to represent him, the court will, in favor of such infant, permit any person to institute suits in the infant's behalf, exercising, however, a very large discretion to facilitate the proper exercise of the right. Kingsbury *v.* Buckner, 134 U. S. 650, 679, 33 L. Ed. 1047.

Though not error, it is a mark of inexcusable attention to appoint, on the motion of counsel for the plaintiffs, a guardian ad litem for an infant, without bringing the infant into court, or issuing a commission for the purpose of making the appointment. United States Bank *v.* Ritchie, 8 Pet. 128, 143, 8 L. Ed. 890.

35. United States Bank *v.* Ritchie, 8 Pet. 128, 143, 8 L. Ed. 890.

Sections 372 and 373 of the Code of Civil Procedure of California, which require the appointment of a guardian, has reference to civil actions as distinguished from "special proceedings," and do not forbid the appointment of an attorney to represent infants in a probate court. Robinson *v.* Fair, 128 U. S. 53, 55, 89, 32 L. Ed. 415.

In Colt *v.* Colt, 111 U. S. 566, 578, 28 L. Ed. 520, an infant was properly served with notice in a state court, but was defended by a general guardian instead of a guardian ad litem in accordance with the general practice of the state, for which he brought as error before the supreme court. Held, that the question was one of local jurisdiction, and that the failure to appoint a guardian ad litem at most was error merely and did not defeat the jurisdiction.

36. Morgan *v.* Potter, 157 U. S. 195, 198. 39 L. Ed. 670.

"It is the infant, and not the next friend, who is the real and proper party. The next friend, by whom the suit is brought on behalf of the infant, is neither technically nor substantially the party, but resembles an attorney, or a guardian ad litem, by whom a suit is brought or defended in behalf of another." Morgan *v.* Potter, 157 U. S. 195, 198, 39 L. Ed. 670.

37. Necessity to show authority.—Kingsbury *v.* Buckner, 134 U. S. 650, 679, 33 L. Ed. 1047.

38. Filing bonds for costs.—Kingsbury

4. Duties.—The next friend or guardian ad litem must exercise good faith in carrying out his duties,[39] and should not surrender the rights of the infant.[40]

C. Service of Process.—See the title Summons and Process.

D. Effect of Appearance by Infant.—See the title Appearances, vol. 2, p. 431.

E. Pleading.—Where one was present at the time his guardian ad litem swore to an answer, he cannot afterward repudiate it in a collateral proceeding on the ground that he was over age at the time the answer was made.[41]

F. Evidence.—See the title Evidence, vol. 5, p. 1004.

G. Statute of Limitations.—See the title Limitation of Actions and Adverse Possession.

H. Judgments and Decrees.—See the title Judgments and Decrees.

INFECTIOUS.—See Contagious, vol. 4, p. 530.

INFECTIOUS DISEASES.—See the titles Animals, vol. 1, p. 324; Health, ante p. 681.

INFERIOR COURTS.—See the title Courts, vol. 4, pp. 885, 889.

INFIRMITIES.—See the title Accident Insurance, vol. 1, p. 60.

IN FORMA PAUPERIS.—See the titles Appeal and Error, vol. 2, p. 425; Costs, vol. 4, p. 823.

v. Buckner, 134 U. S. 650, 678, 33 L. Ed. 1047.

39. In Kingsbury *v.* Buckner, 134 U. S. 650, 686, 33 L. Ed. 1047, it was held that fraud could not be imputed to a guardian ad litem on the grounds that he waived the benefit of a statutory provision requiring ten days notice for the suing out of a commission to take depositions.

Fraud will not be imputed to a guardian ad litem because he did not, after his appointment by the court, file cross interrogatories, where such cross interrogatories were already filed by his partner, and were of the most searching character. Kingsbury *v.* Buckner, 134 U. S. 650, 686, 33 L. Ed. 1047.

Fraud and collusion, by a guardian ad litem, is not shown by the fact that he did not call the attention of the court to various theories against a deed of trust; nor does absence from the opinion of that court of any reference to it prove that the guardian ad litem and next friend failed to make the point, or that he purposely avoided allusion to it. Kingsbury *v.* Buckner, 134 U. S. 650, 683, 33 L. Ed. 1047.

The mere failure of the guardian ad litem and next friend to apply for a rehearing will not raise any presumption of infidelity to his trust. Kingsbury *v.* Buckner, 134 U. S. 650, 687, 33 L. Ed. 1047.

40. A next friend or guardian ad litem of an infant cannot, by admissions or stipulations, in a suit in equity, surrender the rights of the infant. But this rule does not prevent a guardian ad litem or prochein ami from assenting to such arrangements as will facilitate the determination of the case in which the rights of the infant are involved. Kingsbury *v.* Buckner, 134 U. S. 650, 680, 33 L. Ed. 1047.

A prochein ami cannot, during the minority of the heirs, authorize any release to be taken, which does not conform to a decree in their favor, so as to make it binding upon them. Morris *v.* Harmer, 7 Pet. 554, 563, 8 L. Ed. 781.

A consent by the next friend or guardian ad litem that a case be heard in a particular division of the supreme court of Illinois cannot possibly prejudice the substantial rights of an infant, even though in the absence of consent, the supreme court, sitting in one grand division, cannot take cognizance of a case from another grand division. Kingsbury *v.* Buckner, 134 U. S. 650, 681, 33 L. Ed. 1047.

Ignorance.—Where a consent decree was rendered against an infant, it cannot be objected on the ground that his guardian ad litem was a woman ignorant and unfamiliar with business or her duties, if there was no fraud, imposition or error entered into the transaction or brought about the settlement, and her interests were looked after by her brother-in-law and counsel. Thompson *v.* Maxwell Land Grant, etc., Co., 168 U. S. 451, 466, 42 L. Ed. 539.

41. Pleading.—Manson *v.* Duncanson, 166 U. S. 533, 542, 41 L. Ed. 1105.

The Pennsylvania court has held that infancy may be given in evidence under the plea of non assumpsit, and that the jury could decide whether the evidence is a sufficient discharge. Stansbury *v.* Marks, 4 Dall. (Pa. Sup. Ct.) 130, 1 L. Ed. 771. See the title EVIDENCE, vol. 5, p. 1004.

INFORMATION.—See the title INDICTMENTS, INFORMATIONS, PRESENTMENTS AND COMPLAINTS. See note 1.

INFORMATION AND BELIEF.—See the title ATTACHMENT AND GARNISHMENT, vol. 2, p. 677.

INFORMATIONS IN EQUITY.—To cancel land patents, see the title PUBLIC LANDS; against a corporation, see the title CORPORATIONS, vol. 4, p. 764.

INFORMERS.

CROSS REFERENCES.

See the title PENALTIES AND FORFEITURES.

As to power of attorney general to dismiss suit against objection of informer, see the title ATTORNEY GENERAL, vol. 2, p. 741. As to right to give information, see the title CONSTITUTIONAL LAW, vol. 4, p. 486. As to right of informers of gambling, see the title GAMING, ante, p. 544. As to competency of informer as witness, see the title WITNESSES.

Rights and Interest of Informer—Government May Give Whole of Forfeiture to Informer.—The government has the right to give the whole instead of a moiety of the forfeit to the informer.[1a]

Under Revenue Laws.—Legislation giving an interest in the forfeiture to a common informer has been frequent in congressional legislation relating to revenue cases.[2]

Under Confiscation Act.—An informer does not acquire a right to a moiety under the confiscation act of August 6th, 1861, in regard to land informed against, after a complete title to the property has been acquired by the government, by conquest.[3] And in prosecutions under the act, which subjects to confiscation, upon libel filed, property whose owner used or consented to its use in aiding the rebellion, the informer has no vested interest in the subject matter of the suits.[4]

Divesting of Informer's Share by Repeal of Statute.—The repeal of the act of July 13, 1866, allowing a share to an informer, only upon condition the fine or penalty was fixed and the amounts thereof was paid, by the act of July 6, 1872, leaves nothing to the informer, if before the repeal the fine or penalty was not fixed by judgment or compromise;[5] but if the penalty was com-

1. **Information.**—See United States *v.* Poinier, 140 U. S. 160, 161, 35 L. Ed. 395.

Information in the nature of quo warranto.—See the title QUO WARRANTO.

1a. **Government may give whole of forfeiture to informer.**—Marvin *v.* Trout, 199 U. S. 212, 226, 50 L. Ed. 151.

2. **Under revenue laws.**—Marvin *v.* Trout, 199 U. S. 212, 225, 50 L. Ed. 151. See the title REVENUE LAWS.

3. **Interest of informer under confiscation act.**—Titus *v.* United States, 20 Wall. 475, 22 L. Ed. 400.

The government is not estopped from denying an informer's claim to a moiety in such a case (a) by the fact that its direct attorney has allowed proceedings in confiscation to be carried on under the act and the land to be sold, and the purchase money to be received; (b) or by the fact that the commissioner of the freedom's bureau, to whom, as agent of the United States, congress gives the control and management of all captured and abandoned land, never claimed the land itself, but after it had been sold and the price paid into court, and a moiety adjudged to the informer, has taken the other moiety without question. Titus *v.* United States, 20 Wall. 475, 22 L. Ed. 400.

The case of an informer in such a case stands on a very different footing, and is to be judged of by very different principles of estoppel, from that of a purchaser of the land, who has paid his money to the United States in consequence of their offer to sell under the act. Titus *v.* United States, 20 Wall. 475, 22 L. Ed. 400.

4. Confiscation Cases, 7 Wall. 454, 19 L. Ed. 196. See the titles STATES; TREASON; WAR.

Who may claim informer's share.—The right to recover the penalty or forfeiture granted by statute is frequently given to the first common informer who brings the action, although he has no interest in the matter whatever except as such informer. Marvin *v.* Trout, 199 U. S. 212, 225, 50 L. Ed. 151.

In 1861, in 12 Stat. 292, 296, § 11, one moiety of the forfeiture is given "to him who shall first sue for the same." Marvin *v.* Trout, 199 U. S. 212, 226, 50 L. Ed. 151.

5. United States *v.* Connor, 138 U. S. 61, 34 L. Ed. 860.

promised and paid, the act of 1872 did not take away the power to make the payment to such informer.[6]

Remission of Penalty as Affecting Right of Informer.—All rights granted to informers by the Revised Statutes, § 5294, are subject to the secretary of treasury's power of remission, except in cases where the claim of any informer to a share of any penalty has been determined by a court of competent jurisdiction, prior to the application for the remission of the penalty.[7]

Action by Informer.—Statutes providing for actions by a common informer, who himself had no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our government.[8]

Limitation of Actions.—A suit commenced by an informer twelve years after an adjudication of the claim has been determined against the informer, is barred by the statute of limitation.[9]

INFRINGEMENT.—See the titles COPYRIGHT, vol. 4, p. 614; PATENTS; TRADEMARKS, TRADENAMES AND UNFAIR COMPETITION.

INHABITANT.—See the titles ATTACHMENT AND GARNISHMENT, vol. 2, p. 671; CITIZENSHIP, vol. 3, p. 789; DOMICILE, vol. 4, p. 475. As to the use of the term "inhabitants" as affecting corporations, see the title CORPORATIONS, vol. 4, p. 646. See note 1.

INHERITANCE.—See the title DESCENT AND DISTRIBUTION, vol. 5, p. 335. As to inheritance tax, see the title SUCCESSION TAXES, and references given.

INHERITED.—See note 2.

INITIALS.—See, generally, the title NAMES. As to signing bill of exceptions by initials, see the title EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS OF APPEAL, vol. 6, p. 38.

6. An informer gave notice that a railroad company had violated the revenue law. The penalty therefor was paid by the company. The informer applied for payment of his share under the act of July 13, 1866. It was held by a divided court that the power to make payment was not taken away by the act of June 6, 1872, and he was entitled to his claim. United States *v.* Ramsay, 120 U. S. 214, 30 L. Ed. 582.

7. **Remission of penalty as affecting right of informer.**—The Laura, 114 U. S. 411, 413, 29 L. Ed. 147; United States *v.* Morris, 10 Wheat. 246, 6 L. Ed. 314.

8. **Action by informer.**—Marvin *v.* Trout, 199 U. S. 212, 225. L. Ed. 151.

Although, under the act of August 6th, 1861, "to confiscate property used for insurrectionary purposes," an informer may file an information along with the attorney general, and so make the proceeding enure, under the act, to his own benefit equally as to the benefit of the United States, yet, after the proceeding has been instituted by the attorney general alone, and wholly for the benefit of the United States, and after issue has been joined and proofs furnished by other parties, no person can come in asserting himself to have been the informer, and so share the benefit of the proceeding. Francis *v.* United States, 5 Wall. 338, 18 L. Ed. 603.

9. **Limitation to right to maintain action.**—United States *v.* Connor, 138 U. S. 61, 34 L. Ed. 860. See the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION.

1. **Inhabitant.**—As to the use of the word **inhabitant** in the sense of "legal voters," see Walnut *v.* Wade, 103 U. S. 683, 694, 26 L. Ed. 526. As to distinction between the words **inhabitant** and "resident," see Barney *v.* Oelrichs, 138 U. S. 529, 533, 34 L. Ed. 1037; Shaw *v.* Quincy Min. Co., 145 U. S. 444, 447, 36 L. Ed. 768; Galveston, etc., R. Co. *v.* Gonzales, 151 U. S. 496, 500, 38 L. Ed. 248. And see RESIDENCE.

2. **Inherited.**—A testator provided that after the decease of all of his children, and when and as soon as his youngest grandchild should arrive at the age of twenty-one years, the lands should be "**inheited** and equally divided" among his grandchildren. In construing the will, the court said: "The word **inherited** (which is applied to the real estate only) implies taking immediately from the testator upon his death, as heirs take immediately from their ancestor upon his death." McArthur *v.* Scott, 113 U. S. 340, 380, 28 L. Ed. 1015.

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CONSTABLES' AND MARSHALS' SALES; SPECIAL ASSESSMENTS; SPECIFIC PERFORMANCE; STREETS AND HIGHWAYS; TAXATION; TELEGRAPH AND TELEPHONES; TRADEMARKS, TRADENAMES AND UNFAIR COMPETITION; TRESPASS; TRUSTS AND TRUSTEES; VENDOR AND PURCHASER; VENUE; WASTE; WATERS AND WATERCOURSES; WORKING CONTRACTS.

I. Scope of Title.

The scope of this title is limited to the definition, nature and office of the remedy; the general rules under which such remedy is available; injunctions against actions at law and other proceedings; the procedure in obtaining, dissolving, modifying and reinstating; the securities given to obtain, dissolve, etc., the injunction, liabilities thereon, and enforcement of such liabilities; violation of injunctions and punishment. As to injunction in particular instances, see the particular titles throughout this work, and see the table of cross references following the analysis of this title.

II. Definition and Classification.

A. Definition.—An injunction in its ordinary sense is a command, and this command may be either to do or to refrain from doing some particular thing.[1]

B. Prohibitory and Mandatory.—Injunctions are prohibitory or mandatory in their character.[2] It is generally a preventive, not an affirmative remedy.[3] While the function of an injunction is to afford preventive relief, not to redress alleged wrongs which have been committed already,[4] yet a court of equity, is not always limited to the restraint of a contemplated or threatened action; it may require affirmative action, where the circumstances of the case demand it.[5] The court having jurisdiction in personam has power to require the defendant to do or to refrain from doing anything beyond the limits of its territorial jurisdiction which it might have required to be done or omitted within the limits of such territory.[6]

C. Interlocutory or Temporary and Perpetual.—Injunctions are also classified as interlocutory or temporary,[7] and perpetual.[8]

1. **Definition.**—Bisph. Eq. 519. See French *v.* Hay, 22 Wall. 250, 252, 22 L. Ed. 857.

2. **Prohibitory or mandatory.**—In re Lennon, 166 U. S. 548, 556, 41 L. Ed. 1110; Black *v.* Jackson, 177 U. S. 349, 361, 44 L. Ed. 801. See, also, Potts *v.* Hollen, 177 U. S. 365, 44 L. Ed. 808.

In In re Lennon, 166 U. S. 548, 556, 41 L. Ed. 1110, the court says: "Perhaps, to a certain extent, the injunction may be termed mandatory, although its object was to continue the existing state of things, and to prevent an arbitrary breaking off of the current business connections between the roads."

3. **Remedy usually preventive.**—Walkley *v.* Muscatine, 6 Wall. 481, 483, 18 L. Ed. 930; Northern Indiana R. Co. *v.* Michigan Cent. R. Co., 15 How. 233, 242, 14 L. Ed. 674.

4. **Function of injunction.**—Lacassagne *v.* Chapuis, 144 U. S. 119, 124, 36 L. Ed. 363; Black *v.* Jackson, 177 U. S. 349, 361, 44 L. Ed. 801. In the case first cited, it was held that the injunction was not subject to the objection that it is an attempt to compel performance of a personal contract by employees of a railroad company.

The injunction is a prohibitory writ, to restrain a party from doing a wrong or injury to the rights of another. Cherokee Nation *v.* Georgia, 5 Pet. 1, 77, 8 L. Ed. 25. (Dissenting opinion.)

"An injunction will not be used to take property out of the possession of one party and put it into that of another." Lacassagne *v.* Chapuis, 144 U. S. 119, 124, 36 L. Ed. 363.

5. **Affirmative relief.**—In re Lennon, 166 U. S. 548, 556, 41 L. Ed. 1110; Mugler *v.* Kansas, 123 U. S. 623, 673, 31 L. Ed. 205.

"It is sometimes used in the latter character, but this is in cases where it is used by the court to carry into effect its own decrees—as in putting the purchaser under a decree of foreclosure of a mortgage into the possession of the premises." Walkley *v.* Muscatine, 6 Wall. 481, 483, 18 L. Ed. 930.

6. **Equity has jurisdiction in personam.**—French *v.* Hay, 22 Wall. 250, 252, 22 L. Ed. 857. See Cherokee Nation *v.* Georgia, 5 Pet. 1, 77, 8 L. Ed. 25. (Dissenting opinion.)

7. **Interlocutory.**—Georgia *v.* Brailsford, 2 Dall. 402, 406, 408, 1 L. Ed. 433; United States *v.* Chicago, 7 How. 185, 191, 12 L. Ed. 660.

8. **Perpetual.**—Bisphams Eq., p. 525 (6th Ed.); Kerr on Inj., chap. 2. See Wickliffe *v.* Owings, 17 How. 47, 49, 15 L. Ed. 44.

III. Nature, Object and Operation.

A. Nature and Object.—The injunction is a beneficial process for the protection of rights, and is favorably viewed by courts of chancery, as its object is to prevent rather than redress injuries.[9] A suit for an injunction is an equitable proceeding.[10]

B. Operation.—The writ does not operate in rem but in personam.[11] An injunction issues only to the parties before the court and not to the court.[12]

IV. Jurisdiction.

A. In General.—There must be some interference, actual or threatened, with property or rights of a pecuniary nature, to give chancery jurisdiction to exercise the injunctive powers of the court.[13]

B. As Affected by Parties and Subject Matter.—Courts having jurisdiction of the parties may grant and enforce injunctions, regardless of the situation of the subject matter affected by the injunction.[14]

C. Over Particular Parties and Subject Matter—1. UNITED STATES GOVERNMENT.—No injunction can be granted against the United States unless expressly permitted by act of congress.[15]

2. STATE GOVERNMENT.—By the constitution of the United States, the states

9. Nature and object.—Cherokee Nation *v.* Georgia, 5 Pet. 1, 77, 8 L. Ed. 25. (Dissenting opinion.)

10. An equitable proceeding.—Wilson *v.* Shaw, 204 U. S. 24, 31, 51 L. Ed. 351. See, generally, the title EQUITY, vol. 5, p. 803.

11. Operates in personam.—French *v.* Hay, 22 Wall. 250, 252, 22 L. Ed. 857; Phelps *v.* McDonald, 99 U. S. 298, 25 L. Ed. 473.

If the party is within the jurisdiction of the court, it is all that is necessary to give full effect and operation to the injunction; and it is immaterial where the subject matter of the suit, which is only affected consequentially, is situated. Cherokee Nation *v.* Georgia, 5 Pet. 1, 77, 8 L. Ed. 25. (Dissenting opinion.)

This principle is recognized in Massie *v.* Watts, 6 Cranch 148, 157, 3 L. Ed. 181, where it is laid down that in case of fraud, of trust or of contract, the jurisdiction of a court of chancery is sustainable wherever the party may be found, although lands not within the jurisdiction may be affected by the decree. Cherokee Nation *v.* Georgia, 5 Pet. 1, 77, 8 L. Ed. 25. (Dissenting opinion.)

12. Issues only to parties and not to court.—Central Nat. Bank *v.* Stevens, 169 U. S. 432, 463, 42 L. Ed. 807; Peck *v.* Jenness, 7 How. 612, 12 L. Ed. 841.

13. Jurisdiction—Interference actual or threatened.—In re Debs, 158 U. S. 564, 583, 39 L. Ed. 1092. See post, "Nature of Injury Giving Equity Jurisdiction," V, A, 3, c.

14. Court having jurisdiction of the parties.—Phelps *v.* McDonald, 99 U. S. 298, 25 L. Ed. 473; French *v.* Hay, 22 Wall. 250, 252, 22 L. Ed. 857; Massie *v.* Watts, 6 Cranch 148, 3 L. Ed. 181; Cherokee Nat. *v.* Georgia, 5 Pet. 1, 77, 8 L. Ed. 25. See ante, "Operation," III, B.

15. Injunction against United States.—Belknap *v.* Schild, 161 U. S. 10, 17, 40 L. Ed. 599; United States *v.* McLemore, 4 How. 286, 11 L. Ed. 977; Hill *v.* United States, 9 How. 386, 13 L. Ed. 185; Case *v.* Terrell, 11 Wall. 199, 20 L. Ed. 134. See the title UNITED STATES.

Where the United States, as indorsees of a promissory note, recovered judgment against the makers thereof, who thereupon filed a bill upon the equity side of the court, and obtained an injunction to stay proceedings, this injunction was improvidently allowed. The United States were made directly parties defendants; process was prayed immediately against them, and they were called upon to answer the several allegations in the bill. This course of proceeding falls within the principle that the government is not liable to be sued, except by its own consent, given by law. The bill must therefore be dismissed. Hill *v.* United States, 9 How. 386, 13 L. Ed. 185.

Suit virtually against government.—Complainant as the owner of letters patent for a canceling and postmarking machine brought suit against a postmaster to restrain him from using infringing machines which were in his post office used exclusively by his subordinates, employees of the United States, such use being in the service of the United States, the machines having been hired by the post office department for a term not yet expired from the manufacturer at an agreed rental payable on the order of the department by whose order they were placed and used in the post office. Held, that the suit was virtually one against the United States and the circuit court of the United States has not the power to grant an injunction against the defendant restraining the use of the machines pending the leased period. International Postal Supply Co. *v.* Bruce, 194 U. S. 601, 48 L. Ed. 1134.

are as exempt from injunction, as is the United States government.[16]

3. Public Officers—a. *Injunction against*—(1) *Officers of United States.*—The supreme court has no jurisdiction of a bill to enjoin the president in the performance of his official duties; and no such bill ought to be received.[17] No state court can, by injunction or otherwise, prevent federal officers from collecting federal taxes. The government of the United States, within its sphere, is independent of state action; and certainly it would be a strange thing if a state court by its action could relieve property subject to federal taxation from liability to pay the taxes when they are due.[18]

(2) *Officers of States.*—In a suit to which the state is neither formally nor really a party, its officers, although acting by its order and for its benefit, may be restrained by injunction, when the remedy at law is inadequate, from doing positive acts, for which they are personally and individually liable, taking or injuring the plaintiff's property, contrary to a plain official duty requiring no exercise of discretion, and in violation of the constitution or laws of the United States.[19]

Where State Is Necessary Party.—But no injunction can be issued against officers of a state, to restrain or control the use of property already in the possession of the state, or money in its treasury, when the suit is commenced; or to compel the state to perform its obligations; or where the state has otherwise such an interest in the object of the suit as to be a necessary party.[20]

Officer Proceeding Unconstitutionally.—Injunctions against officers proceeding unconstitutionally under color of their office are well known.[21]

b. *Appointment or Removal of Public Officers.*—A court of equity has no jurisdiction over the appointment and removal of public officers, and to sustain a bill in equity to restrain or relieve against proceedings for the removal of public officers would invade the domain of the courts of common law, or of the executive and administrative departments of the government.[22]

4. Legislative Bodies.—The courts must not assume to control the discretion with which municipal assemblies are invested, when deliberating upon the

16. State government.—Belknap *v.* Schild, 161 U. S. 10, 18, 40 L. Ed. 599; Hans *v.* Louisiana, 134 U. S. 1, 33 L. Ed. 842. See the title STATES.

17. Public officers—President.—Mississippi *v.* Johnson, 4 Wall. 475, 501, 18 L. Ed. 437. See the titles CONSTITUTIONAL LAW, vol. 4, p. 277; PUBLIC OFFICERS. As to injunctions against land officers, see the title PUBLIC LANDS.

18. State enjoining federal officers.—Keely *v.* Sanders, 99 U. S. 441, 443, 25 L. Ed. 327. See the titles CONSTITUTIONAL LAW, vol. 4, pp. 130, 186, 191; TAXATION.

19. Public officers of states.—Belknap *v.* Schild, 161 U. S. 10, 18, 40 L. Ed. 599; Osborn *v.* United States Bank, 9 Wheat. 738, 868, 871, 6 L. Ed. 204; Board of Liquidation *v.* McComb, 92 U. S. 531, 541, 23 L. Ed. 623; Allen *v.* Baltimore, etc., R. Co., 114 U. S. 311, 29 L. Ed. 200; Pennover *v.* McConnaughy, 140 U. S. 1, 35 L. Ed. 363. See the title PUBLIC OFFICERS.

"The extent to which officers or agents of the government may be restrained by injunction from doing unlawful acts to the prejudice of private rights is illustrated by the decisions of this court regarding injunctions from the courts of the United States to officers and agents of a state, which, by the Constitution of the United States, is as exempt as the United States are from private suit. Hans *v.* Louisiana, 134 U. S. 1, 33 L. Ed. 842." Belknap *v.* Schild, 161 U. S. 10, 18, 40 L. Ed. 599.

20. Where state is necessary party.—Belknap *v.* Schild, 161 U. S. 10, 18, 40 L. Ed. 599; Louisiana *v.* Jumel, 107 U. S. 711, 720, 728, 27 L. Ed. 448; Cunningham *v.* Macon, etc., R. Co., 109 U. S. 446, 454, 457, 27 L. Ed. 992; Hagood *v.* Southern, 117 U. S. 52, 70, 29 L. Ed. 805; In re Ayers, 123 U. S. 443, 31 L. Ed. 216; North Carolina *v.* Temple, 134 U. S. 22, 33 L. Ed. 849; McGahey *v.* Virginia, 135 U. S. 662, 684, 34 L. Ed. 304.

21. Officer proceeding unconstitutionally.—Chandler *v.* Dix, 194 U. S. 590, 592, 48 L. Ed. 1129, citing Pennover *v.* McConnaughy, 140 U. S. 1, 35 L. Ed. 363; Fargo *v.* Hart, 193 U. S. 490, 48 L. Ed. 761.

22. Appointment or removal of public officers.—White *v.* Berry, 171 U. S. 366, 376, 43 L. Ed. 199; White *v.* Butler, 171 U. S. 379, 43 L. Ed. 204; In re Sawyer, 124 U. S. 200, 223, 31 L. Ed. 402. See the titles EQUITY, vol. 5, p. 803; PUBLIC OFFICERS.

The power of a court of equity to restrain by injunction the removal of a municipal officer is denied. In re Sawyer, 124 U. S. 200, 212, 31 L. Ed. 402.

adoption or rejection of ordinances proposed for their adoption.[23]

5. Proceedings in Federal and State Courts—a. *Proceedings in State Courts.*—A court of the United States cannot enjoin a party from proceeding in a state court,[24] except in bankruptcy cases.[25] But where the federal court has acquired jurisdiction of a cause, it may enjoin actions in state courts, in order to protect its jurisdiction or as ancillary thereto.[26]

23. Legislative bodies.—See the titles CONSTITUTIONAL LAW, vol. 4, p. 274; EQUITY, vol. 5, p. 803.

The mischievous consequences that may result from the attempt of courts of equity to control the proceedings of municipal bodies when engaged in the consideration of matters entirely legislative in their character, are too apparent to permit such judicial action as this suit contemplates. When the city council shall pass an ordinance that infringes the rights of the plaintiff, and is unconstitutional and void as impairing the obligation of its contract with the state, it will be time enough for equity to interfere, and by injunction prevent the execution of such ordinance. If the ordinances already passed are in derogation of the plaintiff's contract rights, their enforcement can be prevented by appropriate proceedings instituted directly against the parties who seek to have the benefit of them. New Orleans Waterworks Co. *v.* New Orleans, 164 U. S. 471, 482, 41 L. Ed. 518.

A court has no authority to issue a mandatory injunction requiring a city to construct a sewer, irrespective of the exercise of discretion vested by law in the municipal authorities to determine the practicability of the sewer ordered, the availability of taxation for the purpose, and the like matters; "we think that the exercise of this authority is primarily vested in the municipality and not in the courts." Vicksburg *v.* Vicksburg Waterworks Co., 202 U. S. 453, 472, 50 L. Ed. 1102.

24. Proceedings in state courts.—Dial *v.* Reynolds, 96 U. S. 340, 24 L. Ed. 644; Hunt *v.* New York Cotton Exchange, 205 U. S. 322, 338, 51 L. Ed. 821; Chapman *v.* Brewer, 114 U. S. 158, 29 L. Ed. 83; Moran *v.* Sturges, 154 U. S. 256, 268, 38 L. Ed. 981; Central Nat. Bank *v.* Stevens, 169 U. S. 432, 42 L. Ed. 807; United States *v.* Parkhurst-Davis Mercantile Co., 176 U. S. 317, 320, 44 L. Ed. 485; Diggs *v.* Wolcott, 4 Cranch 179, 2 L. Ed. 587; Peck *v.* Jenness, 7 How. 612, 625, 12 L. Ed. 841; Watson *v.* Jones, 13 Wall. 679, 719, 20 L. Ed. 666; Haines *v.* Carpenter, 91 U. S. 254, 23 L. Ed. 345; Dial *v.* Reynolds, 96 U. S. 340, 24 L. Ed. 644; Sargent *v.* Helton, 115 U. S. 348, 29 L. Ed. 412; In re Sawyer, 124 U. S. 200, 219, 31 L. Ed. 402; United States *v.* Council, 6 Wall. 514, 18 L. Ed. 933; S. C., 6 Wall. 518, 18 L. Ed. 918; Riggs *v.* Johnson County, 6 Wall. 166, 195, 18 L. Ed. 768, followed in Weber *v.* Lee County, 6 Wall. 210, 18 L. Ed. 781; Laing *v.* Rigney, 160 U. S. 531, 40 L. Ed. 525; Leadville Coal Co. *v.* McCreery, 141 U. S. 475, 478, 35 L. Ed. 824; Mutual Reserve Fund Life Ass'n *v.* Phelps, 190 U. S. 147, 159, 47 L. Ed. 987; Colby *v.* Ledden, 7 How. 626, 12 L. Ed. 847; Lawrence *v.* Morgan's R., etc., Co., 121 U. S. 634, 637, 30 L. Ed. 1018. See Parcher *v.* Cuddy, 110 U. S. 742, 743, 28 L. Ed. 313.

"In Bondurant *v.* Watson, 103 U. S. 281, 288, 26 L. Ed. 447, which was a suit removed from a state court on the application of the defendant after an injunction staying proceedings in the state court for his benefit had been granted, it was said: 'If W. had filed his petition for injunction in the state court, and before it was allowed had petitioned for a removal of the cause to the circuit court, with the design of applying to that court for his injunction, the objection to the right of removal would have force. That would have been an evasion of the statute.'" Lawrence *v.* Morgan's R., etc., Co., 121 U. S. 634, 636, 30 L. Ed. 1018.

Railroad commission not a court.—The commission (to supervise and to some extent control the acts of railroads in that state) is, however, not a court, and is a mere administrative agency of the state, as held by the Mississippi court. Mississippi R. Commission *v.* Illinois Cent. R. Co., 203 U. S. 332, 341, 51 L. Ed. 209.

Staying criminal proceedings in state court.—The circuit court of the United States sitting in equity, in the administration of civil remedies, has no jurisdiction to stay by injunction proceedings pending in a state court in the name of the state to enforce the criminal laws of the state. Fitts *v.* McGhee, 172 U. S. 516, 43 L. Ed. 535; Harkrader *v.* Wadley, 172 U. S. 148, 170, 43 L. Ed. 399.

25. Bankruptcy cases.—See the title BANKRUPTCY, vol. 2, p. 450.

26. Ancillary jurisdiction.—French *v.* Hay, 22 Wall. 250, 22 L. Ed. 857; Osborn *v.* United States Bank, 9 Wheat. 738, 6 L. Ed. 204; Watts *v.* Camors, 115 U. S. 353, 29 L. Ed. 406; Madisonville Traction Co. *v.* St. Bernard Min. Co., 196 U. S. 239, 245, 49 L. Ed. 462. See the title COURTS, vol. 4, p. 982, et seq.

In Dietzsch *v.* Huidekoper, 103 U. S. 494, 26 L. Ed. 497, a plaintiff in a replevin suit brought in a state court had properly removed it to the federal court and obtained a judgment there in his favor, but the state court proceeded to try the cause and render judgment against the plaintiff, notwithstanding the removal, and an action was then brought in the state court upon the replevin bond. It was

b. *Proceedings in Federal Courts.*—A state court has not jurisdiction to enjoin proceedings in the courts of the United States.[27]

6. Enjoining Commission of Crime.—That it is outside of the jurisdiction of a court of equity to enjoin the commission of crimes, is, as a general proposition, unquestioned. A chancellor has no criminal jurisdiction. But when interferences with property or rights of a pecuniary nature appear, the jurisdiction of a court of equity arises, and is not destroyed by the fact that they are accompanied by or are themselves violations of the criminal law.[28] For treatment of injunctions against commission of crime, see the title Equity, vol. 5, pp. 835, 837.

7. Enjoining Prosecution and Punishment of Crime.—A court of equity has no general power to enjoin or stay criminal proceedings,[29] unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there,[30] or to prohibit the invasion of the rights of property

held that the court of the United States might enjoin the prosecution of such action, the relief being merely ancillary to the jurisdiction already acquired and necessary to give effect to its own judgment.

27. State court enjoining federal court.—McKim *v.* Voorhies, 7 Cranch 279, 3 L. Ed. 342; Moran *v.* Sturges, 154 U. S. 256, 38 L. Ed. 981; Shields *v.* Coleman, 157 U. S. 168, 39 L. Ed. 660; Duncan *v.* Darst, 1 How. 301, 306, 11 L. Ed. 139; Peck *v.* Jenness, 7 How. 612, 625, 12 L. Ed. 841; United States *v.* Council, 6 Wall. 514, 18 L. Ed. 933; S. C., 6 Wall. 518, 18 L. Ed. 918; Central Nat. Bank *v.* Stevens, 169 U. S. 432, 460, 42 L. Ed. 807; Freeman *v.* Howe, 24 How. 450, 16 L. Ed. 749; Buck *v.* Colbath, 3 Wall. 334, 18 L. Ed. 257; Rio Grande R. Co. *v.* Gomila, 132 U. S. 478, 33 L. Ed. 400. See the title CONSTITUTIONAL LAW, vol. 4, p. 189.

The injunction of a state court is inoperative to control, or in any manner to affect the process or proceedings of a circuit court of the United States, not on account of any paramount jurisdiction in the latter courts, but because, in their sphere of action, circuit courts are wholly independent of the state tribunals. Riggs *v.* Johnson County, 6 Wall. 166, 196, 18 L. Ed. 768, followed in Weber *v.* Lee County, 6 Wall. 210, 18 L. Ed. 781.

Mandamus from a federal court to officers of a county in a state, to levy a tax to pay interest on bonds issued by the county on which a relator has obtained judgment, and has no means of obtaining satisfaction but by the levy of a tax, cannot be, in any way, controlled by an injunction from a state court to those officers against a levy. Supervisors *v.* Durant, 9 Wall. 415, 19 L. Ed. 732.

It makes no difference whether the relator have been made a defendant to the proceeding in the state court for an injunction or not; nor whether the injunction have issued before or after his suit in the federal court was begun. Supervisors *v.* Durant, 9 Wall. 415, 19 L. Ed. 732.

An injunction from a state court against a city's levying a tax to pay certain bonds of the city, cannot be set up to prevent a mandamus from the federal courts ordering the city to levy a tax to pay a judgment obtained against it on those same bonds. Mayor *v.* Lord, 9 Wall. 409, 19 L. Ed. 704.

28. Enjoining the commission of crime.—In re Debs, 158 U. S. 564, 593, 39 L. Ed. 1092.

29. Enjoining prosecution and punishment of crime.—Davis, etc., Mfg. Co. *v.* Los Angeles, 189 U. S. 207, 217, 47 L. Ed. 782; In re Sawyer, 124 U. S. 200, 209, 31 L. Ed. 402.

Thus, the enforcement of an ordinance by criminal proceedings may not be enjoined. Davis, etc., Mfg. Co. *v.* Los Angeles, 189 U. S. 207, 217, 47 L. Ed. 782.

The rule that a circuit court of the United States, sitting as a court of equity, cannot stay by injunction proceedings pending in a state court to enforce the criminal laws of such state, was applied in Harkrader *v.* Wadley, 172 U. S. 148, 43 L. Ed. 399, to a case where the plaintiff sought to enjoin proceedings against him for the embezzlement of the assets of a bank; and in Fitts *v.* McGhee, 172 U. S. 516, 43 L. Ed. 535, to a suit brought by the receiver of a railroad against the attorney general of the state to restrain him from instituting or prosecuting criminal proceedings to enforce against the plaintiff the provisions of a state law reducing the tolls, which had been exacted of the public by the railroad, of which the plaintiff was receiver. This was held to be in reality a suit against the state to enjoin the institution of criminal proceedings, and hence within the general rule. Davis, etc., Mfg. Co. *v.* Los Angeles, 189 U. S. 207, 217, 47 L. Ed. 782. See, also, Prout *v.* Starr, 188 U. S. 537, 47 L. Ed. 584.

30. Proceedings instituted by party already before court of equity.—Davis, etc., Mfg. Co. *v.* Los Angeles, 189 U. S. 207, 217, 47 L. Ed 782; In re Sawyer, 124 U. S. 200, 31 L. Ed. 402.

Quære: "Even had he been made a

by the enforcement of an unconstitutional law.[31]

8. Public Nuisances.—The jurisdiction of courts of equity to redress the grievance of public nuisances by injunction is undoubted and clearly established.[32]

9. Circuit Court Granting Injunctions Outside of Circuit.—It seems that circuit courts have no authority to grant injunction, in invitum, outside of their respective circuits.[33]

D. Waiver or Failure to Raise Jurisdictional Question.—In the cases where equity has interfered, although there existed an adequate remedy at law, it will be found, upon examination, that the question of jurisdiction was not raised, or was waived.[34]

V. Right to Relief.

A. Rules and Principles Governing Issuance—1. In General—a. *Discretion of Court.*—The granting or refusal of an injunction, either temporary or permanent, rests in the sound discretion of the court under the circumstances of the particular case.[35]

b. *Applicant Must Come Clearly within Rules.*—The remedy by injunction may and does sometimes become very far-reaching and oppressive, as well as speedy and effective, and should only be granted by courts of equity in cases where the applicants therefor bring themselves clearly within the well-defined and established rules authorizing its issuance.[36]

c. *Injunctions against Public Policy.*—If it appears that an injunction would be against public policy, the court properly may refuse to be made an instrument

party, would equity entertain a bill to restrain criminal prosecutions? In re Sawyer, 124 U. S. 200, 31 L. Ed. 402; Harkrader *v.* Wadley, 172 U. S. 148, 43 L. Ed. 399; Fitts *v.* McGhee, 172 U. S. 516, 43 L. Ed. 535." Pacific Steam Whaling Co. *v.* United States, 187 U. S. 447, 452, 47 L. Ed. 253.

31. Enforcement of unconstitutional law restrained.—Davis, etc., Mfg. Co. *v.* Los Angeles, 189 U. S. 207, 217, 47 L. Ed. 782; In re Sawyer, 124 U. S. 200, 31 L. Ed. 402.

It would seem that, if there were jurisdiction in a court of equity to enjoin the invasion of property rights through the instrumentality of an unconstitutional law, that jurisdiction would not be ousted by the fact that the state had chosen to assert its power to enforce such law by indictment or other criminal proceeding. Davis, etc., Mfg. Co. *v.* Los Angeles, 189 U. S. 207, 218, 47 L. Ed. 782.

Prosecution and void ordinance restrained.—Where property rights will be destroyed, unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a decree of a court of equity. Davis, etc., Mfg. Co. *v.* Los Angeles, 189 U. S. 207, 218, 47 L. Ed. 782; Dobbins *v.* Los Angeles, 195 U. S. 223, 241, 49 L. Ed. 169, followed in Daly *v.* Elton, 195 U. S. 242, 49 L. Ed. 177.

32. Public nuisances.—In re Debs, 158 U. S. 564, 591, 39 L. Ed. 1092. See the title NUISANCES.

The jurisdiction of the court of chancery with regard to public nuisances is founded on the irreparable damage to individuals, or the great public injury which is likely to ensue. In no well-considered case has the power of a court of equity to interfere by injunction in cases of public nuisance been denied, the only denial ever being that of a necessity for the exercise of that jurisdiction under the circumstances of the particular case. In re Debs, 158 U. S. 564, 592, 39 L. Ed. 1092.

33. Circuit court granting injunction outside of circuit.—"We must not be understood as intimating an opinion that a circuit judge has power to grant injunctions, appoint receivers or enter orders or decrees, in invitum, outside of his circuit." In re Tampa Suburban R. Co., 168 U. S. 583, 588, 42 L. Ed. 589.

34. Waiver or failure to raise jurisdictional questions.—Dows *v.* Chicago, 11 Wall. 108, 110, 20 L. Ed. 65; Milwaukee *v.* Koeffiler, 116 U. S. 219, 223, 29 L. Ed. 612.

Whether or not a court of equity will grant an injunction to restrain the infringement of a patent which is about to expire, is a matter of discretion. Clark *v.* Wooster, 119 U. S. 322, 30 L. Ed. 392. See the title PATENTS.

35. Discretion of court.—Buffington *v.* Harvey, 95 U. S. 99, 24 L. Ed. 381.

36. Applicant must come clearly within rules.—Lacassagne *v.* Chapuis, 144 U. S. 119, 124, 36 L. Ed. 368; Black *v.* Jackson, 177 U. S. 349, 361, 44 L. Ed. 801, followed in Potts *v.* Hollen, 177 U. S. 365, 44 L. Ed. 808.

The writ of injunction should issue only in a clear case; it is an extraordinary process and should be used sparingly. Irwin *v.* Dixion, 9 How. 10, 13 L. Ed. 25.

for such a result, whatever the pleadings.[37]

d. *Interest of Defendant to Be Considered.*—A suit for an injunction being an equitable proceeding, the interests of the defendant are to be considered as well as those of the plaintiff.[38]

2. As Dependent on Right, Title or Interest of Plaintiff—a. *In General*—(1) *Right Must Be Clear.*—In order to obtain an injunction, complainant's right must, in general, be clear.[39] An injunction will not issue to enforce a right that is doubtful.[40] The bill should set forth a case of probable right.[41]

(2) *Sufficiency of Right, Title or Interest*—(a) *In General.*—The complainant must show an interest, right or title,[42] in the subject matter of the controversy before equity will interpose in his behalf. For illustrative cases, wherein the sufficiency of the right, title or interest of complainant was passed upon, see note.[43] When a plain official duty, requiring no exercise of discretion is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may

37. **Injunctions against public policy.**—In Beasley *v.* Texas, etc., R. Co., 191 U. S. 492, 498, 48 L. Ed. 274, the court say: "The defendant may desire the relief to be granted. It is suggested that it does. But the very meaning of public policy is the interest of others than the parties and that interest is not to be at the mercy of the defendant alone. See Northern Pac. R. Co. *v.* Dustin, 142 U. S. 492, 509, 35 L. Ed. 1092." See, also, Creath *v.* Sims, 5 How. 192, 12 L. Ed. 111; Sample *v.* Barnes, 14 How. 70, 14 L. Ed. 330.

38. **Interest of defendant to be considered.**—Wilson *v.* Shaw, 204 U. S. 24, 31, 51 L. Ed. 351. See post, "Injunction Following as of Course," V, A, 2, b, (3).

"If one person is induced to do an act prejudicial to himself in consequence of the acts or declarations of another, on which he had a right to rely, equity will enjoin the latter from asserting his legal rights against the tenor of such acts or declarations. But, then, the person charged has an opportunity of explaining, and equity will decree according to the justice of the entire case." Branson *v.* Wirth, 17 Wall. 32, 42, 21 L. Ed. 566.

39. **Right must be clear.**—Truly *v.* Wanzer, 5 How. 141, 12 L. Ed. 88; Parker *v.* Winnipiseogee Lake Cotton, etc., Co., 2 Black 545, 552, 17 L. Ed. 333; Board of Liquidation *v.* McComb, 92 U. S. 531, 536, 23 L. Ed. 623; Hunnewell *v.* Cass County, 22 Wall. 464, 22 L. Ed. 752.

40. **Doubtful rights.**—Parker *v.* Winnipiseogee Lake Cotton, etc., Co., 2 Black 545, 552, 17 L. Ed. 333; Consolidated Canal Co. *v.* Mesa Canal Co., 177 U. S. 296, 302, 44 L. Ed. 777; Parcher *v.* Cuddy, 110 U. S. 742, 743, 28 L. Ed. 313. See Irwin *v.* Dixion, 9 How. 10, 13 L. Ed. 25.

Injunction to stay proceedings in action at law.—In Parcher *v.* Cuddy, 110 U. S. 742, 28 L. Ed. 313, relief by injunction was denied where the right of complainant was doubtful and had in fact been twice denied in lower courts. See the title SUPERSEDEAS AND STAY OF PROCEEDINGS.

41. **Probable right.**—Georgia *v.* Brailsford, 2 Dall. 402, 1 L. Ed. 433.

In Georgia *v.* Brailsford, 2 Dall. 402, 1 L. Ed. 433, the marshal was restrained from paying over money paid in satisfaction of an execution, until the rights of the plaintiff were determined, such rights not being determinable in the original suit.

A mortgage was executed by a debtor to his creditor for an unascertained balance of accounts, which sum named in the mortgage was supposed to be sufficient to cover. It did not prove to be sufficient, and the creditor obtained a judgment against the debtor for the residue. It was held that the payment of the sum named in the mortgage was no reason for an injunction to stay proceedings on the judgment. Gear *v.* Parish, 5 How. 168, 12 L. Ed. 100.

42. **Right, title or interest.**—Selz *v.* Unna, 6 Wall. 327, 18 L. Ed. 799. McGahey *v.* Virginia, 135 U. S. 662, 679, 34 L. Ed. 304; Mayre *v.* Parsons, 114 U. S. 325, 29 L. Ed. 205; Zabriskie *v.* Cleveland, etc., R. Co., 23 How. 381, 16 L. Ed. 488; Davis, etc., Mfg. Co. *v.* Los Angeles, 189 U. S. 207, 221, 47 L. Ed. 782.

Equity will not grant relief where the allegations of the complainant show that he has no title nor interest in the subject matter of the dispute. Selz *v.* Unna, 6 Wall. 327, 18 L. Ed. 799.

43. A national bank may, on behalf of its stockholders, maintain a suit to enjoin the collection of a tax which has been unlawfully assessed on their shares by the state authorities. This was established by the cases of Cummings *v.* National Bank, 101 U. S. 153, 25 L. Ed. 903; Pelton *v.* National Bank, 101 U. S. 143, 25 L. Ed. 901. Hills *v.* Exchange Bank, 105 U. S. 319, 26 L. Ed. 1052.

The money received by the collector of taxes in payment of the special tax ordered by the county court to be collected for the payment of the judgment of the plaintiff and other judgment creditors, would, when collected, constitute a separate fund in the county treasury, applicable to this purpose, and if the special

have an injunction to prevent it.[44] As a corporation cannot be said to have life or health or senses, the only ground on which it can obtain either damages or an injunction is injury to its property.[45]

tax had been collected, the plaintiff would have had such an interest therein that a court of equity would at his instance enjoin its diversion to any purpose save that for which it had been levied and collected, and compel its payment to the satisfaction of the judgment of the plaintiff. Findlay *v.* McAllister, 113 U. S. 104, 110, 28 L. Ed. 930, citing Meriwether *v.* Garrett, 102 U. S. 472, 514, 515, 26 L. Ed. 197; Attorney General *v.* Dublin, 1 Bligh N. S. 312. And see Davies *v.* Corbin, 112 U. S. 36, 28 L. Ed. 627.

Chancery will not interfere to prevent an insolvent debtor from alienating his property to avoid an existing or prospective debt, even when there is a suit pending to establish it. Adler *v.* Fenton, 24 How. 407, 411, 16 L. Ed. 696.

Those only who have a clear, legal, and equitable title to land, connected with possession, have a right to claim the interference of a court of equity, to give them peace or dissipate a cloud on the title. Therefore, where the complainant was the volunteer purchaser of a litigious claim; was the assignee of a secret equity for apparently a mere nominal consideration, and of the bare legal title for a like consideration, and this legal title assigned to him during the pendency of a suit in chancery in a state court, to ascertain the person justly entitled to it, it was error in the court below to grant to such complainant a perpetual injunction. Orton *v.* Smith, 18 How. 263, 15 L. Ed. 393.

The plaintiff never had any real ownership or actual control or any lawful right to the bonds in suit, and an injunction to prevent the sale thereof was refused. Matthews *v.* Warner, 112 U. S. 600, 603, 28 L. Ed. 851.

A party as assignee of a city has no legal interest which entitles him to enjoin a railroad company from using its wharf as a public wharf beyond the limits of such use, as defined by a joint resolution of the general assembly. "If he alleges that the railroad company is acting beyond the warrant of the law, the answer is, that a violation of its charter does not of itself injuriously affect any of his rights. The company is not shown to owe him any duty which it has not performed. This was the principle on which this court proceeded in the case of Georgetown *v.* Alexandria Canal Co., 12 Pet. 91, 9 L. Ed. 1012." Railroad Co. *v.* Ellerman, 105 U. S. 166, 173, 174, 26 L. Ed. 1015.

In Reagan *v.* Farmers' Loan, etc., Co., 154 U. S. 362, 393, 38 L. Ed. 1014, it was held that the trustee of the bond holders of a railway corporation could maintain a suit against the state railway commission to restrain the enforcement of unreasonable and unjust rates, upon the express ground that the bond holders were the equitable and the beneficial owners of the property of the corporation, and in that capacity might "invoke the judgment of the federal courts as to whether the contract rights created by the charter, and of which it is thus the beneficial owner, are violated by subsequent acts of the state in limitation of the right to collect tolls." In that case the bond holders were not only the beneficial owners of the property, but a reduction of the tolls might have resulted in the practical destruction of their securities, and unless the bill were maintained they were practically remediless. Cited in Davis, etc., Mfg. Co. *v.* Los Angeles, 189 U. S. 207, 220, 47 L. Ed. 782.

In Zabriskie *v.* Cleveland, etc., R. Co., 23 How. 381, 16 L. Ed. 488, a bill by a stockholder, to restrain a railroad company from paying interest on bonds of another company and from using its effects to redeem the bonds, in pursuance of an ultra vires contract of guarantee, confirmed over the dissent of a stockholder, was sustained.

Sufficiency of interest to enjoin taxes.—See the title TAXATION.

Virginia coupon holders.—A bill for an injunction to compel tax collectors to receive Virginia coupons in payment of taxes could only be maintained by one who alleges himself to be a taxpayer; the contract right of coupon holders, under the act (Va.) of March 30, 1871, could only be exercised by a taxpayer. Mayre *v.* Parsons, 114 U. S. 325, 29 L. Ed. 205. See the titles CONSTITUTIONAL LAW, vol. 4, p. 76; TAXATION.

Shareholder in corporation.—A shareholder may maintain a suit for an injunction to prevent a disaster, where the corporation peremptorily refuses to move in the matter. Hawes *v.* Oakland, 104 U. S. 450, 26 L. Ed. 827; Greenwood *v.* Freight Co., 105 U. S. 13, 16, 26 L. Ed. 961. See the title STOCKS AND STOCKHOLDERS.

44. Violation of official duty threatening personal injury.—Noble *v.* Union River, etc., R. Co., 147 U. S. 165, 172, 37 L. Ed. 123; Board of Liquidation *v.* McComb, 92 U. S. 531, 541, 23 L. Ed. 623.

45. Corporation—Injury to property.—Northern Pac. R. Co. *v.* Whalen, 149 U. S. 157, 163, 37 L. Ed. 686. This case construes Wash. Terr. Code, § 2050, which gives an action against the seller of liquor or the owner of the place where it is sold, to recover damages suffered on account of sales to particular persons, to wit, employees.

"But the usual, and at the suit of a cor-

Employer's Interest in Workmen.—No employer has such a property in his workmen, or in their services, that he can, under the ordinary jurisdiction of a court of chancery, maintain a suit, as for a nuisance, against the keeper of a house at which they voluntarily buy intoxicating liquors, and thereby get so drunk as to be unfit for work.[46]

(b) *Interest Too Remote.*—A person whose interest is too remote has no standing in a court of equity.[47]

(c) *Sufficiency of Interest of United States.*—Where the government is obstructed in the exercise of its duties and powers, it being interested in the promotion of general welfare, it has a right to become a party complainant to its courts for assistance by the way of injunction.[48] The government has sufficient property rights in the mails to sue for an injunction to prevent interference therewith.[49]

(d) *Sufficiency of Interest of State.*—As to sufficiency of interest of a state to maintain bill for injunction against citizen of another state for maintaining a nuisance or for obstructing navigable waters, see the titles COURTS, vol. 4, p. 1016; NUISANCES; WATERS AND WATERCOURSES.

b. *Prior Establishment of Right or Title*—(1) *In General.*—In general, injunction should not issue to protect a doubtful right or disputed title until such doubt is removed or dispute settled by appropriate proceedings.[50] The ordinary rule is that courts of equity will not act where there is a dispute about the title or the extent of the legal rights of the parties, until there has been a trial at law.[51] There are cases in which a court of equity will take jurisdiction and give a complete remedy without the previous intervention of a court of law,

poration the only ground on which, independently of express statute, a court of equity will grant an injunction in a private action for a nuisance, is special injury to the plaintiff's property. 3 Bl. Com. 216; Robinson *v.* Kilvert, 41 Ch. D. 88; Georgetown *v.* Alexandria Canal Co., 12 Pet. 91, 99, 9 L. Ed. 1012." Northern Pac. R. Co. *v.* Whalen, 149 U. S. 157, 162, 37 L. Ed. 686.

46. **Sufficiency of employer's interest.**—Northern Pac. R. Co. *v.* Whalen, 149 U. S. 157, 162, 37 L. Ed. 686.

47. **Interest to remote.**—Where a person is neither a citizen nor a taxpayer, but is a citizen of another state, and presents himself simply in the character of a creditor of the state, the courts would hardly be justified in interfering on his behalf to prevent a supposed violation of the state constitution by an increase of the state debt. His interest is too remote to give him a standing in court for any such purpose. Board of Liquidation *v.* McComb, 92 U. S. 531, 536, 23 L. Ed. 623. See the titles EQUITY, vol. 5, p. 803; PARTIES.

48. **Sufficiency of interest of government.**—In re Debs, 158 U. S. 564, 39 L. Ed. 1092; Pennsylvania *v.* Wheeling, etc., Bridge Co., 13 How. 518, 14 L. Ed. 249; Georgetown *v.* Alexandria Canal Co., 12 Pet. 91, 9 L. Ed. 1012; United States *v.* Rickert, 188 U. S. 432, 47 L. Ed. 532; Matter of Heff, 197 U. S. 488, 509, 49 L. Ed. 848. See the title INTERSTATE AND FOREIGN COMMERCE.

Interference with plans with reference to Indians.—In view of the relation of the United States to the real and personal property, as well as to these dependent Indians still under national control, and in view of the injurious effect of the assessment and taxation complained of upon the plans of the government with reference to the Indians, it is clear that the United States is entitled to maintain this suit for an injunction against the collection of the tax. United States *v.* Rickert, 188 U. S. 432, 444, 47 L. Ed. 532. See the title INDIANS, ante, p. 906.

49. **Interest in mails.**—In re Debs, 158 U. S. 564, 39 L. Ed. 1092. See Searight *v.* Stokes, 3 How. 151, 169, 11 L. Ed. 537.

50. **Prior establishment of right or title.**—"The general principles of equity jurisprudence, as administered both in this country and in England, permit a bill to quiet title to be filed only by a party in possession against a defendant, who has been ineffectually seeking to establish a legal title by repeated actions of ejectment, and as a prerequisite to such bill it was necessary that the title of the plaintiff should have been established by at least one successful trial at law. Pomeroy's Equity Jurisprudence, §§ 253, 1394, and 1396." Wehrman *v.* Conklin, 155 U. S. 314, 321, 39 L. Ed. 167.

51. **Necessity for trial at law.**—Texas, etc., R. Co. *v.* Interstate Transp. Co., 155 U. S. 585, 39 L. Ed. 271; Lacassagne *v.* Chapuis, 144 U. S. 119, 36 L. Ed. 368.

"It was formerly the doctrine of equity, in cases of alleged trespass on land, not to restrain the use and enjoyment of the premises by the defendant when the title was in dispute, but to leave the complaining party to his remedy at law. A controversy as to the title was deemed

but the case must be one of "strong and imperious necessity."[52] Where it appears that careless and wanton injury may be inflicted upon property by the defendants, a court of equity will not refuse relief by injunction until there has been a trial at law.[53]

(2) *Temporary Injunctions—Preservation of Property.*—Where the title or right of the complainant is disputed, a temporary injunction may issue at once without waiting until a trial at law be had,[54] and it is now common practice in cases where irremediable mischief is being done or threatened, going to the destruction of the substance of the estate, to issue an injunction, though the title to the premises be in litigation. The authority of the court is exercised in such cases, through its preventive writ, to preserve the property from destruction pending legal proceedings for the determination of the title.[55]

(3) *Injunction Following as of Course.*—However, after the right has been established at law, a court of chancery will not, as of course, interpose by injunction. It will consider all the circumstances, the consequences of such action, and the real equity of the case.[56]

3. Grounds of Equitable Jurisdiction—a. *Inadequacy of Other Remedies*—(1) *In General.*—The general rule is that where a complainant has unquestioned rights which are not adequately protected by legal remedies, he is entitled to the aid of equity,[57] but an injunction will not issue to protect the com-

sufficient to exclude the jurisdiction of the court." Erhardt *v.* Boaro, 113 U. S. 537, 538, 28 L. Ed. 1113.

52. Exceptions to rule.—Parker *v.* Winnipiseogee Lake Cotton, etc., Co., 2 Black 545, 552, 17 L. Ed. 333.

"The patent having been issued fifteen months before the bill was filed, and having nearly sixteen years then to run, and the bill alleging that the public have generally acknowledged and acquiesced in the validity of the patent, and that the invention has been put in practice by the plaintiff, and has been of great utility, it was not necessary to show a recovery at law, to warrant jurisdiction in equity, for an injunction and an account. Root *v.* Railway Co., 105 U. S. 189, 205, 26 L. Ed. 975." McCoy *v.* Nelson, 121 U. S. 484, 487, 30 L. Ed. 1017. See the title PATENTS.

53. Injunction for preservation of property.—Texas, etc., R. Co. *v.* Interstate Transp. Co., 155 U. S. 585, 589, 39 L. Ed. 271. In this case the relief sought was to restrain defendants from taking too long tow barges through the draws of a railroad bridge.

54. Temporary injunction—Right disputed.—Erhardt *v.* Boaro, 113 U. S. 537, 28 L. Ed. 1113; Irwin *v.* Dixion, 9 How. 10, 13 L. Ed. 25; Clark *v.* Clark, 17 How. 315, 15 L. Ed. 77. In the case last cited, an injunction issued to secure the money, arising from certain claims of a bankrupt against the Mexican government, until the right thereto could be settled.

"Where an injunction is granted without a trial at law, it is usually upon the principle of preserving the property, until a trial at law can be had. A strong prima facie case of right must be shown, and there must have been no improper delay. The court will consider all the circumstances and exercise a careful discretion." Parker *v.* Winnipiseogee Lake Cotton, etc., Co., 2 Black 545, 552, 17 L. Ed. 333.

Until the rights of the parties are settled at law, only a temporary injunction is issued, to prevent irreparable injury. Parker *v.* Winnipiseogee Lake Cotton, etc., Co., 2 Black 545, 552, 17 L. Ed. 333.

Laches—Dissolution of injunction.—Where an injunction in such a case has been granted, and the complainant fails to proceed with diligence in his action at law, the injunction will be dissolved. "A delay of three years or more has been frequently held to be such laches as will preclude a party from relief in equity until he has vindicated his right at law." Parker *v.* Winnipiseogee Lake Cotton, etc., Co., 2 Black 545, 552, 17 L. Ed. 333.

55. Preservations of property pending litigation.—Erhardt *v.* Boaro, 113 U. S. 537, 539, 28 L. Ed. 1113; Parker *v.* Winnipiseogee Lake Cotton, etc., Co., 2 Black 545, 17 L. Ed. 333; Lacassagne *v.* Chapuis, 144 U. S. 119, 36 L. Ed. 368.

56. Injunction following as of course.—Parker *v.* Winnipiseogee Lake Cotton, etc., Co., 2 Black 545, 552, 17 L. Ed. 333. See ante, "Interest of Defendant to Be Considered," V, A, 1, d.

57. Want of other adequate remedy—In general.—Dows *v.* Chicago, 11 Wall. 108, 109, 20 L. Ed. 65; State Railroad Tax Cases, 92 U. S. 575, 23 L. Ed. 663; North *v.* Peters, 138 U. S. 271, 284, 34 L. Ed. 936; National Bank *v.* Kimball, 103 U. S. 732, 26 L. Ed. 469; Northern Indiana R. Co. *v.* Michigan Cent. R. Co., 15 How. 233, 242, 14 L. Ed. 674; Hannewinkle *v.* Georgetown, 15 Wall. 547, 21 L. Ed. 231; Union Pac. R. Co. *v.* Cheyenne, 113 U. S. 516, 28 L. Ed. 1098; Corbus *v.* Alaska Treadwell Min. Co., 187 U. S. 455, 47 L.

Ed. 256; Milwaukee *v.* Kœffler, 116 U. S. 219, 29 L. Ed. 612; Pacific Steam Whaling Co. *v.* United States, 187 U. S. 447, 47 L. Ed. 253; Deweese *v.* Reinhard, 165 U. S. 386, 390, 41 L. Ed. 757; Shelton *v.* Platt, 139 U. S. 591, 35 L. Ed. 273; Allen *v.* Pullman's Palace Car Co., 139 U. S. 658, 35 L. Ed. 303; Grand Chute *v.* Winegar, 15 Wall. 373, 376, 21 L. Ed. 174; Robb *v.* Vos, 155 U. S. 13, 39 L. Ed. 52; American School *v.* McAnnulty, 187 U. S. 94, 110, 47 L. Ed. 90; Coosaw Min. Co. *v.* South Carolina, 144 U. S. 550, 567, 36 L. Ed. 537; Singer Mfg. Co. *v.* Wright, 141 U. S. 696, 700, 35 L. Ed. 906; Little *v.* Bowers, 134 U. S. 547, 33 L. Ed. 1016; Johnson *v.* Christian, 128 U. S. 374, 381, 32 L. Ed. 412; Louisville, etc., R. Co. *v.* Louisville Trust Co., 174 U. S. 552, 567, 43 L. Ed. 1081; Scottish Union, etc., Ins. Co. *v.* Bowland, 196 U. S. 611, 49 L. Ed. 619; Ewing *v.* St. Louis, 5 Wall. 413, 418, 18 L. Ed. 657; Mugler *v.* Kansas, 123 U. S. 623, 673, 31 L. Ed. 205; Missouri *v.* Illinois, 180 U. S. 208, 244, 45 L. Ed. 497; Leeds *v.* Marine Ins. Co., 6 Wheat. 565, 5 L. Ed. 332; Scammon *v.* Kimball, 92 U. S. 362, 23 L. Ed. 483; Embry *v.* Palmer, 107 U. S. 3, 27 L. Ed. 346; Knox County *v.* Harshman, 133 U. S. 152, 33 L. Ed. 586; Marshall *v.* Holmes, 141 U. S. 589, 35 L. Ed. 870; North Chicago Rolling Mills Co. *v.* St. Louis Ore, etc., Co., 152 U. S. 596, 615, 38 L. Ed. 565; Railway Co. *v.* McShane, 22 Wall. 444, 22 L. Ed. 747; United States *v.* Rickert, 188 U. S. 432, 444, 47 L. Ed. 532; Fargo *v.* Hart, 193 U. S. 490, 503, 48 L. Ed. 761; Metcalf *v.* Williams, 104 U. S. 93, 96, 26 L. Ed. 665; United States *v.* Throckmorton, 98 U. S. 61, 65, 25 L. Ed. 93; Gunter *v.* Atlantic Coast Line R. Co., 200 U. S. 273, 292, 50 L. Ed. 477; Creath *v.* Sims, 5 How. 192, 12 L. Ed. 111; Walker *v.* Robbins, 14 How. 584, 14 L. Ed. 552; Brown *v.* County of Buena Vista, 95 U. S. 157, 24 L. Ed. 422; Pacific Express Co. *v.* Seibert, 142 U. S. 339, 35 L. Ed. 1035; Pittsburgh, etc., Railway *v.* Board of Public Works, 172 U. S. 32, 43 L. Ed. 354; Cruickshank *v.* Bidwell, 176 U. S. 73, 44 L. Ed. 377; Indiana Mfg. Co. *v.* Kœhne, 188 U. S. 681, 47 L. Ed. 651; Marine Ins. Co. *v.* Hodgson, 7 Cranch 332, 336, 3 L. Ed. 362; Hendrickson *v.* Hinckley, 17 How. 443, 445, 15 L. Ed. 124; Crim *v.* Handley, 94 U. S. 652, 24 L. Ed. 216; Phillips *v.* Negley, 117 U. S. 665, 675, 29 L. Ed. 1013; Cummings *v.* National Bank, 101 U. S. 153, 157, 25 L. Ed. 903; Pelton *v.* National Bank, 101 U. S. 143, 25 L. Ed. 901; Boyce *v.* Grundy, 3 Pet. 210, 7 L. Ed. 655; Davis, etc., Mfg. Co. *v.* Los Angeles, 189 U. S. 207, 221, 47 L. Ed. 782; Peirsoll *v.* Elliott, 6 Pet. 95, 98, 8 L. Ed. 332; Arkansas Bldg., etc., Ass'n *v.* Madden, 175 U. S. 269, 272, 44 L. Ed. 159; Ogden City *v.* Armstrong, 168 U. S. 224, 239, 42 L. Ed. 444; Wilson *v.* Lambert, 168 U. S. 611, 613, 42 L. Ed. 599; Black *v.* Jackson, 177 U. S. 349, 361, 44 L. Ed. 801; Potts *v.* Hollen, 177 U. S. 365, 44 L. Ed. 808; Parker *v.* Winnipiseogee Lake Cotton, etc., Co., 2 Black 545, 17 L. Ed. 333; Watson *v.* Sutherland, 5 Wall. 74, 18 L. Ed. 580; White *v.* Crow, 110 U. S. 183, 187, 28 L. Ed. 113; Allen *v.* Baltimore, etc., R. Co., 114 U. S. 311, 29 L. Ed. 200; Francis *v.* Flinn, 118 U. S. 385, 388, 30 L. Ed. 165; Trist *v.* Child, 21 Wall. 441, 447, 22 L. Ed. 623; Stanley *v.* Supervisors, 121 U. S. 535, 30 L. Ed. 1000; Weyerhaueser *v.* Minnesota, 176 U. S. 550, 558, 44 L. Ed. 583; Wilson *v.* Shaw, 204 U. S. 24, 31, 51 L. Ed. 351; In re Sawyer, 124 U. S. 200, 223, 31 L. Ed. 402; White *v.* Berry, 171 U. S. 366, 376, 43 L. Ed. 199; Kessler *v.* Eldred, 206 U. S. 285, 290, 51 L. Ed. 1065; Bank *v.* Cooper, 20 Wall. 171, 176, 22 L. Ed. 273; Pennsylvania *v.* Wheeling, etc., Bridge Co., 13 How. 518, 564, 14 L. Ed. 249; Belknap *v.* Schild, 161 U. S. 10, 20, 40 L. Ed. 599; Virginia Coupon Cases, 114 U. S. 269, 29 L. Ed. 185; Reagan *v.* Farmers' Loan, etc., Co., 154 U. S. 362, 38 L. Ed. 1014; Joy *v.* St. Louis, 138 U. S. 1, 49, 34 L. Ed. 843; Brent *v.* Bank, 10 Pet. 596, 613, 9 L. Ed. 547; Kendall *v.* United States, 12 Pet. 524, 615, 9 L. Ed. 1181.

The court affirms the doctrine announced in Hendrickson *v.* Hinckley, 17 How. 443, 15 L. Ed. 124, that a court of equity will not enjoin a judgment at law, unless the proof clearly shows that the defendant had a just defense, of which he could not avail himself at law, or to which, if available, he was prevented from resorting, by fraud or unavoidable accident, unmixed with any fault or negligence in himself or his agents. Crim *v.* Handley, 94 U. S. 652, 24 L. Ed. 216.

Where a party has no adequate remedy elsewhere, a court of equity will not refuse to restrain another from interferring with his rights. Franklin Tele. Co. *v.* Harrison, 145 U. S. 459, 36 L. Ed. 776.

Injunction to quiet title and preserve burying ground.—In Beatty *v.* Kurtz, 2 Pet. 566, 584, 7 L. Ed. 521, it is said: "It cannot be that such acts are to be redressed by the ordinary process of law. The remedy must be sought, if at all, in the protecting power of a court of chancery, operating by its injunction to preserve the repose of the ashes of the dead, and the religious sensibilities of the living."

Effect of abolition of distinction between law and equity.—"A court of a territory authorized, as Oklahoma was, to pass laws not inconsistent with the constitution of the United States, 26 Stat. 81, 84, c. 182, § 6, could not proceed in a 'common law' action as if it were a suit in equity and determine by mandatory injunction rights for the protection or enforcement of which there was a plain and adequate remedy at law according to the established distinctions between law and equity. And this evidently is in accordance with the statutes of Oklahoma providing that while the court must try

plainant's rights, where he has an adequate legal remedy.[58] Although an injunction may issue as ancillary to the original proceedings, notwithstanding the

issues of law, unless referred in the mode prescribed, 'issues of fact arising in actions for the recovery of money or of specific real or personal property, shall be tried by a jury, unless a jury trial is waived or a reference be ordered.' Stat. Okla. 1893, 809, § 4156." Black *v.* Jackson, 177 U. S. 349, 363, 44 L. Ed. 801, followed in Potts *v.* Hollen, 177 U. S. 365, 44 L. Ed. 808.

58. Where adequate remedy exists.—Allen *v.* Baltimore, etc., R. Co., 114 U. S. 311, 29 L. Ed. 200; In re Debs, 158 U. S. 564, 591, 39 L. Ed. 1092; Wilson *v.* Shaw, 204 U. S. 24, 31, 51 L. Ed. 351; Lacassagne *v.* Chapuis, 144 U. S. 119, 124, 36 L. Ed. 368; Davis, etc., Mfg. Co. *v.* Los Angeles, 189 U. S. 207, 47 L. Ed. 782; Insurance Co. *v.* Bailey, 13 Wall. 616, 20 L. Ed. 501; Pittsburgh, etc., Railway *v.* Board of Public Works, 172 U. S. 32, 45, 43 L. Ed. 354; Joy *v.* St. Louis, 138 U. S. 1, 49, 34 L. Ed. 843; Texas, etc., R. Co. *v.* Marshall, 136 U. S. 393, 34 L. Ed. 385; New York Guaranty Co. *v.* Memphis Water Co., 107 U. S. 205, 214, 27 L. Ed. 484; Francis *v.* Flinn, 118 U. S. 385, 30 L. Ed. 165; Cruickshank *v.* Bidwell, 176 U. S. 73, 80, 44 L. Ed. 377; Trist *v.* Child, 21 Wall. 441, 22 L. Ed. 623; Elliott *v.* Swartwout, 10 Pet. 137, 9 L. Ed. 373; Bend *v.* Hoyt, 13 Pet. 263, 10 L. Ed. 154; Philadelphia *v.* Collector, 5 Wall. 720, 731, 18 L. Ed. 614; Swift Co. *v.* United States, 111 U. S. 22, 28 L. Ed. 341; McChord *v.* Louisville, etc., R. Co., 183 U. S. 483, 46 L. Ed. 289; Arkansas Bldg., etc., Ass'n *v.* Madden, 175 U. S. 269, 272, 44 L. Ed. 159. See the title EQUITY, vol. 5, p. 803.

The question arising in each individual case is whether or not the remedy at law is adequate. Watson *v.* Sutherland, 5 Wall. 74, 18 L. Ed. 580.

Conspiracy to destroy plaintiff's business.—An injunction will not issue to prevent a conspiracy to destroy plaintiff's business, where upon the allegations of the bill it appears that an adequate remedy at law exists. Francis *v.* Flinn, 118 U. S. 385, 30 L. Ed. 165.

Cause of action "a purely legal demand."—Courts of equity unquestionably have jurisdiction of fraud, misrepresentation and fraudulent suppression of material facts in matters of contract, but where the cause of action is "a purely legal demand" and nothing appears to show that the defense at law may not be as perfect and complete as in equity, a suit in equity will not be sustained in a federal court. "It is clear that a case, under such circumstances, is controlled by the sixteenth section of the judiciary act." Insurance Co. *v.* Bailey, 13 Wall. 616, 20 L. Ed. 501.

Good defense at law to "a purely legal demand."—Where a party, if his theory of the controversy is correct, has a good defense at law to "a purely legal demand," he should be left to that means of defense, unless he is prepared to allege and prove some special circumstances to show that he may suffer irreparable injury if he is denied a preventive remedy. Insurance Co. *v.* Bailey, 13 Wall. 616, 20 L. Ed. 501.

Enforcing municipal corporation to levy tax.—After judgment at law for a sum of money against a municipal corporation, and execution returned unsatisfied, mandamus, not a bill in equity for an injunction, is the proper mode to compel the levy of a tax which the corporation was bound to levy to pay the judgment. Walkley *v.* Muscatine, 6 Wall. 481, 18 L. Ed. 930.

Absence of one of the counsel employed to conduct his defense in a suit at law does not furnish ground for equitable relief, where it appears that the defendant, had he been present at the trial, might have employed other counsel equally competent; nor does the fact that a witness upon whom he relied was so sick during his examination as to impair his recollection of facts within his knowledge. Having failed to ask a postponement or a continuance, he cannot go into equity and claim to have the judgment enjoined. Crim *v.* Handley, 94 U. S. 652, 24 L. Ed. 216.

Recovery back of taxes paid.—"The remedy of a suit to recover back the tax after it is paid is provided by statute, and a suit to restrain its collection is forbidden. The remedy so given is exclusive, and no other remedy can be substituted for it. Such has been the current of decisions in the circuit courts of the United States, and we are satisfied it is a correct view of the law. In Cheatham *v.* United States, 92 U. S. 85, 88, 23 L. Ed. 561, and again in State Railroad Tax Cases, 92 U. S. 575, 613, 23 L. Ed. 663, it was said by this court, that the system prescribed by the United States in regard to both customs duties and internal revenue taxes, of stringent measures, not judicial, to collect them, with appeals to specified tribunals, and suits to recover back moneys illegally exacted, was a system of corrective justice intended to be complete, and enacted under the right belonging to the government to prescribe the conditions on which it would subject itself to the judgment of the courts in the collection of its revenues. In the exercise of that right, it declares, by § 3224, that its officers shall not be enjoined from collecting a tax claimed to have been unjustly assessed, when those officers, in the course of general jurisdiction over the subject matter in question, have made the assignment and

existence of an adequate remedy at law.[59] Where the choice is between the ordinary and the extraordinary processes of law, and the former are sufficient, the rule will not permit the use of the latter.[60] But it must clearly appear that complainant's remedy at law is adequate and efficient.[61]

(2) *What Constitutes Adequate Remedy.*[62]—The remedy at law, in order to exclude a concurrent remedy at equity, must be as complete, as practical and as efficient to the ends of justice and its prompt administration, as the remedy in equity.[63] Inadequacy of remedy at law exists where the case made demands preventive relief, as, for instance, the prevention of multiplicity of suits, or the prevention of irreparable injury.[64]

Remedy in Foreign Jurisdiction.—Where complainant is compelled to seek his remedy in some foreign court, it may not be considered adequate and efficient.[65]

Act Subject to Criminal Prosecution.—The fact that an act sought to be

claim that it is valid." Snyder *v.* Marks, 109 U. S. 189, 193, 27 L. Ed. 901. See the title TAXATION.

Enjoining obligee in bond.—A municipal corporation, obligors in a bond, cannot ask relief in equity that the obligee be enjoined from proceeding at law, and that the bond be surrendered, when his bill alleges that the bond was issued without authority, in violation of law and in fraud of the town; that the obligee knew this when he took it; that the obligee's possession is merely colorable, and that he gave no value for it, and never had any right title to the bond. Such allegations show a complete defense to the bond at law; and a judgment against the obligee at law would give as full protection every way to the obligor as a decree in equity. Grand Chute *v.* Winegar, 15 Wall. 373, 21 L. Ed. 174.

59. Injunction as ancillary proceedings.—Gunter *v.* Atlantic Coast Line R. Co., 200 U. S. 273, 50 L. Ed. 477. See the title COURTS, vol. 4, p. 982.

60. Ordinary and extraordinary process.—In re Debs, 158 U. S. 564, 583, 39 L. Ed. 1092.

61. Adequacy of remedy must clearly appear.—Where it appears uncertain whether the complainants in a bill in equity for an injunction can avail themselves in the action at law of the defense asserted in the bill, and admitted by the demurrer to be true, the demurrer should have been overruled, and the defendant required to answer. Drexel *v.* Berney, 122 U. S. 241, 255, 30 L. Ed. 1219.

62. What constitutes adequate remedy.—See the title EQUITY, vol. 5, p. 803.

63. Practical and efficient remedy.—Watson *v.* Sutherland, 5 Wall. 74, 18 L. Ed. 580; Georgetown *v.* Alexandria Canal Co., 12 Pet. 91, 9 L. Ed. 1012; Boyce *v.* Grundy, 3 Pet. 210, 7 L. Ed. 655; Insurance Co. *v.* Bailey, 13 Wall. 616, 621, 20 L. Ed. 501; Kilbourn *v.* Sunderland, 130 U. S. 505, 514, 32 L. Ed. 1005; Tyler *v.* Savage, 143 U. S. 79, 95, 36 L. Ed. 82; Walla Walla *v.* Walla Walla Water Co., 172 U. S. 1, 12, 43 L. Ed. 341; Barber *v.* Barber, 21 How. 582, 592, 16 L. Ed. 226.

Suits at law, from time to time, to recover damages for the refusal of a telegraph company to transmit the messages of complainant over his wire, would not have given the relief necessary to secure their rights under the contract, and such a remedy would not be complete, nor an adequate substitute for an injunction. Franklin Tel. Co. *v.* Harrison, 145 U. S. 459, 474, 36 L. Ed. 776.

Where the agreement complained of is perpetual in its nature, the only effectual relief against it, if the keeping of it on foot is a fraud against parties, is the annulment of it. This cannot be decreed by a court of law, but can by a court of equity. Jones *v.* Bolles, 9 Wall. 364, 369, 19 L. Ed. 734.

Equitable estoppel.—"But it does not follow, because equitable estoppels may originate legal, as distinguished from equitable rights, that it may not be necessary in particular cases to resort to a court of equity in order to make them available. All that can properly be said is, that in order to justify a resort to a court of equity, it is necessary to show some ground of equity other than the estoppel itself, whereby the party entitled to the benefit of it is prevented from making it available in a court of law. In other words, the case shown must be one where the forms of the law are used to defeat that which, in equity, constitutes the right. Such a case is one for equitable interposition." Drexel *v.* Berney, 122 U. S. 241, 253, 30 L. Ed. 1219. See the title ESTOPPEL, vol. 5, p. 913.

64. Where preventive relief demanded.—Cruickshank *v.* Bidwell, 176 U. S. 73, 81, 44 L. Ed. 377; Union Pac. R. Co. *v.* Cheyenne, 113 U. S. 516, 28 L. Ed. 1098; Smyth *v.* Ames, 169 U. S. 466, 517, 42 L. Ed. 819; Watson *v.* Sutherland, 5 Wall. 74, 18 L. Ed. 580.

65. Remedy in foreign jurisdiction.—See Smyth *v.* Ames, 169 U. S. 466, 42 L. Ed. 819, where it was held the federal courts may enjoin the enforcement of a void freight rate law, although the state in passing the law provided a remedy to be pursued in the courts of that state.

enjoined may have been the subject of a criminal prosecution, does not prevent the issuance of an injunction where such prosecution is not an efficient remedy to prevent or give satisfaction for the injury.[66]

Right of Party to Redress Own Wrongs.—Although a party may have the right to redress his own grievances, he will not be compelled to do so;[67] the right of the complainant to use force to protect his property and rights does not exclude the right of appeal to the courts for a judicial determination and for the exercise of all their powers of prevention.[68]

(3) *In Cases of Illegal Taxation.*—It must be presumed that the law affords an adequate, efficient and prompt remedy for mere illegal taxation.[69] While the court does not lay down any absolute rule limiting the powers of a court of equity in restraining the collection of taxes, it declares that it is essential that every case be brought within some of the recognized rules of equity jurisdiction, and that neither illegality or irregularity in the proceedings, nor error or excess in the valuation, nor the hardship or injustice of the law, provided it be constitutional, nor any grievance which can be remedied by a suit at law, either before or after the payment of the tax, will authorize an injunction against its collection.[70] As to what grounds will afford equitable relief, see reference in note.[71]

(4) *Interstate Commerce Cases.*—Congress having the control of interstate commerce, has also the duty of protecting it, and it is entirely competent for that body to give the remedy by injunction as more efficient than any other civil remedy.[72]

66. **Act subject to criminal prosecution.**—In re Debs, 158 U. S. 564, 39 L. Ed. 1092.

67. **Existence of remedy outside the courts.**—In re Debs, 158 U. S. 564, 39 L. Ed. 1092.

68. **Right to resort to court for remedy.**—In re Debs, 158 U. S. 564, 583, 39 L. Ed. 1092.

In some cases of trespass the law permits an individual to abate the one and prevent the other by force, because such permission is necessary to the complete protection of property and person. When the choice is between redress or prevention of injury by force and by peaceful process, the law is well pleased if the individual will consent to waive his right to the use of force and await its action. Therefore, as between force and the extraordinary writ of injunction, the rule will permit the latter. In re Debs, 158 U. S. 564, 583, 39 L. Ed. 1092. See the titles NUISANCES; TRESPASS.

69. **Mere illegality of taxation.**—Lyon *v.* Alley, 130 U. S. 177, 187, 32 L. Ed. 899; Union Pac. R. Co. *v.* Cheyenne, 113 U. S. 516, 525, 28 L. Ed. 1098.

70. **When equity will entertain.**—Arkansas Bldg., etc., Ass'n *v.* Madden, 175 U. S. 269, 274, 44 L. Ed. 159; State Railroad Tax Cases, 92 U. S. 575, 23 L. Ed. 663; Union Pac. R. Co. *v.* Cheyenne, 113 U. S. 516, 525, 28 L. Ed. 1098; Lyon *v.* Alley, 130 U. S. 177, 187, 32 L. Ed. 899; Milwaukee *v.* Kœffler, 116 U. S. 219, 224, 29 L. Ed. 612; Hannewinkle *v.* Georgetown, 15 Wall. 547, 548, 21 L. Ed. 231; Cummings *v.* National Bank, 101 U. S. 153, 157, 25 L. Ed. 903; Pelton *v.* National Bank, 101 U. S. 143, 25 L. Ed. 901.

A bill to restrain the collection of a tax cannot be maintained on the sole ground of the illegality of the tax. There must be an allegation of fraud; that it creates a cloud upon the title; that there is apprehension of multiplicity of suits, or the allegation of some cause presenting a case of equity jurisdiction. There exists no such cloud upon the title as justified the interference of a court of equity, where the proceedings are void upon their face. Dows *v.* Chicago, 11 Wall. 108, 109, 20 L. Ed. 65; Hannewinkle *v.* Georgetown, 15 Wall. 547, 21 L. Ed. 231.

This rule is founded on the principle that the levy of taxes is a legislative and not a judicial function, and the court can neither make nor cause to be made a new assessment if the one complained of be erroneous, and also in the necessity that the taxes, without which the state could not exist, should be regularly and promptly paid into its treasury. State Railroad Tax Cases, 92 U. S. 575, 23 L. Ed. 663.

Quære: Whether the same rigid rule against equitable relief would apply to taxes levied solely by municipal corporations for corporate purposes as that here applied to state taxes. Probably not. State Railroad Tax Cases, 92 U. S. 575, 23 L. Ed. 663.

71. **Equitable grounds affording relief.**—See post, "Multiplicity of Suits," V, A, 3, b; "Irreparable Injury—Not Compensated in Damages," V, A, 3, c, (2), "Cloud on Title," V, A, 3, e; "Offer to Do Equity," V, A, 4, b.

For a full and comprehensive treatment of injunctions against illegal taxation, see the title TAXATION.

72. **Interstate commerce cases.**—United

b. *Multiplicity of Suits.*—It is universally admitted that an injunction will issue to suppress oppressive or interminable litigation or to prevent multiplicity of suits.[73] This is one of the special grounds of equity jurisdiction.[74] A party is entitled to an injunction where the consummation of an act may result in many actions at law against him; his remedy at law, in such case is wholly inadequate.[75]

Act Doing Common Injury.—Although many persons may be allowed to unite in a bill to restrain the commission of an act which would injure them all in a similar way, an injunction will be refused where no common right or title is involved and where there is no community of interest in the subject matter.[76]

c. *Nature of Injury Giving Equity Jurisdiction*—(1) *Reasonable Apprehension of Injury.*—The anticipation and prevention of threatened injury is a valuable feature of equity jurisdiction.[77] However, equity does not interfere simply to restrain a possible future violation of law;[78] the injury must be impending

States *v.* Trans-Missouri Freight Ass'n, 166 U. S. 290, 343, 41 L. Ed. 1007.

The subject is fully and ably discussed in the case of In re Debs, 158 U. S. 564, 39 L. Ed. 1092. See, also, Cincinnati, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 184, 40 L. Ed. 935; Texas, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 197, 40 L. Ed. 940. See the title INTERSTATE AND FOREIGN COMMERCE.

73. Multiplicity of suits.—Dows *v.* Chicago, 11 Wall. 108, 109, 20 L. Ed. 65; State Railroad Tax Cases, 92 U. S. 575, 23 L. Ed. 663; National Bank *v.* Kimball, 103 U. S. 732, 26 L. Ed. 469; Hannewinkle *v.* Georgetown, 15 Wall. 547, 21 L. Ed. 231; Union Pac. R. Co. *v.* Cheyenne, 113 U. S. 516, 28 L. Ed. 1098; Corbus *v.* Alaska Treadwell Min. Co., 187 U. S. 455, 47 L. Ed. 256; Milwaukee *v.* Kœffler, 116 U. S. 219, 29 L. Ed. 612; Pacific Steam Whaling Co. *v.* United States, 187 U. S. 447, 47 L. Ed. 253; Pittsburgh, etc., Railway *v.* Board of Public Works, 172 U. S. 32, 43 L. Ed. 354; Shelton *v.* Platt, 139 U. S. 591, 35 L. Ed. 273; Allen *v.* Pullman's Palace Car Co., 139 U. S. 658, 35 L. Ed. 303; Pacific Express Co. *v.* Seibert, 142 U. S. 339, 35 L. Ed. 1035; Cruickshank *v.* Bidwell, 176 U. S. 73, 44 L. Ed. 377; Indiana Mfg. Co. *v.* Kœhne, 188 U. S. 681, 47 L. Ed. 651; Missouri *v.* Illinois, 180 U. S. 208, 45 L. Ed. 497; Cummings *v.* National Bank, 101 U. S. 153, 156, 25 L. Ed. 903; Pelton *v.* National Bank, 101 U. S. 143, 25 L. Ed. 901; Arkansas Bldg., etc., Ass'n *v.* Madden, 175 U. S. 269, 272, 44 L. Ed. 159; Ogden City *v.* Armstrong, 168 U. S. 224, 239, 42 L. Ed. 444; Ewing *v.* St. Louis, 5 Wall. 413, 418, 18 L. Ed. 657; McChord *v.* Louisville, etc., R. Co., 183 U. S. 483, 46 L. Ed. 289; Mugler *v.* Kansas, 123 U. S. 623, 673, 31 L. Ed. 205; Fargo *v.* Hart, 193 U. S. 490, 503, 48 L. Ed. 761; Equator Co. *v.* Hall, 106 U. S. 86, 87, 27 L. Ed. 114; Parker *v.* Winnipiseogee Lake Cotton, etc., Co., 2 Black 545, 17 L. Ed. 333; Kessler *v.* Eldred, 206 U. S. 285, 289, 51 L. Ed. 1065; Insurance Co. *v.* Bailey, 13 Wall. 616, 20 L. Ed. 501.

74. Special head of equity jurisdiction.—Insurance Co. *v.* Bailey, 13 Wall. 616, 20 L. Ed. 501; Dows *v.* Chicago, 11 Wall. 108, 110, 20 L. Ed. 65. See the titles EQUITY, vol. 5, p. 803; MULTIPLICITY OF SUITS.

75. Consummation of act resulting in many suits.—See Detroit *v.* Detroit Citizens' St. R. Co., 184 U. S. 368, 46 L. Ed. 592; Cleveland *v.* Cleveland City R. Co., 194 U. S. 517, 48 L. Ed. 1102, where the enforcement of an ordinance reducing rates of fare was restrained.

And so a court of equity may restrain the enforcement of an unconstitutional freight rate law. Smyth *v.* Ames, 169 U. S. 466, 42 L. Ed. 819.

Where the case is one of a continuing trespass, involving injury of a permanent nature, a suit at law can only determine the particular wrong occurring on a particular occasion, and will not reach other wrongs of like character that will occur almost every hour of each day. A court of equity is alone competent to meet such an unusual emergency, and by a comprehensive decree determine finally and once for all the entire controversy between the parties—thus avoiding a multiplicity of suits and conserving the public interests. No remedy at law would be so complete or efficacious as a suit in equity in such a case as this one. Donovan *v.* Pennsylvania Co., 199 U. S. 279, 304, 50 L. Ed. 192; Coosaw Min. Co. *v.* South Carolina, 144 U. S. 550, 36 L. Ed. 537; Smyth *v.* Ames, 169 U. S. 466, 517, 42 L. Ed. 819. See the title TRESPASS.

76. Act doing common injury.—Kirwan *v.* Murphy, 189 U. S. 35, 47 L. Ed. 698; Beatty *v.* Kurtz, 2 Pet. 566, 585, 7 L. Ed. 521.

77. Anticipation and prevention of injury.—Vicksburg *v.* Vicksburg Waterworks Co., 202 U. S. 453, 50 L. Ed. 1102; Vicksburg Waterworks Co. *v.* Vicksburg, 185 U. S. 65, 46 L. Ed. 808; Penn Mut. Life Ins. Co. *v.* Austin, 168 U. S. 685, 42 L. Ed. 626; Parker *v.* Winnipiseogee Lake Cotton, etc., Co., 2 Black 545, 552, 17 L. Ed. 333.

78. Future violation.—United States *v.*

and threatened, so as to be averted only by the issuance of preventive process.[79]

(2) *Irreparable Injury—Not Compensated in Damages.*—It may be stated as a general rule that in order that a threatened injury to one's rights may furnish ground for equitable interference by injunction, such injury must be one which in its nature is irreparable and not susceptible of compensation by damages, recoverable at law.[80] When irreparable injury is spoken of, it is not meant that the injury is beyond the possibility of repair, or beyond the possibility of com-

Trans-Missouri Freight Ass'n, 166 U. S. 290, 309, 41 L. Ed. 1007. See Adler *v.* Fenton, 24 How. 407, 16 L. Ed. 696.

The legislature of Virginia incorporated the stockholders of the Richmond, Fredericksburg, and Potomac Railroad Company, and in the charter pledged itself not to allow any other railroad to be constructed between those places, or any portion of that distance; the probable effect would be to diminish the number of passengers traveling between the one city and the other upon the railroad authorized by that act, or to compel the said company, in order to retain such passengers, to reduce the passage money. Afterwards the legislature incorporated the Louisa Railroad Company, whose road came from the west and struck the first-named company's track nearly at right angles, at some distance from Richmond; and the legislature authorized the Louisa Railroad Company to cross the track of the other, and continue their road to Richmond. In this latter grant, the obligation of the contract with the first company is not impaired within the meaning of the constitution of the United States. In the first charter, there was an implied reservation of the power to incorporate companies to transport other articles than passengers; and if the Louisa Railroad Company should infringe upon the rights of the Richmond company, there would be a remedy at law, but the apprehension of it will not justify an injunction to prevent them from building their road. Richmond, etc., R. Co. *v.* Louisa R. Co., 13 How. 71, 14 L. Ed. 55. See Jefferson Branch Bank *v.* Skelley, 1 Black 436, 446, 17 L. Ed. 173.

If the proper officer gives a permit for the erection of certain specially described buildings in Washington city, a clear case of danger to the public safety, or of departure from the permit, must be made before the party acting under it can be arrested midway in the construction of them, and required to remove them. Dainese *v.* Cooke, 91 U. S. 580, 23 L. Ed. 251.

79. Injury impending and threatened.—Truly *v.* Wanzer, 5 How. 141, 12 L. Ed. 88; Missouri *v.* Illinois, 180 U. S. 208, 248, 45 L. Ed. 497; McChord *v.* Louisville, etc., R. Co., 183 U. S. 483, 46 L. Ed. 289; Railroad Commission Cases, 116 U. S. 307, 29 L. Ed. 636; New Orleans Waterworks Co. *v.* New Orleans, 164 U. S. 471, 472, 41 L. Ed. 518.

An injunction will be granted where irreparable injury is threatened or impending. Vicksburg Waterworks Co. *v.* Vicksburg, 185 U. S. 65, 46 L. Ed. 808; Peik *v.* Chicago, etc., R. Co., 94 U. S. 164, 24 L. Ed. 97.

In order to support a motion for an injunction the bill should set forth a case of probable danger to plaintiff's rights, without the special interposition of the court. Georgia *v.* Brailsford, 2 Dall. 402, 1 L. Ed. 433; Georgia *v.* Brailsford, 2 Dall. 415, 1 L. Ed. 438.

80. Irreparable injury.—Dows *v.* Chicago, 11 Wall. 108, 109, 20 L. Ed. 65; Pennsylvania *v.* Wheeling, etc., Bridge Co., 13 How. 518, 14 L. Ed. 249; State Railroad Tax Cases, 92 U. S. 575, 23 L. Ed. 663; National Bank *v.* Kimball, 103 U. S. 732, 26 L. Ed. 469; Hannewinkle *v.* Georgetown, 15 Wall. 547, 21 L. Ed. 231; Union Pac. R. Co. *v.* Cheyenne, 113 U. S. 516, 28 L. Ed. 1098; Corbus *v.* Alaska Treadwell Min. Co., 187 U. S. 455, 47 L. Ed. 256; Milwaukee *v.* Koeffler, 116 U. S. 219, 29 L. Ed. 612; Pacific Steam Whaling Co. *v.* United States, 187 U. S. 447, 47 L. Ed. 253; Pittsburgh, etc., Railway *v.* Board of Public Works, 172 U. S. 32, 43 L. Ed. 354; Shelton *v.* Platt, 139 U. S. 591, 35 L. Ed. 273; Allen *v.* Pullman's Palace Car Co., 139 U. S. 658, 35 L. Ed. 303; Pacific Express Co. *v.* Seibert, 142 U. S. 339, 35 L. Ed. 1035; Cruickshank *v.* Bidwell, 176 U. S. 73, 44 L. Ed. 377; Indiana Mfg. Co. *v.* Koehne, 188 U. S. 681, 47 L. Ed. 651; Missouri *v.* Illinois, 180 U. S. 208, 45 L. Ed. 497; American School *v.* McAnnulty, 187 U. S. 94, 110, 47 L. Ed. 90; Arkansas Bldg., etc., Ass'n *v.* Madden, 175 U. S. 269, 272, 44 L. Ed. 159; Ogden City *v.* Armstrong, 168 U. S. 224, 239, 42 L. Ed. 444; Ewing *v.* St. Louis, 5 Wall. 413, 418, 18 L. Ed. 657; Mugler *v.* Kansas, 123 U. S. 623, 673, 31 L. Ed. 205; Parker *v.* Winnipiseogee Lake Cotton, etc., Co., 2 Black 545, 551, 17 L. Ed. 333; McChord *v.* Louisville, etc., R. Co., 183 U. S. 483, 46 L. Ed. 289; Fargo *v.* Hart, 193 U. S. 490, 503, 48 L. Ed. 761; Erhardt *v.* Boaro, 113 U. S. 537, 538, 28 L. Ed. 1113; Cunningham *v.* Macon, etc., R. Co., 109 U. S. 446, 454, 27 L. Ed. 992; Walla Walla *v.* Walla Walla Water Co., 172 U. S. 1, 12, 43 L. Ed. 341; Lockhart *v.* Leeds, 195 U. S. 427, 438, 49 L. Ed. 263; Vicksburg Waterworks Co. *v.* Vicksburg, 185 U. S. 65, 82, 46 L. Ed. 808; Osborn *v.* United States Bank, 9 Wheat. 738, 6 L. Ed. 204; Griffing *v.* Gibb, 2 Black 519, 17

pensation in damages, but it must be of such constant and frequent recurrence

L. Ed. 353; Kirwan *v.* Murphy, 189 U. S. 35, 47 L. Ed. 698; Insurance Co. *v.* Bailey, 13 Wall. 616, 20 L. Ed. 501; Dainese *v.* Cooke, 91 U. S. 580, 23 L. Ed. 251.

If injuries are threatened, and a court of equity can be satisfied that irreparable injuries may be occasioned by careless or wanton action on the part of defendants, a remedy by injunction can be had. Texas, etc., R. Co. *v.* Interstate Transp. Co., 155 U. S. 585, 589, 31 L. Ed. 271.

Whether, upon a petition or bill asserting that the prior rights of the first appropriator have been invaded, a court of equity will interfere to restrain the acts of the party complained of, will depend upon the character and extent of the injury alleged, whether it be irremediable in its nature, whether an action at law would afford adequate remedy, whether the parties are able to respond for the damages resulting from the injury, and other considerations which ordinarily govern a court of equity in the exercise of its preventive process of injunction. Atchison *v.* Peterson, 20 Wall. 507, 22 L. Ed. 414.

Deterioration and destruction of water-flow.—Where a prior appropriation of water for mining purposes filed a bill to restrain other parties above him, subsequently appropriating the water, who it is alleged have deteriorated the water and destroyed the flow, it was held that as the deterioration was very slight, not rendering the water less useful for the purposes, and as no additional labor was imposed on complainant on account of such deterioration, no injunction should be granted. Atchison *v.* Peterson, 20 Wall. 507, 22 L. Ed. 414.

A bill was filed by Kansas to enjoin Colorado from diminishing the flow of the Arkansas River by appropriating its waters for irrigation purposes. Kansas had recognized the right to appropriate the waters of a stream to such use, subject to the condition of an equitable division between riparian proprietors. It was held that complainant was not entitled to an injunction in view of the fact that the act of the defendant has resulted in the reclamation of vast areas of arid land within her borders, while on the other hand the injury, though perceptible as to some parts of the land, has worked little or no injury to the great body of the land within complainant's borders. Kansas *v.* Colorado, 206 U. S. 46, 51 L. Ed. 956.

Transfer of specific property.—A court of equity will interpose by injunction, to prevent the transfer of a specific thing, which, if transferred, will be irretrievably lost to the owner; such as negotiable securities and stocks. Osborn *v.* United States Bank, 9 Wheat. 738, 6 L. Ed. 204; Louisiana *v.* Jumel, 107 U. S. 711, 725, 27 L. Ed. 448.

Prevention of destruction of corporate franchise.—An injunction will be granted, to prevent the franchise of a corporation from being destroyed, as well as to restrain a party from violating it, by attempting to participate in its exclusive privileges. Osborn *v.* United States Bank, 9 Wheat. 738, 6 L. Ed. 204. See the title CORPORATIONS, vol. 4, p. 621.

The injury done, by denying to the corporation the exercise of its franchise, is as difficult to calculate as an injury done by participating in an exclusive privilege. The single act of levying the tax, in the first instance, is the cause of an action at law; but that affords a remedy only for the single act, and is not equal to the remedy in chancery, which prevents its repetition, and protects the privilege. Osborn *v.* United States Bank, 9 Wheat. 738, 841, 6 L. Ed. 204.

"The appropriation of private property to public use, under color of law, but in fact without authority, is such an invasion of private rights as may be assumed to be essentially irremediable, if indeed, relief may not be awarded ex debito justitiæ." Osborne *v.* Missouri, etc., R. Co., 147 U. S. 248, 258, 37 L. Ed. 155.

Osborne *v.* Missouri, etc., R. Co., 147 U. S. 248, 37 L. Ed. 155, was an action to enjoin the construction of a track along a public street, because of irreparable damage to be thereby inflicted on the plaintiff. The court, following the decision in McElroy *v.* Kansas City, 21 Fed. Rep. 257, said: "If the defendant had an ultimate right to do the act sought to be restrained, but only upon some condition precedent, and compliance with the condition was within the power of the defendant, the injunction would almost universally be granted until the condition was complied with; but if the means of complying with the condition were not at defendant's command, then the court would adjust its order so as to give complainants substantial benefit of the condition, while not restraining defendant from the exercise of his ultimate rights." Western Union Tel. Co. *v.* Pennsylvania R. Co., 195 U. S. 540, 578, 49 L. Ed. 312.

Digging lead ore from the lead mines upon the public lands in the United States, is such a waste as entitles the United States to a writ of injunction to restrain it. United States *v.* Gear, 3 How. 120, 11 L. Ed. 523, cited in Cotton *v.* United States, 11 How. 229, 232, 13 L. Ed. 675.

Injury fugitive and temporary.—In Kirwan *v.* Murphy, 189 U. S. 35, 47 L. Ed. 698, the injury was held to be of so fugitive and temporary a character as to lack such elements of irreparable injury as would furnish the basis for equity interposition.

The establishment of general harbor lines, of itself, takes or injures no one's property, and cannot, consistently with

that no fair or reasonable redress can be had therefor in a court of law.[81] An injunction will not issue to restrain an act, the injurious consequences of which are merely trifling.[82] Where money damages will constitute an adequate compensation for the injury impending or inflicted, an injunction will not issue.[83] A diminution of the value of the premises without irreparable injury is no ground for interference.[84]

Collateral and Consequential Damages.—Although legal compensation may be recoverable for actual injury done to property, yet an injunction may issue to prevent collateral and consequential damages not referred by such compensation.[85]

the interests of the public, or with the principles of equity, be restrained by injunction. Prosser *v.* Northern Pac. Railroad, 152 U. S. 59, 65, 38 L. Ed. 352.

Restraining lessor from ousting lessee.—Where a railroad company entered upon the use and occupation of land under a lease with a view to its purchase when it could properly be effected, the lessor having no general or absolute power of sale, it is held that such railroad company is entitled to an injunction restraining the lessor from any attempt to oust it from the land, for a reasonable period, in order to permit condemnation proceedings to be instituted and prosecuted. Winslow *v.* Baltimore, etc., R. Co., 188 U. S. 646, 47 L. Ed. 635. See the titles EMINENT DOMAIN, vol. 5, p. 746; LANDLORD AND TENANT.

Public nuisance.—Wherever a public nuisance is productive of a specific injury to an individual, he may make it the foundation of an action at law, and if the injury would be irreparable, a court of equity will interpose by injunction. Gilman *v.* Philadelphia, 3 Wall. 713, 722, 18 L. Ed. 96; Pennsylvania *v.* Wheeling, etc., Bridge Co., 13 How. 518, 14 L. Ed. 249. See the title NUISANCES.

Improvement of highways.—The public having control over a highway may determine the manner in which it shall be improved, and, as a general rule, such improvement cannot be enjoined by an abutting lot or landowner, whatever may be his right to compensation growing out of the injury which such manner of improvement may bring to his property. This being true of ordinary highways, a fortiori is it true in respect to property which was not reserved for a highway alone, but for other public uses. Burlington Gas Light Co. *v.* Burlington, etc., R. Co., 165 U. S. 370, 372, 41 L. Ed. 749.

81. **Meaning of "irreparable injury."**—Donovan *v.* Pennsylvania Co., 199 U. S. 279, 305, 50 L. Ed. 192.

82. **Trifling injury.**—Consolidated Canal Co. *v.* Mesa Canal Co., 177 U. S. 296, 302, 44 L. Ed. 777; Parker *v.* Winnipiseogee Lake Cotton, etc., Co., 2 Black 545, 552, 17 L. Ed. 333.

83. **Money damages.**—Cruickshank *v.* Bidwell, 176 U. S. 73, 44 L. Ed. 377; Manigault *v.* Springs, 199 U. S. 473, 486, 50 L. Ed. 274. See Otis Co. *v.* Ludlow Mfg. Co., 201 U. S. 140, 154, 50 L. Ed. 696.

Where there is no direct taking of the estate itself, in whole or in part, and the injury complained of is the infliction of damage in respect to the complete enjoyment thereof, a court of equity must be satisfied that the threatened damage is substantial and the remedy at law in fact inadequate before restraint will be laid upon the progress of a public work. And if the case made discloses only a legal right to recover damages rather than to demand compensation, the court will decline to interfere. Osborne *v.* Missouri, etc., R. Co., 147 U. S. 248, 249, 37 L. Ed. 155.

In Manigault *v.* Springs, 199 U. S. 473, 486, 50 L. Ed. 274, where a bill was filed to enjoin the erection of a dam until damages were paid, the court say: "In view of the incidental character of the damage probably resulting to plaintiff's land from the erection of this dam, and the careful provision of the act that the defendants shall be liable for such damage, we do not think, at least in the absence of an allegation that the defendants are financially irresponsible, that a court of equity would be authorized to enjoin the erection until the damages, which, if they exist at all, must be very difficult of ascertainment, shall be paid."

84. **Diminution of value of premises.**—Parker *v.* Winnipiseogee Lake Cotton, etc., Co., 2 Black 545, 552, 17 L. Ed. 333.

85. **Collateral and consequential damages.**—Loss of trade, destruction of credit, and failure of business prospects, are collateral or consequential damages, which it is claimed would result from the trespass, but for which compensation cannot be awarded in a trial at law. To prevent a consequence like this, a court of equity steps in, arrests the proceedings in limine; brings the parties before it; hears their allegations and proofs, and decrees either that the proceedings shall be unrestrained, or else perpetually enjoined. The absence of a plain and adequate remedy at law affords the only test of equity jurisdiction, and the application of this principle to a particular case must depend altogether upon the character of the case, as disclosed in the pleadings. Watson *v.* Sutherland, 5 Wall. 74, 79, 18 L. Ed. 580; North *v.* Peters, 138 U. S. 271, 281, 34 L.

Continuing or Permanent Injury.—An injunction will be granted where injury from its continuance or permanent mischief will occasion constantly recurring grievance, which cannot be removed or corrected otherwise than by such a preventive remedy.[86]

(3) *Where Act Sought to Be Enjoined Completed.*—In its general nature, an injunction is a preventive remedy. The general rule is that an injunction will not issue for the correction of wrongs already perpetrated, but that the complainant must go elsewhere for redress.[87]

d. *Fraud, Accident or Mistake.*—Equity has always had jurisdiction of fraud, misrepresentation, and concealment; and it does not depend on discovery.[88] A party is clearly entitled to an injunction in case of accident, fraud or mistake, injuring his rights.[89] An injunction will issue to prevent an inequitable inter-

Ed. 936; Walla Walla *v.* Walla Walla Water Co., 172 U. S. 1, 12, 43 L. Ed. 341.

Where a creditor of A. levied on goods, a miscellaneous stock in retail trade, suitable for the then current season, and intended to be paid for out of the sales—in the possession of B., a young man recently established in trade and doing a profitable business, alleging that they had been conveyed to B. by A. to defeat his creditors—the court, upon being satisfied that they had not been so conveyed, held that the execution had been rightly enjoined; that as at law the measure of damages, if the property were not sold, could not extend beyond the injury done to it, or, if sold, to the value of it when taken, with interest from the time of the taking down to the trial—loss of trade, destruction of credit, and failure of business prospects—commercial ruin, in short—collateral or consequential damages, which might nevertherless ensue, would not be compensated for at law, but were properly prevented in equity. Watson *v.* Sutherland, 5 Wall. 74, 18 L. Ed. 580.

A court of equity will interfere when the injury by the wrongful act of the adverse party will be irreparable, as where the loss of health, the loss of trade, the destruction of the means of subsistence, or the ruin of the property must ensue. Parker *v.* Winnipiseogee Lake Cotton, etc., Co., 2 Black 545, 551, 17 L. Ed. 333.

86. Continuing or permanent injury.—Parker *v.* Winnipiseogee Lake Cotton, etc., Co., 2 Black 545, 551, 17 L. Ed. 333; Insurance Co. *v.* Bailey, 13 Wall. 616, 20 L. Ed. 501; Donovan *v.* Pennsylvania Co., 199 U. S. 279, 50 L. Ed. 192.

87. Correction of wrongs perpetrated.—Northern Indian R. Co. *v.* Michigan Cent. R. Co., 15 How. 233, 242, 14 L. Ed. 674; Lacassagne *v.* Chapuis, 144 U. S. 119, 124, 36 L. Ed. 368. See ante, "Prohibitory and Mandatory," II, B.

88. Fraud, misrepresentation, etc.—Jones *v.* Bolles, 9 Wall. 364, 369, 19 L. Ed. 734.

Any authorized attempt by one partner to oust the other from the position and rights assigned to him by the contract was, therefore, not only a breach of their agreement, but a fraud upon the relation they had assumed to each other. Such a wrong it is the province of the court of equity to prevent. A chancellor will interfere by injunction to restrain one partner from violating the rights of his copartner, even when dissolution of the partnership is not necessarily contemplated. Marble Co. *v.* Ripley, 10 Wall. 339, 351, 19 L. Ed. 955.

Where an agreement against which a complainant in equity asks to have relief is perpetual in its nature, and the keeping of it on foot is a fraud against the party complaining, so that the only effectual relief against it is to have it annulled, the case is one for equity, not for law. Jones *v.* Bolles, 9 Wall. 364, 19 L. Ed. 734.

89. Right to injunctive process.—Dows *v.* Chicago, 11 Wall. 108, 20 L. Ed. 65; State Railroad Tax Cases, 92 U. S. 575, 23 L. Ed. 663; National Bank *v.* Kimball, 103 U. S. 732, 26 L. Ed. 469; Hannewinkle *v.* Georgetown, 15 Wall. 547, 21 L. Ed. 231; Union Pac. R. Co. *v.* Cheyenne, 113 U. S. 516, 28 L. Ed. 1098; Corbus *v.* Alaska Treadwell Min. Co., 187 U. S. 455, 47 L. Ed. 256; Milwaukee *v.* Kœffler, 116 U. S. 219, 29 L. Ed. 612; Lockhardt *v.* Leeds, 195 U. S. 427, 49 L. Ed. 263; Pacific Steam Whaling Co. *v.* United States, 187 U. S. 447, 47 L. Ed. 253; Shelton *v.* Platt, 139 U. S. 591, 35 L. Ed. 273; Allen *v.* Pullman's Palace Car Co., 139 U. S. 658, 35 L. Ed. 303; Pacific Express Co. *v.* Seibert, 142 U. S. 339, 35 L. Ed. 1035; Pittsburg, etc., Railway *v.* Board of Public Works, 172 U. S. 32, 43 L. Ed. 354; Cruickshank *v.* Bidwell, 176 U. S. 73, 44 L. Ed. 377; Indiana Mfg. Co. *v.* Kœhne, 188 U. S. 681, 47 L. Ed. 651; Crim *v.* Handley, 94 U. S. 652, 653, 24 L. Ed. 216; Davis *v.* Tileston, 6 How. 114, 12 L. Ed. 366; Insurance Co. *v.* Bailey, 13 Wall. 616, 20 L. Ed. 501; Cage *v.* Cassidy, 23 How. 109, 16 L. Ed. 430; Streitwolf *v.* Streitwolf, 181 U. S. 179, 182, 45 L. Ed. 807.

Bills of exchange or promissory notes fraudulently procured may be enjoined and practically divested of their negotiability. Insurance Co. *v.* Bailey, 13 Wall. 616, 20 L. Ed. 501; Hungerford *v.* Sigerson, 20 How. 156, 161, 15 L. Ed. 869.

Judgment obtained by fraud.—A judgment obtained without proper and sufficient notice, is fraudulent and will be enjoined by a court of equity. Earle *v.*

ference with and a fraud upon plaintiff's rights by the defendant.[90]

e. *Cloud on Title.*—Equity will interfere by injunction to prevent a cloud on complainant's title.[91] Equity will enjoin written instruments, procured by false representation or by fraudulent suppression of the truth, where they operate as a cloud upon the title of the opposite party,[92] and where the enforcement of an illegal tax would throw a cloud on complainant's title, the aid of equity can be invoked.[93] The issuance of patents by the governor and the commission of the general land office, will be enjoined where such acts would place a cloud upon the title of the complainant.[94]

f. *Unconstitutionality of Statute.*—It is settled that the mere fact that a law is unconstitutional does not entitle a party to relief by injunction against proceedings in compliance therewith, but it must appear that he has no adequate

McVeigh, 91 U. S. 503, 23 L. Ed. 398; Hendrickson *v.* Hinckley, 17 How. 443, 15 L. Ed. 124; Crim *v.* Handley, 94 U. S. 652, 24 L. Ed. 216.

A court of equity will enjoin a judgment at law where it is shown that the complainant was prevented from resorting to a legal defense by fraud or unavoidable accident, without any fault or negligence on his part. Johnson *v.* Christian, 128 U. S. 374, 381, 32 L. Ed. 412; Marine Ins. Co. *v.* Hodgson, 7 Cranch 332, 336, 3 L. Ed. 362; Hendrickson *v.* Hinckley, 17 How. 443, 445, 15 L. Ed. 124; Crim *v.* Handley, 94 U. S. 652, 24 L. Ed. 216; Phillips *v.* Negley, 117 U. S. 665, 675, 29 L. Ed. 1013; Knox County *v.* Harshman, 133 U. S. 152, 154, 33 L. Ed. 586; Leeds *v.* Marine Ins. Co., 6 Wheat. 565, 5 L. Ed. 332; Scammon *v.* Kimball, 92 U. S. 362, 23 L. Ed. 483; Embry *v.* Palmer, 107 U. S. 3, 27 L. Ed. 346; Marshall *v.* Holmes, 141 U. S. 589, 35 L. Ed. 870; North Chicago Rolling Mill Co. *v.* St. Louis Ore, etc., Co., 152 U. S. 596, 615, 38 L. Ed. 565; Brown *v.* County of Buena Vista, 95 U. S. 157, 159, 24 L. Ed. 422. See, also, United States *v.* Throckmorton, 98 U. S. 61, 65, 25 L. Ed. 93.

Where a bill in equity sought to enjoin a judgment, and charged that the complainant had a good defense which he did not know of at the time when judgment at law was rendered against him, and charged also that he was entitled to pay the debt in the depreciated notes of a particular bank, of which advantage it was attempted to deprive him by fraud and collusion, and this bill was demurred to, it was error in the court below to sustain the demurrer. Davis *v.* Tileston, 6 How. 114, 12 L. Ed. 366. See the titles FRAUD AND DECEIT, ante, p. 394; JUDGMENTS AND DECREES; MISTAKE AND ACCIDENT.

90. Inequitable interference.—In Florida *v.* Anderson, 91 U. S. 667, 23 L. Ed. 290, an interference by holders of railway bonds was enjoined at the instance of the state, where the trustees of the internal improvement fund to secure the payment of the railway bonds had sold the road and were pursuing their lawful remedies to subject the road to the payment of the purchase money.

91. Cloud on title.—Dows *v.* Chicago, 11 Wall. 108, 20 L. Ed. 65; State Railroad Tax Cases, 92 U. S. 575, 23 L. Ed. 663; National Bank *v.* Kimball, 103 U. S. 732, 26 L. Ed. 469; Hannewinkle *v.* Georgetown, 15 Wall. 547, 21 L. Ed. 231; Union Pac. R. Co. *v.* Cheyenne, 113 U. S. 516, 28 L. Ed. 1098; Corbus *v.* Alaska Treadwell Min. Co., 187 U. S. 455, 47 L. Ed. 256; Wickliffe *v.* Owings, 17 How. 47, 15 L. Ed. 44; Shelton *v.* Platt, 139 U. S. 591, 35 L. Ed. 273; Allen *v.* Pullman's Palace Car Co., 139 U. S. 658, 35 L. Ed. 303; Pacific Express Co. *v.* Seibert, 142 U. S. 339, 35 L. Ed. 1035; Cruickshank *v.* Bidwell, 176 U. S. 73, 44 L. Ed. 377; Indiana Mfg. Co. *v.* Koehne, 188 U. S. 681, 47 L. Ed. 651; Detroit *v.* Detroit Citizens' St. R. Co., 184 U. S. 368, 46 L. Ed. 592; In re Tyler, 149 U. S. 164, 37 L. Ed. 689; Rouse *v.* Letcher, 156 U. S. 47, 31 L. Ed. 341; White *v.* Ewing, 159 U. S. 36, 40 L. Ed. 67; Ogden City *v.* Armstrong, 168 U. S. 224, 239, 42 L. Ed. 444; Blair *v.* Chicago, 201 U. S. 400, 449, 50 L. Ed. 801. See the title QUIETING TITLE.

92. Written instrument operating as cloud.—Insurance Co. *v.* Bailey, 13 Wall. 616, 20 L. Ed. 501.

93. Illegal tax.—Dows *v.* Chicago, 11 Wall. 108, 20 L. Ed. 65; Union Pac. R. Co. *v.* Cheyenne, 113 U. S. 516, 525, 28 L. Ed. 1098; Lyon *v.* Alley, 130 U. S. 177, 187, 32 L. Ed. 899. See the title TAXATION.

94. Issuance of patents enjoined.—"In Davis *v.* Gray, 16 Wall. 203, 21 L. Ed. 447, the receiver of a land-grant railroad obtained an injunction against the governor and the commissioner of the general land office of Texas to restrain them from encumbering, by patents to others, lands which had been contracted to the railroad company. The legal title was in the state, but the equitable title in the company. The specific tracts in dispute were, by the contract which had been made, segregated from the public domain and set apart for the company. The case rests on the same principle it would if patents had been actually issued to the company, and the state, through its officers, was attempting to place a cloud on the title by granting subsequent patents to others." Louisiana *v.* Jumel, 107 U. S. 711, 725, 27

remedy by the ordinary processes of the law or that the case falls under some recognized head of equity jurisdiction.[95]

4. Conduct of Plaintiff as Affecting Right—a. *In General.*—The right, whatever it may be and from what source derived, must be not only one not protected by legal title, but in and of itself appealing to the conscience of a chancellor. A court of equity acts only when and as conscience commands, and if the conduct of the plaintiff be offensive to the dictates of natural justice, then, whatever may be the rights he possesses and whatever use he may make of them in a court of law, he will be held remediless in a court of equity.[96]

b. *Offer to Do Equity.*—The rule that he who seeks the aid of equity must do equity, applies as well to an applicant for an injunction as to any other person.[97]

Taxation—Tender of Amount Justly Due.—As to necessity for tender as a condition precedent to maintaining suit to enjoin the collection of a tax, in whole or in part, see the title Taxation.

c. *Laches and Negligence*—(1) *In General.*—Where a party has failed to make a proper defense through negligence, a court of equity will not enjoin the

L. Ed. 448. See the title PUBLIC LANDS.

95. Unconstitutionality of statute.—Cruickshank *v.* Bidwell, 176 U. S. 73, 80, 44 L. Ed. 377; Shelton *v.* Platt, 139 U. S. 591, 35 L. Ed. 273; Allen *v.* Pullman's Palace Car Co., 139 U. S. 658, 35 L. Ed. 303; Pacific Express Co. *v.* Seibert, 142 U. S. 339, 35 L. Ed. 1035; Pittsburg, etc., Railway *v.* Board of Public Works, 172 U. S. 32, 43 L. Ed. 354; Arkansas Bldg., etc., Ass'n *v.* Madden, 175 U. S. 269, 44 L. Ed. 159.

"In Noble *v.* Union River, etc., R. Co., 147 U. S. 165, 37 L. Ed. 123, the jurisdiction was sustained, but the government raised no point as to the form of the remedy, and deprivation of a vested legal right of property, acquired before any suggestion that it could be taken away, was there threatened. And it appeared that the only remedy was through equity interposition. New Orleans *v.* Paine, 147 U. S. 261, 264, 37 L. Ed. 162. But we are unwilling to extend that precedent." Cruickshank *v.* Bidwell, 176 U. S. 73, 80, 44 L. Ed. 377.

96. Conduct of complainant.—Deweese *v.* Reinhard, 165 U. S. 386, 390, 41 L. Ed. 757. See the titles EQUITY, vol. 5, p. 803; MAXIMS.

Where, for the purpose of evading the payment of a tax on his money on deposit, which the law of a state required to be listed for taxation March 1 in each year, a party withdrew it February 28 from a bank where it was subject to his check, converted it into notes of the United States, and deposited them to his general credit March 3, and the state court passed a decree dismissing the bill in equity by him filed to restrain the collection of the tax thereon, held, that the decree was correct; and that, although such notes were exempt from taxation by or under state or municipal authority, a court of equity would not use its extraordinary powers to promote such a scheme devised for the purpose of enabling a party to escape his proportionate share of the burdens of taxation. Mitchell *v.* Board of Comm'rs, 91 U. S. 206, 23 L. Ed. 302; Shotwell *v.* Moore, 129 U. S. 590, 597, 32 L. Ed. 827.

"It is well settled that if a person wishes his trademark property to be protected by a court of equity, he must come into court with clean hands, and if it appears that the trademark for which he seeks protection is itself a misrepresentation to the public, and has acquired a value with the public by fraudulent misrepresentation in advertisements, all relief will be denied to him. This is the doctrine of the highest court of England, and no court has laid it down with any greater stringency than the supreme court of the United States. Manhattan Medicine Co. *v.* Wood, 108 U. S. 218, 27 L. Ed. 706." Worden *v.* California Fig Syrup Co., 187 U. S. 516, 535, 47 L. Ed. 282. See the title TRADEMARKS, TRADENAMES, AND UNFAIR COMPETITION.

97. Offer to do equity.—In Stanley *v.* Gadsby, 10 Pet. 521, 9 L. Ed. 518, it was held that a person seeking an injunction to the end that he might be delivered from usury, must do equity by paying the principal and legal interest. Whenever a complainant does not comply with the rule, by averring in his bill that he is ready and willing to pay the principal and interest, he can have no standing in a court of equity. See the titles EQUITY; vol. 5, p. 803; MAXIMS.

Where, in a lease of a water power, the lease provides in a plain way and with a specification of the rates for an abatement of rent for every failure of water, the tenant cannot, on a bill by him to enjoin a writ of possession by the landlord, after a recovery by him at law for forfeiture of the estate for nonpayment of rent reserved, set up a counterclaim for repairs to the water channel made necessary by the landlord's gross negligence.

judgment;[98] and the same rule applies where he voluntarily abstained from using the defense in the trial at law.[99] Even though a complainant were guilty of such delay in seeking relief upon infringement of his patent as to preclude him from obtaining an account of gains and profits, yet, if he were otherwise so entitled, an injunction against future infringement might properly be awarded.[1]

He is confined to the remedy specified in the lease; a covenant that a lessor will make repairs not being to be implied. In such a case, before he can ask relief from a forfeiture, he should at least tender the difference between the amount of rents due, and the amount which he could rightly claim by way of reduction for failure of water. Sheets *v.* Selden, 7 Wall. 416, 19 L. Ed. 166. See the titles COVENANTS, vol. 5, p. 5; LANDLORD AND TENANT.

If the requirements of the law had been complied with, or if the appellant had enforced the forfeiture by a recovery in ejectment, upon tender of the amount due with interest and costs at the proper time, relief would have been given; in the former case in equity by injunction, and in the latter by motion and stay of execution. Where it is necessary to take an account between the parties, no tender need be made before bringing the bill. This subject was fully examined in Sheets *v.* Selden, 7 Wall. 416, 420, 19 L. Ed. 166. Prout *v.* Roby, 15 Wall. 471, 477, 21 L. Ed. 58. See the title TENDER.

98. Laches—Failure to make defense at law.—Hungerford *v.* Sigerson, 20 How. 156, 161, 15 L. Ed. 869; Phillips *v.* Negley, 117 U. S. 665, 675, 29 L. Ed. 1013; Creath *v.* Sims, 5 How. 192, 12 L. Ed. 111; Sample *v.* Barnes, 17 How. 70, 14 L. Ed. 330; Crim *v.* Handley, 94 U. S. 652, 653, 24 L. Ed. 216; Hendrickson *v.* Hinckley, 17 How. 443, 445, 15 L. Ed. 124; Embry *v.* Palmer, 107 U. S. 3, 11, 27 L. Ed. 346; Walker *v.* Robbins, 14 How. 584, 14 L. Ed. 552; Marine Ins. Co. *v.* Hodgson, 7 Cranch 332, 3 L. Ed. 362; Cragin *v.* Lovell, 109 U. S. 194, 198, 27 L. Ed. 903; Jones *v.* League, 18 How. 76, 15 L. Ed. 263; Life Ins. Co. *v.* Bangs, 103 U. S. 780, 782, 26 L. Ed. 608.

A court of equity will not relieve against a judgment at law where the party seeking its aid has been guilty of laches or fault. Brown *v.* County of Buena Vista, 95 U. S. 157, 24 L. Ed. 422. See the titles JUDGMENT AND DECREES; LACHES.

Where the defendants in a suit at law had an opportunity to make their defense there, and failed to make it, they cannot be heard in a court of equity. It was adjudged in the case of Creath *v.* Sims, 5 How. 192, 204, 12 L. Ed. 111, that whenever a competent defense shall have existed at law, the party who may have neglected to use it will never be permitted to supply the omission and set it up by bill in chancery. "This court has never departed from the foregoing rule, nor allowed the circuit courts to depart from it in cases brought here. Nor can we do so without violating the sixteenth section of the judiciary act of 1789, in its true sense. Apparent aberrations may be found, but they are only apparent." Walker *v.* Robbins, 14 How. 584, 586, 14 L. Ed. 552.

99. Waiver of defense at law.—Certain claims of set-off existed which defendant purposely abstained from using in the trial at law. It was held if he voluntarily waived this defense, relying upon a separate action, he has no right now to ask a court of equity to interfere. Hendrickson *v.* Hinckley, 17 How. 443, 15 L. Ed. 124.

1. Infringement of patent—Effect of delay.—Menendez *v.* Holt, 128 U. S. 514, 523, 32 L. Ed. 526. See the title PATENTS.

"In McLean *v.* Fleming, 96 U. S. 245, 24 L. Ed. 828, there had been apparently a delay of about twenty years in instituting proceedings, but the court observed that 'equity courts will not, in general, refuse an injunction on account of delay in seeking relief, where the proof of infringement is clear, even though the delay may be such as to preclude the party from any right to an account for past profits.' An injunction was granted in this case, but it was held that by reason of inexcusable laches, the complainant was not entitled to an account of gains or profits." Saxlehner *v.* Eisner, etc., Co., 179 U. S. 19, 39, 45 L. Ed. 60.

"An effort was made in Menendez *v.* Holt, 128 U. S. 514, 32 L. Ed. 526, to obtain a reconsideration of the principle of McLean *v.* Fleming, so far as it was therein held that an injunction might be awarded, though the complainant were precluded by his delay from obtaining an account of gains and profits. But the chief justice observed: 'The intentional use of another's trademark is a fraud; and when the excuse is that the owner permitted such use, that excuse is disposed of by affirmative action to put a stop to it. Persistence then in the use is not innocent, and the wrong is a continuing one, demanding restraint by judicial interposition when properly invoked. Mere delay or acquiescence cannot defeat the remedy by injunction in support of the legal right, unless it has been continued so long and under such circumstances as to defeat the right itself, * * * nor will the issue of an injunction against the infringement of a trademark be denied on the ground that mere procrastination in seeking redress for depredations had deprived the true proprietor of his legal right.'" Saxlehner *v.* Eisner, etc., Co.,

Question for Court.—Whether the time which has elapsed since the discovery of the fraud, set up as the ground of relief, be sufficient to bar the remedy, is a question to be determined by the sound discretion of the court.[2]

(2) *Government and Officials.*—The principle of laches has no application to the government and its officials.[3]

B. In Particular Instances—1. In General.—It would be difficult to enumerate the many instances in which the injunctive power will be exercised, for in the endless variety of cases in which a plaintiff is entitled to equitable relief, if that relief consists in restraining the commission or continuance of acts of defendants, a court of equity administers it by means of a writ of injunction.[4]

2. Against Actions at Law and Other Legal Proceedings—a. *Actions at Law*—(1) *In Whose Favor It May Issue.*—An action at law will not as a rule be enjoined at the instance of one not a party thereto,[5] and this is especially so where such complainant is not interested in the decision of suit.[6]

(2) *Grounds of Jurisdiction*—(a) *Inadequacy of Legal Remedy.*—Equity will restrain proceedings at law in order to afford a more complete, plain and adequate remedy for the wrong complained of than the party can have at law.[7] But there can be no reason or propriety in appealing to a court of equity to restrain proceedings that are being conducted in other courts, competent to construe the statutes under which they act, and to decide every question that may arise in the course of the proceeding.[8]

Where a court is proceeding without jurisdiction, such proceeding is void at law as well as in equity and the law affords a complete and adequate remedy; consequently, an injunction will not, in the absence of special circumstances, issue.[9]

179 U. S. 19, 39, 45 L. Ed. 60. See, on this, Keyes *v.* Eureka Min. Co., 158 U. S. 150, 153, 39 L. Ed. 929

2. **Question for court.**—Brown *v.* County of Buena Vista, 95 U. S. 157, 24 L. Ed. 422. See the title QUESTION OF LAW AND FACT.

3. **Laches—Government and officials.**—United States *v.* Kirkpatrick, 9 Wheat. 720, 6 L. Ed. 199. See Georgia *v.* Tennessee Copper Co., 206 U. S. 230, 51 L. Ed. 1038. See the titles LACHES; STATES; UNITED STATES.

4. **Right to relief in particular instances.**—As to the right to relief by injunctions, in particular instances, see the appropriate titles throughout this work. For instance, injunctions against executions, see the title EXECUTIONS, ante, p. 84; injunctions against judgments, see the title JUDGMENTS AND DECREES; injunctions against nuisances, see the title NUISANCES; injunctions against illegal and erroneous taxation, see the title TAXATION, etc.

5. **Who may obtain.**—New York *v.* Connecticut, 4 Dall. 1, 1 L. Ed. 715.

6. **Person not interested in decision.**—New York *v.* Connecticut, 4 Dall. 1, 1 L. Ed. 715.

7. **Grounds of jurisdiction—Adequacy of remedy.**—Crampton *v.* Zabriskie, 101 U. S. 601, 25 L. Ed. 1070. See ante, "Inadequacy of Other Remedies," V, A, 3, a.

Where a married woman became a trustee of land for the benefit of her son-in-law, and executed a deed (without joining her husband) to a bona fide purchaser, who had paid the purchase money to the cestui que use, it was not necessary, under the circumstances of the case, for her husband to join in the deed. These circumstances were, that by executing the deed she did not defeat an estate to which her husband was entitled, nor did he claim adversely to the deed, but it was within the scope of her authority as trustee, and therefore will be sustained by a court of equity against her heirs. Her children, who were her heirs at law, having brought a suit at law to recover the land from the bona fide purchaser, a court of equity will interpose to restrain their proceedings. The alleged illegality of the consideration of the deed of trust—viz, that it was intended to protect the property of her son-in-law, who was insolvent—was not sufficient to destroy the independent equity of the bona fide purchaser, nor was it necessary to make the son-in-law a party when the bona fide purchaser sought relief in a court of equity against the title of the heirs. Gridley *v.* Wynant, 23 How. 500, 16 L. Ed. 411.

8. **Proceedings before competent tribunal.**—Wilson *v.* Lambert, 168 U. S. 611, 618, 42 L. Ed. 599; Parcher *v.* Cuddy, 110 U. S. 742, 743, 28 L. Ed. 313; Grand Chute *v.* Winegar, 15 Wall. 373, 21 L. Ed. 174; Hapgood *v.* Hewitt, 119 U. S. 226, 234, 30 L. Ed. 369.

9. **Court proceeding without jurisdiction.**—Walker *v.* Robbins, 14 How. 584, 14 L. Ed. 552.

(b) *Equitable Defenses in General.*—Bills in equity to restrain actions at law are not infrequently brought by defendants in such actions to enable them to avail themselves of defenses which would not be valid at law.[10] But an injunction will not issue for matters of defense of which the complainant can avail himself in an action at law.[11] And where an equitable estoppel can be set at law, equally as well as in equity, an injunction should be disallowed.[12]

(c) *Multiplicity of Suits.*—A bill to restrain the prosecution of a suit will be sustained in order to prevent a multiplicity of suits.[13]

10. Equitable defenses not available at law.—Branson *v.* Wirth, 17 Wall. 32, 21 L. Ed. 566; Davis *v.* Wakelee, 156 U. S. 680, 686, 39 L. Ed. 578. See ante, "Inadequacy of Other Remedies," V, A, 3, a.

Equitable estoppel.—In Drexel *v.* Berney, 122 U. S. 241, 30 L. Ed. 1219, a bill was sustained by a defendant in an action at law, to enjoin the plaintiff in such action from setting up certain facts, of which it was claimed she was equitably estopped to avail herself in such action.

In Wehrman *v.* Conklin, 155 U. S. 314, 39 L. Ed. 167, a bill was sustained by a defendant in ejectment, to enjoin the plaintiff from availing himself of a deed, against the use of which he was held to be equitably estopped. See the title ESTOPPEL, vol. 5, p. 913.

"Analogous cases are those in which bills have been sustained to enable a defendant to make use of an equitable setoff. North Chicago Rolling Mills Co. *v.* St. Louis Ore, etc., Co., 152 U. S. 596, 38 L. Ed. 565." Davis *v.* Wakelee, 156 U. S. 680, 686, 39 L. Ed. 578.

Mistake as to extent of liability on bond.—In Griswold *v.* Hazard, 141 U. S. 260, 35 L. Ed. 678, a suit on ne exeat bond, against surety thereon, was restrained. There was a mistake and misunderstanding of parties as to the extent and nature of the bond, rendering reformation of the bond necessary. The death of the defendant in the suit in which the bond was given rendered a decree of reformation inappropriate, hence an injunction against any suit on the bond was rendered.

Restraining collection of purchase money.—A court of equity may restrain the collection of the purchase money, where the title to the property sold fails and the vendee has been disturbed in his possession by a paramount title, and the vendor is insolvent. Wanzer *v.* Truly, 17 How. 584, 15 L. Ed. 216, cited in McCullough *v.* Roots, 19 How. 349, 354, 15 L. Ed. 681.

11. Defenses available at law.—Insurance Co. *v.* Bailey, 13 Wall. 616, 20 L. Ed. 501; Grand Chute *v.* Winegar, 15 Wall. 373, 21 L. Ed. 174; Deweese *v.* Reinhard, 165 U. S. 386, 41 L. Ed. 757. Hapgood *v.* Hewitt, 119 U. S. 226, 30 L. Ed. 369; Scottish Union, etc., Ins. Co. *v.* Bowland, 196 U. S. 611, 49 L. Ed. 619.

An action of ejectment having been commenced to recover possession, a bill in equity was filed by the defendant to enjoin the further prosecution of that action and to quiet his title. The plaintiff in the injunction case contended that, notwithstanding the action of the department of the interior in certifying the land in controversy to the state of Nebraska and the subsequent conveyances in the chain of title from that state to the appellees, such apparent legal title was absolutely void, because, by the acts of congress the land was not subject to selection by the state, it being within the limits of the land grant to the Burlington & Missouri River Railroad Company, and reserved for homestead and pre-emption, but not for private entry. All the facts upon which that contention rested were matters of statute and record, and any defense to the apparent legal title created by them was available in an action at law to recover possession. Held, that, without deciding whether the selection and certification of these lands were absolutely void or simply voidable at the election of the government, or were valid and beyond any right of challenge of the government, or any one else, a case was not presented for the interference of a court of equity. Deweese *v.* Reinhard, 165 U. S. 386, 388, 41 L. Ed. 757.

In Scottish Union, etc., Ins. Co. *v.* Bowland, 196 U. S. 611, 49 L. Ed. 619, equity refused to enjoin the prosecution of civil suits against a foreign corporation, for the recovery of certain taxes on property within the state on the ground that the corporation was not personally liable, as such defense could be set up by answer at law.

12. Equitable estoppel available at law.—Wehrman *v.* Conklin, 155 U. S. 314, 39 L. Ed. 167. See the title ESTOPPEL, vol. 5, p. 913.

13. Multiplicity of suits.—Dietzsch *v.* Huidekoper, 103 U. S. 494, 497, 26 L. Ed. 497. See, also, Equator Co. *v.* Hall, 106 U. S. 86, 27 L. Ed. 114; Root *v.* Woolworth, 150 U. S. 401, 411, 37 L. Ed. 1123. See the title MULTIPLICITY OF SUITS.

Enjoining relitigation of decided question.—In order to prevent a relitigation of question once decided as between the same parties, a court of equity will, in the protection of its own judgments and decrees, award an injunction. Root *v.* Woolworth, 150 U. S. 401, 37 L. Ed. 1123.

Enjoining new trials in ejectment.—Where a party has, at common law, recovered judgment in ejectment, equity

(d) *Fraud.*—Where any contract, obligation or evidence of indebtedness is founded in fraud, the general rule is that defendant can make a good defense at law, and an injunction will not issue.[14] And of course where the facts proven do not amount to fraud, no injunction will issue.[15]

(e) *Former Suit Pending in Equity in Foreign Jurisdiction.*—The plea of a former suit pending in equity in a foreign jurisdiction will not authorize an injunction against prosecuting an action at law for the same cause.[16]

b. *Restraining Interposition of Inequitable Defenses.*—An injunction will issue to restrain a defendant in an action at law from interposing an inequitable defense or one which he is estopped to assert, where such defense, if recognized, would work injury to the plaintiff.[17]

c. *Ancillary Jurisdiction.*—See the title COURTS, vol. 4, p. 982.

d. *Courts Having Concurrent Jurisdiction.*—No injunction ever goes to the court having a concurrent jurisdiction of the question.[18] It is a rule absolutely necessary to be observed by courts who have a concurrent jurisdiction, that in all cases "where the jurisdiction of a court and the right of a plaintiff to prosecute his suit in it have once attached, that right cannot be arrested or taken away by proceedings in another court. This rule, it is said, "has its foundation not merely in comity, but in necessity. If one may enjoin, the other may retort by injunction, and thus the parties be without remedy."[19] But courts for the purpose of protecting their jurisdiction over persons and subject matter may enjoin parties who are amenable to their process and subject to their

will enjoin the unsuccessful party from further litigating the title, there being no limit to the possible number of new trials in ejectment at common law. Equator Co. *v.* Hall, 106 U. S. 86, 27 L. Ed. 114. See the title EJECTMENT, vol. 5, p. 695.

14. Fraud.—Insurance Co. *v.* Bailey, 13 Wall. 616, 20 L. Ed. 501; Grand Chute *v.* Winegar, 15 Wall. 373, 21 L. Ed. 174. See the title FRAUD AND DECEIT, ante, p. 394.

Where for some reason the party liable cannot present the defense fully and completely in a court of law as he can in equity, equity will enjoin proceedings at law. Insurance Co. *v.* Bailey, 13 Wall. 616, 20 L. Ed. 501. See ante, "Equitable Defenses in General," V, B, 2, a, (2), (b).

15. Facts not constituting fraud.—Where a bill seeks an injunction against an ejectment suit on the ground that the plaintiffs in ejectment had obtained their patents through fraud, if the facts proven do not establish the fraud the bill will be dismissed and the parties remitted to the trial at law. Gaines *v.* Nicholson, 9 How. 356, 13 L. Ed. 172. See post, "Dismissal of Bill," VI, G. See the title DISMISSAL, DISCONTINUANCE AND NONSUIT, vol. 5, p. 356.

16. Former suit pending in foreign jurisdiction.—Insurance Co. *v.* Brune, 96 U. S. 588, 24 L. Ed. 737.

If a bill in equity pending in a foreign jurisdiction has no effect upon an action at law for the same cause in a domestic forum, even when pleaded in abatement; if, still more, it has no effect when pleaded to another bill in equity, as the authorities show, it is impossible to see how it can be a basis for an injunction against prosecuting a suit at law. Insurance Co. *v.* Brune, 96 U. S. 588, 593, 24 L. Ed. 737.

17. Interposition of inequitable defenses.—Bernards Tp. *v.* Stebbins, 109 U. S. 341, 27 L. Ed. 956; Davis *v.* Wakelee, 156 U. S. 680, 39 L. Ed. 578; Streitwolf *v.* Streitwolf, 181 U. S. 179, 45 L. Ed. 807. See Michels *v.* Olmstead, 157 U. S. 198, 201, 39 L. Ed. 671.

In Streitwolf *v.* Streitwolf, 181 U. S. 179, 45 L. Ed. 807, it was held that an injunction would issue against setting up, in bar of divorce proceedings, a judgment fraudulent obtained in another state.

A bill may be sustained in favor of a plaintiff in a proposed action at law, to enjoin the defendant from setting up a threatened defense, upon the ground that he is equitably estopped from so doing, unless his remedy at law be plain, adequate, and complete. Davis *v.* Wakelee, 156 U. S. 680, 686, 39 L. Ed. 578. See, also, ante, "Equitable Defenses in General," V. B. 2, a, (2), (b). See the title ESTOPPEL, vol. 5, p. 913.

18. Courts having concurrent jurisdiction.—Orton *v.* Smith, 18 How. 263, 265, 15 L. Ed. 393.

19. Necessity for rule.—Orton *v.* Smith, 18 How. 263, 265, 15 L. Ed. 393. See Peck *v.* Jenness, 7 How. 612, 625, 12 L. Ed. 841.

"The doctrine is firmly established that where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court, and that where property is actually in the possession of one court of competent jurisdiction, such possession cannot be disturbed by process out of another court of con-

jurisdiction from interference with them in respect of property in their possession or identical controversies therein pending, by subsequent proceedings as to the same parties and subject matter in other courts of concurrent jurisdiction.[20]

e. *Inferior Boards or Tribunals of Special Jurisdiction.*—Courts of equity will not interfere with the proceedings and determinations of inferior boards or tribunals of special jurisdiction unless it should become necessary to prevent a multiplicity of suits or irreparable injury, or unless the proceeding sought to be annulled or corrected is valid upon its face, and the alleged invalidity consists in matters to be established by extrinsic evidence.[21]

f. *Enjoining Proceedings in Other States.*—The courts of one state are, in proper cases, permitted to enjoin persons within their jurisdiction from instituting legal proceedings in other states, or from further proceeding in actions already begun.[22]

g. *Proceedings in Federal and State Courts.*—See ante, "Proceedings in Federal and State Courts," IV, C, 5.

h. *Prosecution and Punishment of Crime.*—See ante, "Prosecution and Punishment of Crime," IV, C, 7.

3. Trade Secrets.—A trade secret is entitled to the protection of the law. The plaintiff has the right to keep the work which it has done or paid for doing to itself. The fact that others might do similar work, does not authorize them to steal plaintiff's.[23] The plaintiff does not lose its rights by communicating the result to persons, even if many, in confidential relations to itself, under a contract not to make it public, and strangers to the trust will be restrained from getting at the knowledge by inducing a breach of trust and using knowledge obtained by such a breach.[24]

VI. Procedure to Obtain.

A. Jurisdiction.—See ante, "Jurisdiction," IV. See, also, the titles Equity, vol. 5, p. 803; Jurisdiction.

B. Parties—1. In General.—It is a general rule of equity that every person who is interested in the subject matter, or in the event of the suit, should be made a party, plaintiff or defendant.[25] In equity a final decree cannot be pronounced until all parties interested are brought before the court.[26] This is

current jurisdiction. Moran *v.* Sturges, 154 U. S. 256, 38 L. Ed. 981." In re Chetwood, 165 U. S. 443, 460, 41 L. Ed. 782.

20. For protection of jurisdiction.—Moran *v.* Sturges, 154 U. S. 256, 273, 38 L. Ed. 981.

21. Tribunals of special jurisdiction.—Ewing *v.* St. Louis, 5 Wall. 413, 418, 18 L. Ed. 657.

22. Enjoining proceedings in other states.—Moran *v.* Sturges, 154 U. S. 256, 268, 38 L. Ed. 981.

Enjoining attachment in another state.—A creditor, who is a citizen and resident of the same state as his debtor, against whom insolvent proceedings have been instituted in such state, is bound by the assignment of the debtor's property in such proceedings, and if he attempts to seize or attach the personal property of the debtor situated in another state, and embraced in the assignment, he may be restrained by injunction by the courts of the state in which he and the debtor reside. Cole *v.* Cunningham, 133 U. S. 107, 33 L. Ed. 538; Moran *v.* Sturges, 154 U. S. 256, 272, 38 L. Ed. 981.

But a creditor who is not a citizen or resident of the same state with his debtor may proceed in another state against property there, unaffected by insolvency proceedings in the state of the debtor's residence, if in accordance with the law of such other state. Reynolds *v.* Adden, 136 U. S. 348, 36 L. Ed. 360; Moran *v.* Sturges, 154 U. S. 256, 272, 38 L. Ed. 981.

23. Trade secrets.—Board of Trade *v.* Christie Grain, etc., Co., 198 U. S. 236, 250, 49 L. Ed. 1031. Compare Bleistein *v.* Donaldson Lithographing Co., 188 U. S. 239, 249, 250, 47 L. Ed. 460. See, also, American Colortype Co. *v.* Continental Colortype Co., 188 U. S. 104, 47 L. Ed. 404.

24. Effect of communicating results to others.—Board of Trade *v.* Christie Grain, etc., Co., 198 U. S. 236, 250, 49 L. Ed. 1031.

25. Parties—In general.—See the title PARTIES.

26. Interested parties must be before court.—Marshall *v.* Beverley, 5 Wheat. 313, 5 L. Ed. 97; Osborn *v.* United States Bank, 9 Wheat. 738, 6 L. Ed. 204; Mallow *v.* Hinde, 12 Wheat. 193, 6 L. Ed. 599.

certainly true where it is in the power of the plaintiff to make them parties.[27] Where an injunction suit is brought which relates to rights in corporations, private or municipal, all persons whose interests, either legal or equitable, will be affected by the decree prayed for, should be made parties.[28] It is not necessary, in a court of limited jurisdiction to certain persons parties, to a bill to enjoin a judgment, it not being considered an original bill, if their introduction would render the jurisdiction of the court doubtful.[29]

2. PARTIES PLAINTIFF.—Equity will not grant relief where the allegations of the complainant show that he has no title nor interest in the subject matter of the dispute.[30]

One or More Suing for All.—One or more of those who have a common interest in the subject of the suit may sue in behalf of all of them, where such parties are numerous and widely scattered.[31]

3. PARTIES DEFENDANT—a. *Proper and Necessary Parties.*—In a suit for an injunction, all persons not parties plaintiff, whose presence is necessary to a complete adjudication of and who are interested in the controversy, should be made defendants.[32]

27. **Ability of plaintiff to make parties defendant.**—Osborn *v.* United States Bank, 9 Wheat. 738, 6 L. Ed. 204.

28. **Suits against corporations.**—Minnesota *v.* Northern Securities Co., 184 U. S. 199, 46 L. Ed. 499. In this case, a corporation which held a majority of the stock in two other corporations was made a party; the court held that this fact did not dispense with the necessity of making the other corporations and their stockholders parties.

29. **Introduction of parties rendering jurisdiction doubtful.**—Simms *v.* Guthrie, 9 Cranch 19, 3 L. Ed. 642; Dunn *v.* Clarke, 8 Pet. 1, 8 L. Ed. 845; Webb *v.* Barnwall, 116 U. S. 193, 196, 29 L. Ed. 595. See Jones *v.* Andrews, 10 Wall. 327, 19 L. Ed. 935; Christmas *v.* Russell, 14 Wall. 69, 81, 20 L. Ed. 762.

30. **Interest of plaintiff.**—See ante, "Sufficiency of Right, Title or Interest," V, A, 2, a, (2). See the title PARTIES.

31. **Parties numerous and widely scattered.**—Scott *v.* Donald, 165 U. S. 107, 41 L. Ed. 648. See the title PARTIES.

Enforcement of liquor law.—Importers of liquor for their individual consumption are held not to have sufficient interest to permit them to sue in behalf of all. Scott *v.* Donald, 165 U. S. 107, 41 L. Ed. 648.

32. **Defendants—In general.**—Minnesota *v.* Northern Securities Co., 184 U. S. 199, 46 L. Ed. 499; Litchfield *v.* Register & Receiver, 9 Wall. 575, 19 L. Ed. 681.

In a suit to restrain the levy of an attachment upon certain property, it was held that the sheriff was the necessary party defendant and that the plaintiffs in the writs of attachment were not necessary parties as it did not appear that they had directed the seizure. North *v.* Peters, 138 U. S. 271, 34 L. Ed. 936.

Bill assailing power of secretary of interior to execute leases.—Where a bill assailed generally the want of power in the secretary of the interior to execute leases affecting lands owned by a particular Indian tribe, and referred to an application pending for a lease made by the Cherokee Oil & Gas Company, as manifesting but a particular instance in which it was charged that the secretary of the interior might exercise the power conferred by the statute, the corporation named was not an indispensable party to the bill. "Clearly, all the persons with whom the secretary might contract, if he exercised the discretion vested in him by the statute, were not indispensable parties to the determination of the question whether the statute had lawfully conferred such discretionary power upon the official in question." Cherokee Nation *v.* Hitchcock, 187 U. S. 294, 300, 47 L. Ed. 183.

State as necessary party to suit against a corporation.—Suit was brought against the defendant corporation alone, to obtain, among other things, a decree enjoining the company and its officers from acting as a corporation on the ground that its alleged charter was a nullity. It was also brought to forfeit the charter in case it should be held that it had been legally organized, and such forfeiture was prayed on the ground that the company had violated the law by not receiving cash on payment of its shares. It is now claimed that the company defendant could not properly have been made a sole defendant in an action to declare null its charter to be a corporation, and that therefore a decree in such suit declaring the company not to be a corporation (while making no decree upon the question of a violation of the charter by not taking payment for its stock in cash) condemns the corporators and takes away their property without a hearing from them and is not due process of law, they claiming that the franchise to be a corporation was their property exclusively and did not belong to the corporation as such. The court say: "We are of opinion that for the purpose of obtaining a decree declaring the charter void and restraining the officers from acting as a corporation, the state through its attorney general was

Person against Whom No Relief Is Prayed.—A person may be properly made a party defendant to an injunction suit, though no relief is prayed for against him, but rather relief in his favor.[33]

Injunction against Agent.—As a general rule, an injunction will not be allowed against an agent where the principal is not made a party to the suit;[34] however, if the principal is not subject to the jurisdiction of the court the rule may be dispensed with.[35]

Necessity for Coming in of Answers.—As to the necessity for the coming in of the answers of all parties defendant, see post, "Necessity for Answer by All Defendants—Perpetual Injunction," VI, D, 2, a, (1).

b. *Retaining Jurisdiction until Conflicting Rights Litigated.*—The court may in a proper case retain jurisdiction of a cause on an injunction bill, as between the parties before it, until the conflicting rights of the plaintiff and third persons not parties, may be properly determined before a competent tribunal.[36]

C. Notice.—Injunctions will only be granted on reasonable notice to the adverse party or his attorney of the application.[37] The design and effect of injunctions must render a shorter notice reasonable in the case of an application to a court than would be so construed in most cases of an application to a single judge.[38] And until a general rule be settled, the particular circumstances of each case must be regarded.[39]

a proper party to bring the action, and for the reasons stated it was well brought against the corporation alone and the final injunction was properly issued." New Orleans Debenture, etc., Co *v.* Louisiana, 180 U. S. 320, 326, 45 L. Ed. 550.

Where an injunction suit is brought against an officer who has exceeded his authority, under writs of execution or attachment, to restrain the continued wrongdoing, it is not essential that the plaintiffs in the writs be joined as parties defendant, where it does not appear, either from the pleadings or the proofs, that they advised or directed the sheriff to seize the particular property, as the property of their judgment debtor. North *v.* Peters, 138 U. S. 271, 284, 34 L. Ed. 930.

33. **Person against whom no relief is prayed.**—Where a bill is filed by stockholders to enjoin the setting up of a claim for purchase money, against the lands of a company whose capital stock is divided into shares, the ground of the bill being that the party now setting up the claim, induced the complainants to buy their shares by fraudulently representing that the property sold to the company was unencumbered, and that he had no interest in it—the agents of the company also joining in such misrepresentations—the company may be properly made a defendant, though no relief is prayed for against it, but rather relief in its favor. Jones *v.* Bolles, 9 Wall. 364, 19 L. Ed. 734.

34. **Injunctions against agent.**—Osborn *v.* United States Bank, 9 Wheat. 738, 6 L. Ed. 204.

35. **Principal not subject to jurisdictions.**—Osborn *v.* United States Bank, 9 Wheat. 738, 6 L. Ed. 204. In this case the principal was a sovereign state.

36. **Retention of case until rights litigated.**—If it be shown to the circuit court, that from the incapacity of that court to bring all the necessary parties before it, that court cannot decide finally the rights in contest, the court, in the exercise of a sound discretion, may retain the cause, and the injunction, on the application of the complainants, until they have reasonable time to litigate the matters of controversy between them, and third parties, in the courts of the state, or such other courts as have jurisdiction over them; and if then it is made to appear by the judgment of a competent tribunal, that the complainants are equitably invested with the rights of such parties, the circuit court can proceed to decree upon the merits. Such a proceeding would seem to be justified, in order to prevent a failure of justice; and the cause will remain under the control of the circuit court, so as to enable it to prevent unreasonable delay, by the negligence or design of the parties, in litigating their rights before some competent tribunal. Mallow *v.* Hinde, 12 Wheat. 193, 194, 198, 6 L. Ed. 599. See the titles EQUITY, vol. 5, p. 803; PARTIES.

37. **Notice.**—The prohibition contained in the statute (1 U. S. Stat. 334-5, § 5), that writs of injunction shall not be granted, without reasonable notice to the adverse party or his attorney, extends to injunctions granted by the supreme or circuit court as well as to those granted by a single judge. New York *v.* Connecticut, 4 Dall. 1, 1 L. Ed. 715. See the title SUMMONS AND PROCESS.

38. **Time of notice.**—New York *v.* Connecticut, 4 Dall. 1, 1 L. Ed. 715.

39. **Particular circumstances considered.**—New York *v.* Connecticut, 4 Dall. 1, 1 L. Ed. 715.

D. Pleading—1. Bill or Complaint—Form and Requisites—a. *Allegations as to Grounds of Application*—(1) *Certainty and Clearness.*—The allegations of the complaint must be definite and certain.[40] A charge, though general, is sufficiently certain where it sets forth the essential ultimate facts upon which the plaintiff rests his claim for relief. All the minute circumstances which may be proven in support of the general allegation need not be set forth.[41]

(2) *Allegation of Facts—Sufficiency of Allegation*—(a) *In General.*—A bill in equity for an injunction must set forth the facts and circumstances which give rise to his right to ask for equitable relief.[42] A bill for an injunction, the allegation of which covers the entire equity of the case, is sufficient on demurrer.[43]

40. **Pleading—Allegation definite and certain.**—St. Louis *v.* Knapp Co., 104 U. S. 658, 26 L. Ed. 883. See the titles EQUITY, vol. 5, p. 803; PLEADING.

41. **General charge sufficient.**—A bill for an injunction averred what the defendant proposed to do, and that averment was accompanied by a general charge or statement as to the ultimate effect of defendant's proposed acts, to wit; a diversion of the river from its natural course and the creating of a deposit of mud and sediment in the river, thereby rendering it impossible for boats and vessels engaged in navigation to approach or land at certain designated places. The court held that this was a sufficiently certain, though general, statement of the essential ultimate facts upon which the complainant rested his claim for relief. It was not necessary to aver all the minute circumstances which may be proven in support of the general allegations. The allegations might have been more extended, without departing from correct rules of pleading, but they distinctly apprised the defense of the proposed case it was required to meet and are sufficient. St. Louis *v.* Knapp Co., 104 U. S. 658, 26 L. Ed. 883.

42. **Allegation of facts—In general.**—Where a bill in chancery was filed for the purpose of enjoining a judgment at law, obtained upon a promissory note, and the bill did not allege that adequate relief could not be had at law, and did not contain any charges of fraud; neither did it aver that it was owing to the contrivance or unfairness of the defendant that an adequate remedy could not be had at law, nor did it show the necessity of interference by a court of equity to obtain a discovery, the bill must be dismissed. Hungerford *v.* Sigerson, 20 How. 156, 15 L. Ed. 869.

A bill based upon general allegations of the absence of an adequate remedy at law, the necessity of relief to avoid a multiplicity of suits and to prevent the casting of a cloud upon the title of the nation to its said lands, the claim that irreparable injury would be caused and wrong and oppression result, and that there would be a deprivation of property rights of the complainants and of other citizens of the Cherokee Nation, prayed an injunction against further action by the secretary of the interior in the premises. It was held that the statements in the bill were sufficient to show that the jurisdiction of a court of equity was properly invoked. Cherokee Nation *v.* Hitchcock, 187 U. S. 294, 300, 47 L. Ed. 183.

A bill which calls for a decree declaring merely an abstract right, and does not set any other ground for relief, should be dismissed. Mayre *v.* Parsons, 114 U. S. 325, 29 L. Ed. 205.

43. **Allegations covering entire equity of case.**—Atkins *v.* Dick, 14 Pet. 114, 10 L. Ed. 378.

A bill for an injunction was filed, alleging that the parties who had obtained a judgment at law for the amount of a bill of exchange, of which the complainant was an endorser, had, before the suit was instituted, obtained payment of the bill from a subsequent endorser, out of funds of the drawer of the bill, obtained by the subsequent endorser from one of the drawers. A demurrer was filed on the ground that neither the amount nor value, nor nature of the effects charged to have been paid, was specified, and that it was not stated what portion of the debt was discharged nor whether any of such effects proved to be productive. It was held that the demurrer was untenable, in that the allegation covers the whole equity of the case; it asserts that there was a payment, and that payment was of the money mentioned in the bill, that is, the whole amount of the bill. Atkins *v.* Dick, 14 Pet. 114, 10 L. Ed. 378.

A bill was filed in the circuit court to enjoin the infringement of letters patent. The bill alleges that the plaintiff is the original and first inventor of a new and useful improvement and invention; that he applied for and obtained a patent, of which is given a full, clear and exact description; that he was and is the owner of the patent; that he has invested and expended a large sum of money for the purpose of carrying on the business of making and selling the invention. On the other hand it alleges that the defendant had manufactured, used and vended to others an article containing and embracing the invention, without a license from the plaintiff, in violation of his rights and in infringement of the patent, with full

(b) *Particular Allegations*—aa. *Allegations as to Right or Title of Complainant.*—The complaint must sufficiently set forth the right, title or interest of the complainant.[44]

bb. *Averment of Inadequacy of Other Remedies.*—A bill praying an injunction must set forth facts from which the court can determine the inadequacy of the legal remedies.[45]

cc. *Averment of Facts Constituting Injury.*—The complaint must set forth the facts constituting the injury; it is not sufficient to merely allege injury.[46]

dd. *Fraud.*—Relief cannot be given on the ground of fraud unless it be made a distinct allegation to the bill, so that it may be put in issue in the pleadings.[47] In stating the facts which constitute a fraud, where relief is sought in a bill in equity, the evidence which may be adduced to prove that fraud need not be recited in the bill. It is sufficient if the main facts or incidents which constitute the fraud against which relief is desired shall be fairly stated, so as to put the defendant upon his guard and apprise him of what answer may be required of him.[48]

ee. *Offer to Do Equity.*—The complaint must allege that the complainant has done or is willing to do everything necessary to entitle him to the relief sought.[49] In some cases payment or tender of payment of the sum conceded to be due is a condition precedent to invoking equitable relief as against the balance claimed by defendant,[50] and, of course, a compliance with such condition must be set forth in the complaint.[51]

knowledge of those rights and to the plaintiff's injury; that he has made and sold large quantities, is still engaged in selling the same and has a large quantity thereof on hand which he is offering for sale. It was held that the bill is entirely sufficient to put the defendant upon his answer. McCoy *v.* Nelson, 121 U. S. 484, 30 L. Ed. 1017.

44. Right or title of plaintiff.—Walla Walla *v.* Walla Walla Water Co., 172 U. S. 1, 43 L. Ed. 341; Mayre *v.* Parsons, 114 U. S. 325, 29 L. Ed. 205; Georgia *v.* Brailsford, 2 Dall. 402, 1 L. Ed. 433.

A sufficient interest in the stock of a company will be inferred, where the bill expressly states that the complainant purchased on his own account and in trust for other parties a large number of shares, and paid therefor upwards of $25,000; and then afterwards states that the defendant threatened to bring an action against the company to enforce the pretended claim, whereby the stock of the company, which the complainant alleges he purchased in good faith, and which he still held, was liable to become greatly depreciated in value; this statement being nowhere denied in the answer—the defendant averring only his ignorance on the subject—and the allegation being fully corroborated by the proof, at least so far as relates to the purchase of stock by the complainant; and no question having been made on the examination as to the complainant's still holding the stock. Jones *v.* Bolles, 9 Wall. 364, 19 L. Ed. 734.

45. Averment of inadequacy of other remedies.—Pollock *v.* Farmers' Loan, etc., Co., 157 U. S. 429, 39 L. Ed. 759.

46. Allegation of facts constituting injury.—Griffing *v.* Gibb, 2 Black 519, 17 L. Ed. 353; Cruickshank *v.* Bidwell, 176 U. S. 73, 81, 44 L. Ed. 377; Georgia *v.* Brailsford, 2 Dall. 402, 1 L. Ed. 433.

A general averment that to enforce the tax by distraint and sale of complainant's property would result in irreparable injury, is not sufficient, where there are no facts stated from which it could be inferred that irreparable injury would be likely to result from such enforcement, and where a plain and adequate remedy to recover the amount is given by statute; no such irreparable injury can be inferred. Some averment of specific facts must be made from which the court can see that irreparable injury would be a natural and probable result. Indiana Mfg. Co. *v.* Kœhne, 188 U. S. 681, 690, 47 L. Ed. 651. See the title TAXATION.

47. Allegation of fraud.—Patton *v.* Taylor, 7 How. 132, 12 L. Ed. 637.

48. Stating evidence to be adduced.—United States *v.* American Bell Tel. Co., 128 U. S. 315, 356, 32 L. Ed. 450; Harding *v.* Handy, 11 Wheat. 103, 6 L. Ed. 429; St. Louis *v.* Knapp Co., 104 U. S. 658, 26 L. Ed. 883.

49. Offer to do equity.—Stanley *v.* Gadsby, 10 Pet. 521, 9 L. Ed. 518. See, generally, the title EQUITY, vol. 5, p. 803.

50. Payment or tender of payment.—See ante, "Offer to Do Equity," V. A, 4, b. For treatment of this point in general, see the titles EQUITY, vol. 5, p. 803; MAXIMS. For treatment with reference to illegal taxation, see the title TAXATION.

51. Allegation of payment or tender.—See the titles EQUITY, vol. 5, p. 803; TAXATION; TENDER.

b. *Prayer.*—The general rule seems to be that an injunction will not be granted unless the relief desired is expressly prayed for.[52]

c. *Verification.*—An affidavit to the contents of a bill is not the only foundation for an injunction.[53]

2. Effect of Filing Bill.—If a defendant, after notice of the filing of a bill in equity for an injunction to restrain the building of a structure, persists in completing the building, the court nevertheless is not deprived of the authority, whenever in its opinion justice requires it, to deal with the rights of the parties as they stood at the commencement of the suit, and to compel the defendant to undo what he has wrongfully done since that time, or to answer in damages.[54] But if the intervening event is owing either to the plaintiff's own act or to a power beyond the control of either party, the court will stay its hand.[55]

3. Defendants' Pleading—a. *Answer*—(1) *Necessity for Answer by All Defendants—Perpetual Injunction.*—A perpetual injunction should not be decreed until the answers of all defendants have come in.[56]

(2) *Verification.*—The weight of an answer is very much lessened, if not entirely destroyed, if it is put in unaccompanied by an oath.[57] That an answer not under oath is to be considered merely as a denial of the allegations in the bill, analogous to the general issue at law, so as to put the complainant to the proof of such allegations, has been adopted as a general rule in some cases.[58]

(3) *Operation and Effect.*—Where motion for an injunction is made on bill and answer, sworn statements in the answer, where responsive to the allegations in the bill, are taken as true.[59]

52. Prayer for relief.—Georgia *v.* Stanton, 6 Wall. 50, 77, 18 L. Ed. 721. See the title EQUITY, vol. 5, p. 803.

53. Affidavit to bill.—Schermerhorn *v.* L'Espenasse, 2 Dall. 360, 1 L. Ed. 415.

In Schermerhorn *v.* L'Espenasse, 2 Dall. 360, 1 L. Ed. 415, it was held that an affidavit was not the only foundation for the issuance of an injunction and that other proof should be allowed. In this case the court say: "In the very case now before the court, the power of attorney, operating effectually as a transfer of the property, is certainly stronger evidence than an affidavit of the interested party."

54. Effect of filing bill—Defendant proceeds at his own risk.—Mills *v.* Green, 159 U. S. 651, 654, 40 L. Ed. 293.

55. Intervening event beyond defendant's control.—"For example, appeals have been dismissed by this court when the plaintiff had executed a release of his right to appeal; Elwell *v.* Fosdick, 134 U. S. 500, 33 L. Ed. 998; or when the rights of both parties had come under the control of the same persons; Lord *v.* Veazie, 8 How. 251, 12 L. Ed. 1067; Cleveland *v.* Chamberlain, 1 Black 419, 17 L. Ed. 93; Wood-Paper Co. *v.* Heft, 8 Wall. 333, 19 L. Ed. 378; East Tennessee, etc., R. Co. *v.* Southern Tel. Co., 125 U. S. 695, 31 L. Ed. 853; South Spring, etc., Min. Co. *v.* Amador, etc., Min. Co., 145 U. S. 300, 36 L. Ed. 712; or when the matter had been comprised and settled between the parties; Dakota County *v.* Glidden, 113 U. S. 222, 28 L. Ed. 981; or when, pending a suit concerning the validity of the assessment of a tax, the tax was paid; San Mateo County *v.* Southern Pac. R. Co., 116 U. S. 138, 29 L. Ed. 589; Little *v.* Bowers, 134 U. S. 547, 33 L. Ed. 1016; Singer Mfg. Co. *v.* Wright, 141 U. S. 696, 35 L. Ed. 906; or the amount of the tax was tendered, and deposited in a bank, which by statute had the same effect as actual payment and receipt of the money; California *v.* San Pablo, etc., R. Co., 149 U. S. 308, 37 L. Ed. 747." Mills *v.* Green, 159 U. S. 651, 654, 40 L. Ed. 293.

56. Answers must have come in.—Marshall *v.* Beverley, 5 Wheat. 313, 5 L. Ed. 97. See ante, "Parties Defendant," VI, B, 3.

Where a bill was filed for a perpetual injunction, on judgments obtained on certain bills of exchange, drawn by the plaintiff, and negotiated to the defendant, and which had subsequently passed from the latter into the hands of third persons, by whom the judgments were obtained; held, that the injunction could not be decreed, until their answers had come in, although the bill stated, and the defendant admitted, that he had paid the judgments, and was then the only person interested in them; because such statement and admission might be made by collusion. Marshall *v.* Beverley, 5 Wheat. 313, 5 L. Ed. 97.

57. Verification of answer.—It was so held in Union Bank *v.* Geary, 5 Pet. 99, 8 L. Ed. 60, where an injunction bill was filed, upon the oath of the complainant, against a corporation and the answer was put in, under their common seal, unaccompanied by an oath.

58. Considered merely as denial of allegations.—Union Bank *v.* Geary, 5 Pet. 99, 8 L. Ed. 60.

59. Operation and effect of answer—Sworn statements.—Monroe Cattle Co. *v.*

b. *Demurrer.*—Where the defendant demurs to the injunction bill, the court, in considering the case, are to take all the allegations in the bill as true.[60]

E. Discretion of Court—1. In General.—See ante, "Discretion of Court," V, A, 1, a.

2. Imposition of Terms—a. *In General.*—The discretion of imposing terms upon a party, as a condition of granting or withholding an injunction, is an inherent power of the court, exercised for the purpose of effecting justice between the parties.[61] The condition of the suit at law may be a reason for imposing terms on the party who applies for an injunction, but can be no reason for refusing it.[62]

b. *Relief from Conditions.*—It would seem to follow that, in the absence of an imperative statute to the contrary, the court should have the power to mitigate the terms imposed, or to relieve from them altogether, whenever in the course of the proceedings it appears that it would be inequitable or oppressive to continue them.[63]

F. Evidence—1. Presumptions and Burden of Proof.—Fraud is not to be presumed and the burden is upon the complainant to establish it; and failing to do so, ground for equitable relief fails also, and the parties should be left to a settlement of their rights in an action at law.[64]

Becker, 147 U. S. 47, 37 L. Ed. 72. See ante, "Verification," VI, D, 2, a, (2).

60. Demurrer.—Atkins *v.* Dick, 14 Pet. 114, 10 L. Ed. 378. See the title DEMURRERS, vol. 5, p. 293.

61. Imposition of terms.—Russell *v.* Farley, 105 U. S. 433, 437, 26 L. Ed. 1060; Parker *v.* Circuit Court, 12 Wheat. 561, 6 L. Ed. 729; Mechanics' Bank *v.* Lynn, 1 Pet. 376, 7 L. Ed. 185; Meyers *v.* Block, 120 U. S. 206, 214, 30 L. Ed. 642.

The power to impose such conditions is founded upon, and arises from, the discretion which the court has in such cases, to grant, or not to grant, the injunction applied for. It is a power inherent in the court, as a court of equity, and has been exercised from time immemorial. Russell *v.* Farley, 105 U. S. 433, 445, 26 L. Ed. 1060. In this case the court say: "We are inclined to think that the court has this power; and that it is an inherent power, which does not depend on any provision in the bond that the party shall abide by such order as the court may make as to damages (which is the usual formula in England); nor on the existence of an express law or rule of court (as adopted in some of the states) that the damages may be ascertained by reference or otherwise, as the court may direct; this being a mere appendage to the principal provision requiring a bond to be taken, and not conferring the power to take one, or to deal with it after it has been taken."

"Mr. Kerr, in his treaties on Injunctions, says: 'In balancing the comparative convenience or inconvenience from granting or withholding an injunction, the court will take into consideration what means it has of putting the party who may be ultimately successful in the position he would have stood if his legal rights had not been interfered with. The court may often by imposing terms on the one party, as the condition of either granting or withholding the injunction, secure the other party from damage in the event of his proving ultimately to have the legal right. * * * The defendant may be required to do such acts, or execute such works, or otherwise deal with the same as the court shall direct; or to enter into an undertaking to refrain from doing in the meantime the acts complained of by the bill, or to abide the order the court may make as to damages or otherwise, in the event of the legal right being determined in favor of the plaintiff. * * * So, on the other hand, as a condition of granting an injunction (the court may), require the plaintiff to enter into an undertaking as to damages in the event of the right at law being determined in favor of the defendant, and the injunction proving to have been wrongly granted.' Kerr, Injunctions, 212. Again, in another place, he says: 'In doubtful cases where damage may be occasioned to the defendant in the event of an injunction or interim restraining order proving to have been wrongly granted, the court will require the plaintiff, as a condition of its interference in his favor, to enter into an undertaking to abide by any order it may make as to damages.' Kerr, 622." Russell *v.* Farley, 105 U. S. 433, 437, 26 L. Ed. 1060.

62. Condition of suit at law.—Parker *v.* Circuit Court, 12 Wheat. 561, 6 L. Ed. 729.

63. Relief from conditions.—Russell *v.* Farley, 105 U. S. 433, 437, 26 L. Ed. 1060.

64. Presumption and burden of proof.—While an ejectment suit was pending to try the legal title to a tract of land in Mississippi, the defendants filed a bill on the equity side of the court, praying a perpetual injunction, upon the ground that the plaintiffs had obtained a patent from the United States by fraud and misrepre-

2. Weight and Sufficiency.—An injunction will issue only upon determinate and satisfactory evidence; if the evidence be conflicting and the injury be doubtful, that conflict and doubt will be a ground for withholding an injunction.[65] The question as to what constitutes a preponderance of the evidence is one for the court trying the case.[66] It is a well-settled rule that in a bill praying relief, when the facts charged in the bill as the ground for the decree are clearly and positively denied by a verified answer, and proved only by a single witness, the court will not decree against the defendant.[67] But it is equally well settled that when the witness on the part of the complainant is supported and corroborated by the circumstances sufficient to outweigh the denial in the answer, the rule does not apply.[68]

G. Dismissal of Bill[69]—1. In General—Grounds for Dismissal.—Where the complainant, though he had a right to an injunction at the filing of his bill, has, by a change of circumstances lost it, his bill must be dismissed.[70] A bill to enjoin an action at law should be dismissed, where it appears that the grounds upon which it is based is the result of error.[71]

Where a public officer has retired from office, an action to enjoin the enforcement of liens for taxes, in which he is made defendant, must be dismissed.[72]

2. Operation and Effect.—A dismissal of a bill for an injunction, because of want of jurisdiction, is not res adjudicata.[73]

H. Trial and Hearing.—All parties whose interests are affected by an injunction suit have a right to be heard and a court of equity will not make a decree for a perpetual injunction without giving them an opportunity.[74]

I. Writ or Order—1. In General.—In the absence of some statute or decision authorizing it, the signing of an order for an injunction, by the clerk of a state court, in the absence of the judge, is void and an injunction cannot be considered as having issued.[75]

2. Operation and Effect—a. *In General.*—Where an action at law is restrained, the subpœna and injunction act on the person to whom they are di-

sentation. The fraud was not established by the evidence and it was held that the bill must be dismissed, and the parties remitted to a trial at law. Gaines *v.* Nicholson, 9 How. 356, 13 L. Ed. 172. See the titles FRAUD AND DECEIT, ante, p. 394; PRESUMPTIONS AND BURDEN OF PROOF.

65. **Weight and sufficiency.**—Missouri *v.* Illinois, 180 U. S. 208, 248, 45 L. Ed. 497. See the title EVIDENCE, vol. 5, p. 1004.

66. **Question of preponderance of evidence.**—Matthews *v.* Warner, 112 U. S. 600, 28 L. Ed. 851; Walsh *v.* Preston, 109 U. S. 297, 27 L. Ed. 940.

67. **Single witness uncorroborated.**—Union Bank *v.* Geary, 5 Pet. 99, 8 L. Ed. 60.

68. **Single witness corroborated by circumstances.**—Union Bank *v.* Geary, 5 Pet. 99, 8 L. Ed. 60.

69. See, generally, the title DISMISSAL, DISCONTINUANCE AND NONSUIT, vol. 5, p. 356.

70. **Right lost by change of circumstances.**—Pennsylvania *v.* Wheeling, etc., Bridge Co., 18 How. 421, 15 L. Ed. 435. In this case, the act sought to be enjoined had become legalized.

Where nearly four years have elapsed since the filing of the bill, and the exigency, which was made the principal foundation of the bill, has long since passed away, to entertain the bill would be to deal with a state of affairs no longer existing, and which possibly may never recur, and the decree dismissing the bill and dissolving the restraining order was correct. Texas, etc., R. Co. *v.* Interstate Transp. Co., 155 U. S. 585, 589, 39 L. Ed. 271.

71. **Accounts erroneously adjusted.**—A decree of perpetual injunction on suits instituted on the common-law side of the circuit court of the District of Columbia, was reversed and the bill dismissed where the accounts between the parties had been so erroneously adjusted in the circuit court as to make it appear that an equitable set-off existed in favor of the complainant. Nixdorff *v.* Smith, 16 Pet. 132, 10 L. Ed. 913.

72. **Officer retired from office.**—Chandler *v.* Dix, 194 U. S. 590, 592, 48 L. Ed. 1129.

73. **Operation and effect.**—Smith *v.* McNeal, 109 U. S. 426, 27 L. Ed. 986; Walden *v.* Bodley, 14 Pet. 156, 10 L. Ed. 398. See the title RES ADJUDICATA.

74. **Right of parties to be heard.**—Marshall *v.* Beverley, 5 Wheat. 313, 5 L. Ed. 97. See ante, "Parties," VI, B.

75. **Signing order.**—Lawrence *v.* Morgan's R., etc., Co., 121 U. S. 634, 30 L. Ed. 1018.

rected, not on the record, and it can be of no consequence where the record is.[76] An injunction does not, in general, bind or affect those who were not parties to the suit in which the injunction was obtained or in privity with the parties thereto.[77]

b. *Void Order.*—A restraining order issued by a court of equity, which was without jurisdiction to entertain the bill, is void and without effect.[78]

J. Dissolution, Continuance and Modification of Preliminary Injunction.—See post, "Dissolution and Continuance," VII; "Modification or Suspension Pending Appeal," VIII.

K. Final Decree—1. AGAINST WHOM ENTERED.—A decree is objectionable which enjoins persons not parties to the suit,[79] unless, perhaps, it is a case wherein the defendants named represent those not named,[80] or where there is a conspiracy between the parties defendant, and unknown parties.[81] An injunction may be granted against some defendants who have been properly summoned, although there are other defendants who are not subject to the court.[82] Where an injunction suit is filed against a public officer, the successor in office may be substituted in his stead and thereby became subjected to the preliminary and final decrees.[83]

2. SCOPE OF RESTRAINT—a. *Dependent on Bill or Complaint.*—As to relief granted under prayer in bill, see the title EQUITY, vol. 5, p. 803.

b. *Limitation of Decree to Relief Sought*—(1) *In General.*—A final decree of injunction should be no broader than the necessities of the case require,[84]

76. **Writ or order—Operation and effect.**—Parker *v.* Circuit Court, 12 Wheat. 561, 6 L. Ed. 729.

77. **Upon whom binding.**—Hawley *v.* Fairbanks, 108 U. S. 543, 551, 27 L. Ed. 820; Carroll County *v.* Smith, 111 U. S. 556, 28 L. Ed. 517. See the titles JUDGMENTS AND DECREES; RES ADJUDICATA.

"An injunction against the officers before the judgment against the town was rendered cannot stand in the way of the enforcement of the tax by the circuit court to carry its judgment into execution." Hawley *v.* Fairbanks, 108 U. S. 543, 552, 27 L. Ed. 820.

78. **Void restraining order.**—In re Sawyer, 124 U. S. 200, 221, 31 L. Ed. 402. See post, "Violation of Void Writ," XII, C, 3.

79. **Against whom entered.**—In Scott *v.* Donald, 165 U. S. 107, 117, 41 L. Ed. 648, the court say: "We do not think it comports with well-settled principles of equity procedure to include them in an injunction in a suit in which they were not heard or represented, or to subject them to penalties for contempt in disregarding such an injunction."

80. **Defendants represented.**—Scott *v.* Donald, 165 U. S. 107, 117, 41 L. Ed. 648.

81. **Where the complaint charges no conspiracy** on the part of the defendants with others, the decree of injunction should be limited in its operation to the parties to the suit. Scott *v.* Donald, 165 U. S. 107, 117, 41 L. Ed. 648.

82. **Part of defendants not subject to court.**—Osborn *v.* United States Bank, 9 Wheat. 738, 6 L. Ed. 204. In this case, an agent was restrained, though his principal was not subject to the jurisdiction of the court.

83. **Successor in office substituted.**—"On the face of the record in the Pegues case, the nominal defendants were the treasurers of the counties of Chesterfield and Darlington, in which counties the property of the railroad was situated. Those now holding the office of treasurer in each of the named counties are among the parties on this record, with the addition of the treasurer of Florence County, which county, as we have stated, consists of territory embraced in Chesterfield or Darlington County at the time of the entry of the Pegues decree. That under these circumstances the defendant treasurers, as the successors in office of the officials who were parties to the Pegues case, are privies to that decree, is established. Prout *v.* Starr, 188 U. S. 537, 544, 47 L. Ed. 584." Gunter *v.* Atlantic Coast Line R. Co., 200 U. S. 273, 283, 50 L. Ed. 477.

"The object of the supplemental bill was to restrain the present appellant, as successor to Smyth, from attempting to transfer the very matters that stood for judgment in the federal court to the state court by filing a bill in the latter. Such a course might bring about a conflict between those courts, and create the confusion so often deprecated by this court. Peck *v.* Jenness, 7 How. 612, 625, 12 L. Ed. 841; Chittenden *v.* Brewster, 2 Wall. 191, 17 L. Ed. 839; Orton *v.* Smith, 18 How. 263, 15 L. Ed. 393." Prout *v.* Starr, 188 U. S. 537, 544, 47 L. Ed. 584. See the title PUBLIC OFFICERS.

84. **Limitation of decree to relief sought.**—McNeill *v.* Southern R. Co., 202 U. S. 543, 563, 50 L. Ed. 1142.

and should be considered as limited to the subject of the suit.[85] An injunction should not be so broad as to prevent the defendant from exercising his rights.[86]

(2) *In Particular Cases*—(a) *Against Carriers.*—Whenever a carrier has been adjudged to have violated the act to regulate commerce in any particular, the court may enjoin the carrier from further like violations, but should not command it in general terms not to violate the act in the future in any particular.[87]

(b) *Abatement of Nuisances.*—Where there is a power to abate a nuisance, the abatement must be limited by its necessity, and no wanton or unnecessary injury can be committed to the property or rights of individuals.[88]

(c) *Illegal Taxation or Assessment.*—Where a special assessment is in itself an illegal one, because it rests upon a basis that excludes any consideration of benefits, a decree enjoining the whole assessment is the only appropriate one.[89] While in some case it is proper to enjoin merely the collection of the illegal excess.[90]

(d) *Injunction against Unreasonable Rates.*—A decree enjoining the enforcement of rates, fixed by a legislature of a railroad commission, as unjust and un-

85. Limited to subject of suit.—Conway *v.* Taylor, 1 Black 603, 17 L. Ed. 191. Although it be admitted that a board of education erred in supposing that its duty was to provide educational facilities for a great number of colored children who were without an opportunity of primary schools, rather than to maintain a school for the benefit of a few colored children who wish to attend a high school, that was not an error which a court of equity should attempt to remedy by an injunction that would compel the board to withhold all assistance from high schools maintained for white children. Cumming *v.* Richmond County Board of Education, 175 U. S. 528, 44 L. Ed. 262. See the title SCHOOLS.

86. Injunction preventing exercise of rights.—To the extent that a decree includes in its scope the enjoining defendants from combining in regard to contracts for selling their goods in their own state, it is too broad and will be modified, and limited to that portion of the agreement which is interstate in its character. Addyston Pipe, etc., Co. *v.* United States, 175 U. S. 211, 44 L. Ed. 136.

By the laws of Louisiana where there has been a judicial sale of the succession by a probate judge, a judgment creditor of the estate cannot levy an execution upon the property on the ground that the sale was fraudulent and void, and where a purchaser under a judicial sale filed a bill and obtained an injunction against the creditor to stay the execution, it was held that although it was an irregular mode of raising the question of fraud for the creditor to file an answer and set it forth, and allege the sale to be void upon that ground, yet if the court below should perpetuate the injunction upon the defendant's refusal to answer further, the injunction should be free from doubt, in leaving the creditor to pursue other property under his judgment, and also at liberty to file a cross bill. If the injunction priate relief against a tax wrongfully as- the creditor, it goes too far, and the judgment of the court will be reversed. Ford *v.* Douglas, 5 How. 143, 12 L. Ed. 89.

87. Injunction against common carrier.—New York, etc., R. Co. *v.* Interstate Commerce Commission, 200 U. S. 361, 50 L. Ed. 515. See the title INTERSTATE AND FOREIGN COMMERCE.

"The requirement of the act to regulate commerce that a court shall enforce an observance of the statute against a carrier who has been adjudged to have violated its provisions, in no way gives countenance to the assumption that congress intended that a court should issue an injunction of such a general character as would be violative of the most elementary principles of justice. The injunction which was granted in the case of In re Debs, 158 U. S. 564, 39 L. Ed. 1092, was not open to such an objection, as its terms were no broader than the conspiracy which it was the purpose of the proceeding to restrain. To accede to the doctrine relied upon would compel us, under the guise of protecting freedom of commerce, to announce a rule which would be destructive of the fundamental liberties of the citizen." New York, etc., R. Co. *v.* Interstate Commerce Commission, 200 U. S. 361, 404, 50 L. Ed. 515.

88. Abatement of nuisances.—"Thus, if the nuisance consists in the use to which a building is put, the remedy is to stop such use, not to tear down or to demolish the building itself, or to destroy property found within it." Mugler *v.* Kansas, 123 U. S. 623, 678, 31 L. Ed. 205.

89. Illegal assessment.—Norwood *v.* Baker, 172 U. S. 269, 291, 43 L. Ed. 443. See the titles SPECIAL ASSESSMENTS; TAXATION.

90. Enjoining illegal excess.—In Cummings *v.* National Bank, 101 U. S. 153, 25 L. Ed. 903, it was held that the aprossessed on the shares of a bank, is to endoes not clearly reserve these rights to

reasonable, should not undertake to enjoin the establishment of other rates.[91]

3. Alternative Relief.—It seems that a court of equity has power to ascertain and order the payment of damages by decree of injunction in the alternative.[92] It is said that a court of equity will not exercise such power where the defendant has committed a permanent injury without authority of law and without pretense of right to take and retain the property.[93] But, however true that proposition may be generally when invoked at the inception and before any work has been done, it is not applicable when the plaintiffs have waited until the work has been progressing for two years and the defendant has expended a large sum of money thereon.[94]

L. Expiration of Injunction.—The act which authorized the district judges in December, 1852, to grant writs of injunction provided, "that the same shall not, unless so ordered by the circuit court, continue longer than to the circuit court next ensuing."[95]

M. Injunction on Final Decree.—The granting of a permanent injunction is part of the final decree and abides the fate of the decree.[96] Where an injunction is issued as part of the judgment, simply a means of carrying out what the court decrees, whether an injunction prior thereto and preliminary in its nature had been granted ex parte or not is immaterial. The final injunction is part of the relief sought by the action, and when the court decides such action in favor of the plaintiff, the injunction is to follow as matter of course.[97]

VII. Dissolution and Continuance.

A. Continuance or Expiration.—Where a bill is dismissed because the complainant has an adequate remedy at law, the injunction may, in the discretion of the court, be continued till the complainant has time to institute a suit at law.[98]

Expiration as of Course.—As to expiration of injunction as a matter of

join the collection of the excess upon the payment of the amount justly due.

91. Injunction against unreasonable rates.—Courts of equity are not authorized to revise or change the body of rates imposed on a railroad by a legislature or a commission; they do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and if found so to be, to restrain its operation. Reagan *v.* Farmers' Loan, etc., Co., 154 U. S. 362, 397, 38 L. Ed. 1014, followed in Reagan *v.* Farmers' Loan, etc., Co., 154 U. S. 420, 38 L. Ed. 1031.

92. Alternative relief.—New York City *v.* Pine, 185 U. S. 93, 108, 46 L. Ed. 820. The court in this case said: "The decrees of the circuit court of appeals and the circuit court will be reversed and the case remanded to the latter court, with instructions to set aside its decree and to enter one providing for an ascertainment, in the way courts of equity are accustomed to proceed, of the damages, if any, which the plaintiffs will suffer by the construction of the dam and the appropriation of the water, and for which the defendant is legally responsible, a proposition upon which we express no opinion, and fixing a time within which the defendant will be required to pay such sum, and that upon the failure to make such payment an injunction will issue as prayed for; and, on the other hand, that upon payment a decree will be entered in favor of the defendant. If the plaintiffs shall prefer to have their damages assessed by a jury, leave may be given to dismiss the bill without prejudice to an action at law." Cited with approval in Western Union Tel. Co. *v.* Pennsylvania R. Co., 195 U. S. 540, 578, 49 L. Ed. 312. And see Osborne *v.* Missouri, etc., R. Co., 147 U. S. 248, 37 L. Ed. 155.

93. Permanent injury without pretense of right.—New York City *v.* Pine, 185 U. S. 93, 108, 46 L. Ed. 820.

94 When rule not applicable.—New York City *v.* Pine, 185 U. S. 93, 99, 46 L. Ed. 820.

95. Expiration of injunction.—Parker *v.* Circuit Court, 12 Wheat. 561, 6 L. Ed. 729.

96. Injunction on final decree.—Buffington *v.* Harvey, 95 U. S. 99, 24 L. Ed. 381.

97. Injunction follows decree as of course.—New Orleans Debenture, etc., Co. *v.* Louisiana, 180 U. S. 320, 330, 45 L. Ed. 550.

98. Continuance.—Horsburg *v.* Baker, 1 Pet. 232, 7 L. Ed. 125. In this case the

course, see ante, "Expiration of Injunction," VI, L.

As to effect of appeal upon decree granting, refusing or dissolving an injunction, see the title APPEAL AND ERROR, vol. 2, pp. 277, 278.

B. Dissolution of Injunction—1. POWER TO DISSOLVE—DISCRETION OF COURT.—It seems that a court which issues an injunction has inherent power to suspend or dissolve it, where the impropriety of the order is made to appear.[99] The dissolution of a temporary injunction, rests in the sound discretion of the court.[1]

Mandamus does not lie to compel an inferior court to dissolve an injunction.[2]

2. GROUNDS FOR DISSOLUTION.—Where the complainant is guilty of unreasonable delay in prosecuting his action or suit for the determination of his right, his preliminary injunction will be dissolved.[3] An injunction will not be dissolved because of delay in bringing the suit to a decision under it, which appears to have happened through inadvertance and mistake and not procrastination.[4]

3. DISSOLUTION ON BILL.—Where it appears from the bill that the injunction should not have issued in the first instance, the injunction will be dissolved.[5]

4. DISSOLUTION UPON COMING IN OF ANSWER.—Upon the coming in of the answer, the defendant can ask for a dissolution of the injunction upon so much of his answer as is responsive to the bill. But matter in avoidance cannot be relied upon in support of the motion to dissolve.[6] Upon a question of dissolution of an injunction, if the answer neither admits nor denies the allegations of the bill, they are to be taken as true.[7]

VIII. Modification or Suspension Pending Appeal.

The supreme court has power to modify an injunction granted by a decree below, in advance of a final hearing of an appeal on its merits, but it has deemed it advisable to rest the discretion to suspend the writ pending appeal, with the trial judge.[8]

IX. Reinstatement, Revival or Renewal.

Revival after Dissolution.—When an injunction has been dissolved, it cannot be revived except by a new exercise of judicial power, and no appeal by the dissatisfied party can of itself revive it.[9]

Reinstatement or Renewal.—If, in point of law, the injunction ceased to exist, the court could reinstate it at will.[10] The denial of several successive mo-

bill was originally for a discovery, but subsequently became a bill for relief. The relief prayed for was a forfeiture, which might have been enforced at law. The bill was remanded for dismissal but the injunction was to be continued, in the discretion of the court, till such proceeding could be instituted.

99. Inherent power to dissolve.—Barnard *v.* Gibson, 7 How. 650, 12 L. Ed. 857.

1. Dissolution rests in discretion of court.—Buffington *v.* Harvey, 95 U. S. 99, 24 L. Ed. 381. See the title APPEAL AND ERROR, vol. 1, p. 333.

2. Mandamus.—Ex parte Schwab, 98 U. S. 240, 25 L. Ed. 105, citing Ex parte Loring, 94 U. S. 418, 24 L. Ed. 165; Ex parte Flippin, 94 U. S. 348, 350, 24 L. Ed. 194.

3. Grounds for dissolution—Delay and laches.—Parker *v.* Winnipiseogee Lake Cotton, etc., Co., 2 Black 545, 17 L. Ed. 333.

4. Inadvertence and mistake.—Schermerhorn *v.* L'Espenasse, 2 Dall. 360, 1 L. Ed. 415.

5. Dissolution on bill.—Barnard *v.* Gibson, 7 How. 650, 12 L. Ed. 857.

6. Dissolution upon coming in of answer.—Young *v.* Grundy, 6 Cranch 51, 3 L. Ed. 149; Leeds *v.* Marine Ins. Co., 2 Wheat. 380, 383, 4 L. Ed. 266.

7. When allegations of bill to be taken as true.—Young *v.* Grundy, 6 Cranch 51, 3 L. Ed. 149.

8. Modification or suspension pending appeal.—See the title APPEAL AND ERROR, vol. 2, p. 278.

9. Revival after dissolution.—Knox County *v.* Harshman, 132 U. S. 14, 16, 33 L. Ed. 249. It is said: "A fortiori, the mere prosecution of an appeal cannot operate as an injunction where none has been granted." See the title APPEAL AND ERROR, vol. 2, p. 277.

10. Reinstatement.—Parker *v.* Circuit Court, 12 Wheat. 561, 564, 6 L. Ed. 729.

tions to dissolve an injunction, may, under certain circumstances be considered as equivalent to an order renewing it.[11]

X. Bond.

A. Right to Require.—The power to take bond with security as indemnity to the opposite party, and as a substitute for a deposit of money in court, has for a long time been exercised by a court of chancery.[12]

B. Necessity for.—In some jurisdictions, and this is so in the United States courts, without a bond for the payment of damages or other obligation of like effect, a party against whom an injunction wrongfully issues, can recover nothing but costs, unless he can make out a case of malicious prosecution. It is only by reason of the bond, and upon the bond, that he can recover anything.[13] While in other jurisdictions damages may be recovered for suing out an injunction without just cause, independently of a bond.[14]

C. Conditions and Penalties—1. CONDITIONS.—Where a bond was given in order to obtain an injunction to suspend proceedings, under an order of seizure and sale, and the condition was that the principal and sureties "would pay to the plaintiff, in the case of seizure and sale, all such damages as he may recover against us, in case it should be decided that the said injunction was wrongfully obtained," this bond was irregular.[15] The proper condition of an injunction

11. **Renewal.**—Parker *v.* Circuit Court, 12 Wheat. 561, 6 L. Ed. 729.

Denial of successive motions to dissolve.—"The judges acted obviously on the opinion, that the injunction still continued, and ought to continue. Two successive motions to dissolve it were overruled. The same view of the case which induced the court thus to continue the injunction, must have induced a reinstatement of it, had it been supposed to be discontinued, by the omission to make an order in it, at the term to which the subpœna was returnable. If, upon the ground of this omission, the mandamus should be awarded, it might be rendered useless by granting a new injunction. It ought to be granted, as the case, as it now appears, shows that the plaintiff in equity is entitled to relief. It must be supposed that, in the opinion of the court, he is so entitled, or the injunction would have been dissolved on motion. The continuance of the injunction is, in substance, equivalent to a renewal of it." Parker *v.* Circuit Court, 12 Wheat. 561, 562, 564, 6 L. Ed. 729.

12. **Bond—Right to require.**—Meyers *v.* Block, 120 U. S. 206, 211, 30 L. Ed. 642. See Lockhart *v.* Leeds, 195 U. S. 427, 438, 49 L. Ed. 263.

By express provision of the Revised Statutes (§ 617), proceedings of the courts of the United States in equity causes are "subject to regulation by this court, with power to modify and change such rules." Rule No. 90, promulgated under the authority thus conferred, provides as follows: "In all cases where the rules prescribed by this court or by the circuit court do not apply, the practice of the circuit court shall be regulated by the present practice of the high court of chancery in England, so far as the same may be reasonably applied consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice." "It is by the force and effect of this rule that the equity courts of the United States exercise their power with respect to the exaction of security when granting writs of injunction. Russell *v.* Farley, 105 U. S. 433, 26 L. Ed. 1060." Tullock *v.* Mulvane, 184 U. S. 497, 510, 46 L. Ed. 657.

13. **Necessity for security.**—Meyers *v.* Block, 120 U. S. 206, 211, 30 L. Ed. 642; Bein *v.* Heath, 12 How. 168, 13 L. Ed. 939.

Where no bond or undertaking has been required, the court has no power to award damages sustained by either party in consequence of the litigation, except by making such a decree in reference to the costs of the suit as it may deem equitable and just. Russell *v.* Farley, 105 U. S. 433, 437, 26 L. Ed. 1060.

14. **Damages independent of bond.**—Meyers *v.* Block, 120 U. S. 206, 211, 30 L. Ed. 642. This is so in Louisiana, 3 La. 291.

15. **Conditions.**—Bein *v.* Heath, 12 How. 168, 13 L. Ed. 939.

It conformed to the Louisiana practice, by which, if an injunction be dissolved, judgment is at once given for the debt, interest, and damages, against the principal and sureties in the injunction bond. Bein *v.* Heath, 12 How. 168, 13 L. Ed. 939.

But the equity practice in the courts of the United States is regulated by the laws of congress, and the rules of this court, made under the authority of an act of congress; and one of those rules is, that, when not otherwise directed, the practice in the high court of chancery, in England, shall be followed. According to these rules, a court of equity cannot, when it dissolves an injunction, give judg-

bond is "to answer all damages which the defendant may sustain in consequence of the injunction being granted."[16]

2. PENALTY.—It is the practice of all courts, in taking injunction bonds, to prescribe a penalty more than enough to cover all possible damages which the respondent may sustain by reason of the injunction.[17]

D. Construction of Bond.—A bond given in pursuance of a law of the United States was governed, as to its construction, not by the local law of a particular state, but by the principles of law as determined by the federal supreme court, and operative throughout the courts of the United States.[18]

E. Liability on Bond—1. IN GENERAL.—It would be against the well-established rule of the chancery court to extend the liability of the surety, by any equitable construction, beyond the terms of his contract. And, in a proceeding upon the bond, the liability of the principal obligor cannot be extended beyond that of the surety.[19]

2. JOINT AND SEVERAL OBLIGORS.—If one of two joint obligors die, the debt is extinguished against his representative, and the surviving obligor is alone chargeable.[20]

3. RAISING QUESTION OF ILLEGALITY.—Securities to an injunction bond cannot go behind the decree to raise a question of illegality as to an agreement on which it is founded.[21]

4. WHEN LIABILITY ACCRUES.—Until the contingency on which the parties agree to pay has happened, and the condition of the bond is broken, no action can be maintained upon it.[22]

F. Procedure on Bond.—Power of Chancery to Assess Damages on Dissolution.—Where no specific provision is made either in the bond, or by any statute or rule of court, and the condition of the bond is simply to pay such damages as the parties enjoined may sustain by reason of the injunction if the court

ment, at the same time, against the obligors. It merely orders the dissolution, leaving the obligee to proceed at law against the sureties, if he sustains damage from the delay occasioned by the injunction. Bein *v.* Heath, 12 How. 168, 13 L. Ed. 939. See post, "Procedure on Bond," X, F.

16. **Proper condition.**—Bein *v.* Heath, 12 How. 168, 13 L. Ed. 939; Tullock *v.* Mulvane, 184 U. S. 497, 513, 46 L. Ed. 657.

17. **Penalty.**—Brown *v.* Shannon, 20 How. 55, 58, 15 L. Ed. 826.

18. **Construction.**—Tullock *v.* Mulvane, 184 U. S. 497, 514, 46 L. Ed. 657; Cox *v.* United States, 6 Pet. 172, 8 L. Ed. 359; Duncan *v.* United States, 7 Pet. 435, 8 L. Ed. 739.

In Bein *v.* Heath, 12 How. 168, 13 L. Ed. 939, it was held that the local law should not have been applied in construing and enforcing an injunction bond given in a court of the United States. See ante, "Condition." X, C, 1.

19. **Liability — In general.**—Bein *v.* Heath, 12 How. 168, 179, 13 L. Ed. 939.

"A surety cannot be held beyond the terms or legal effect of his engagement; and when that has respect to the conduct or fidelity of the principal, or to any other matter usually contemplated as arising in the future, it is to be interpreted prospectively, and not retrospectively. But if, from the nature of the case, the subject of guaranty is a past transaction in whole or in part, and the language of the engagement, taken in its natural sense or legal effect, is broad enough to cover it, such language may properly be construed to do so." Meyers *v.* Block, 120 U. S. 206, 213, 30 L. Ed. 642. See the title PRINCIPAL AND SURETY.

20. **Joint and several obligors.**—Pickersgill *v.* Lahens, 15 Wall. 140, 143, 21 L. Ed. 119.

A general statute enacted that a party might stay, by injunction, proceedings in a suit at law on executing a bond, "with one or more sufficient sureties," conditioned, etc. A. a defendant in a case at law, being about to apply for an injunction to stay that suit, did accordingly execute a joint bond with B. as co-obligor; B. having no interest in the suit, nor deriving any benefit from the execution of the bond. Held, that there was nothing in the language of the statute which compelled the bond to be joint merely, instead of joint and several; and that being in terms joint merely, and B. being in fact but a surety, there was no right in the obligee (A. being insolvent) to pursue B.'s estate in equity; B. having died before A., and B.'s estate being so discharged at law. Pickersgill *v.* Lahens, 15 Wall. 140, 21 L. Ed. 119.

21. **Raising question of illegality.**—Oelrichs *v.* Spain, 15 Wall. 211, 21 L. Ed. 43. See the title RES ADJUDICATA.

22. **Accruing of liability.**—Bein *v.* Heath, 12 How. 168, 178, 13 L. Ed. 939.

finally decide that the party was not entitled thereto, some difference of opinion exists as to the power of the court of chancery to assess the damages, and whether the only proper method is not an action at law on the bond.[23] But whilst the court may have the power to assess the damages, yet if it has that power, it is in its discretion to exercise it, or to leave the parties to an action at law. No doubt in many cases the latter course would be the more suitable and convenient one.[24]

Recovery at Law.—An injunction bond, given one who held the legal title to a fund, will enable him at law to recover to the full extent damages touching the entire fund; and a court of equity will follow the law in its proper distribution.[25]

Equity jurisdiction will be sustained when time, expense, and multiplicity of suits will be saved, as also when the case contains an element of trust.[26]

G. Damages—1. In General.—When the condition of the bond declares that the obligors will pay such damages as the obligee may recover against them, it must mean that they will pay such damages as he may recover by a suit on the bond itself.[27]

23. Power of chancery to assess damages on dissolution.—In Russell *v.* Farley, 105 U. S. 433, 445, 26 L. Ed. 1060, the court refused to decide the question, but say: "Upon a careful examination we are not satisfied that they (the cases) furnish any good authority for disaffirming the power of the court having possession of the case, in the absence of any statute to the contrary, to have the damages assessed under its own direction. This is the ordinary course in the court of chancery in England, by whose practice the courts of the United States are governed, and seems to be in accordance with sound principle. The imposition of terms and conditions upon the parties before the court is an incident to its jurisdiction over the case; and having possession of the principal case, it is fitting that it should have power to dispose of the incidents arising therein, and thus do complete justice, and put an end to further litigation."

"In the case of Bein *v.* Heath (12 How. 168, 179, 13 L. Ed. 939), Mr. Chief Justice Taney made this remark: 'A court proceeding according to the rules of equity cannot give a judgment against the obligors in an injunction bond when it dissolves the injunction. It merely orders the dissolution, leaving the obligee to proceed at law against the sureties, if he sustains damage from the delay occasioned by the injunction.' In that case, an injunction bond had been given to stay proceedings on an executory process in the circuit court for the district of Louisiana, and, in an action on the bond, that court had given judgment against the sureties, not merely for the damages arising from the delay caused by the injunction, but for the whole debt, interest and costs, in accordance with the law of Louisiana, where injunction bonds are binding to that extent, and where judgment is usually given against the sureties as parties to the cause, on dismissing the injunction, similar to the proceeding against stipulators in admiralty. This court held that the circuit courts sitting in equity could not take such a bond, or give it such effect, and reversed the judgment. The remark that the bond must be prosecuted at law was a mere passing remark; it was so prosecuted in that case; but from the great experience of the chief justice, it undoubtedly expressed the prevailing practice with regard to ordinary injunction bonds given under the Maryland statute in cases of injunctions to stay proceedings at law. Whether the remark can be understood as having a wider scope is doubtful." Russell *v.* Farley, 105 U. S. 433, 437, 26 L. Ed. 1060.

24. Equity will leave parties to action at law.—Russell *v.* Farley, 105 U. S. 433, 436, 26 L. Ed. 1060.

25. Recovery at law.—Oelrichs *v.* Spain, 15 Wall. 211, 21 L. Ed. 43.

26. Equity jurisdiction.—Oelrichs *v.* Spain, 15 Wall. 211, 21 L. Ed. 43.

Where proceeding in equity necessary to settle rights of parties.—"If the injunction bonds were sued upon at law, and judgments recovered, a proceeding in equity would still be necessary to settle the respective rights of the several obligees to the proceeds. The direct proceeding in equity will save time, expense, and a multiplicity of suits, and settle finally the rights of all concerned in one litigation. Besides, there is an element of trust in the case, which, wherever it exists, always confers jurisdiction in equity." Oelrichs *v.* Spain, 15 Wall. 211, 228, 21 L. Ed. 43.

27. Damages—In general.—Meyers *v.* Block, 120 U. S. 206, 208, 211, 30 L. Ed. 642.

Where it was contended that the court erred in holding that the bond, construed with the order requiring it, bound the obligors for damages sustained before it was given, the court said: "The order

2. Items Covered by Bond.—Counsel fees are not recoverable on injunction bonds.[28]

XI. Remedies for Wrongful Injunction.

A. Assessment of Damages on Bond.—See ante, "Procedure on Bond," X, F.

B. Action on Bond.—See ante, "Procedure on Bond," X, F.

C. Remedies Other than on Bond.—See ante, "Necessity for," X, B.

XII. Violation of Injunction.

A. In General.—1. What Constitutes.—As to what constitutes contempt, see the title Contempt, vol. 4, p. 535.

2. Power to Punish.—In order that a court may compel obedience to its orders, it must have the right to inquire whether there has been any disobedience thereof. To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency.[29]

3. Not an Execution of Criminal Laws.—A court, enforcing obedience to its orders by proceedings for contempt, is not executing the criminal laws of the land, but only securing to suitors the rights which it has adjudged them entitled to.[30]

was 'that the injunction be maintained on the complaining creditors giving bond and security to save the parties harmless from the effects of said injunction.' The last words clearly mean all the effects of the injunction. The condition of the bond was, to pay 'all such damages as he (the obligee) may recover against us in case it should be decided that the said writ of injunction was wrongfully issued.' It seems plain to us that all the damages arising from the wrongful issue of the injunctions were intended to be covered by the bond as well as by the order; in other words, that the bond was intended and understood as a compliance with the requirements of the order. That is the natural and obvious meaning of its language when the two are read together; and the parties signing the bond must be presumed to have been cognizant of the order under which it was given." Meyers *v.* Block, 120 U. S. 206, 213, 30 L. Ed. 642.

28. Items covered—Counsel's fees.—Oelrichs *v.* Spain, 15 Wall. 211, 21 L. Ed. 43.

"There was error committed by the Kansas City court of appeals in affirming the action of the trial court in allowing, in the judgment by it rendered, attorneys' fees as an element of damage upon the injunction bond contrary to the controlling rule on this subject enunciated by this court, by which the courts of the United States are governed in requiring the execution of such instruments." Tullock *v.* Mulvane, 184 U. S. 497, 46 L. Ed. 657; Missouri, etc., R. Co. *v.* Elliott, 184 U. S. 530, 539, 46 L. Ed. 673.

29. Power to punish.—In re Debs, 158 U. S. 564, 595, 39 L. Ed. 1092; In re Chiles, 22 Wall. 157, 159, 22 L. Ed. 819; Spalding *v.* New York, 4 How. 21, 11 L. Ed. 858.

The process of injunction having been issued and served on the defendants, the circuit court has authority to inquire whether its orders have been disobeyed, and when it finds that they have been, then to proceed under § 725, Rev. Stat., which grants power "to punish, by fine or imprisonment, * * * disobedience, * * * by any party * * * or other person, to any lawful writ, process, order, rule, decree or command," and enter the order of punishment complained of. In re Debs, 158 U. S. 564, 600, 39 L. Ed. 1092.

The courts of California under the statute of that state hold that "when a party charged with contempt in disobeying a legal order willfully conceals himself to avoid service of an order to show cause why he should not be adjudged guilty of contempt, the court is not powerless to proceed, or to prevent the continued disregard of its lawful order," but may order, as justice shall require, after due service of an order to show cause, on the attorneys of the party proceeded against. Eureka Lake, etc., Canal Co. *v.* Yuba County, 116 U. S. 410, 416, 29 L. Ed. 671.

30. Not an execution of criminal laws.—In re Debs, 158 U. S. 564, 596, 39 L. Ed. 1092.

The proceeding by injunction is of a civil character, and is enforced by proceedings in contempt; such proceedings are not in execution of the criminal laws of the land; the penalty for a violation of injunction is no substitute for and no defense to a prosecution for any criminal offenses committed in the course of such violation. In re Debs, 158 U. S. 564, 599, 39 L. Ed. 1092. See, however, the discussions in Ex parte Kearney, 7 Wheat. 38, 5 L. Ed. 391; New Orleans *v.* Steam-

B. Knowledge or Notice.—To render a person amenable to an injunction it is neither necessary that he should have been a party to the suit in which the injunction was issued, nor to have been actually served with a copy of it, so long as he appears to have had actual notice.[31]

C. Defense, Justification or Excuse—1. In General.—It is no defense to a contempt of court for violation of an injunction that the injunction was improvidently or erroneously allowed or irregularly served.[32]

2. Statutory Authority for Performance of Act.—Where an act of congress is passed authorizing defendants to do the thing which an injunction, issued as a matter of course on the face of the bill, to which there was no opposition, forbid them doing, they were excused from contempt.[33]

3. Violation of Void Writ.—Where the restraining order, in the nature of an injunction, was issued without authority, the adjudication that the defendants were guilty of a contempt in disregarding that order is void, and their detention by the marshal is without authority of law, and they are entitled to be discharged.[34]

D. Procedure and Punishment—1. In General.—The summary power to commit and punish for contempts tending to obstruct or degrade the administration of justice is inherent in courts of chancery and other superior courts, as essential to the execution of their powers to the maintenance of their authority, and is part of the law of the land, within the meaning of Magna Charta and of the twelfth article of our Declaration of Rights.[35]

Trial by Jury.—Proceedings according to the common law for contempt of court have never been subject to the right of trial by jury; surely it cannot be supposed that the question of contempt of the authority of a court of the United States, committed by a disobedience of its orders, is triable, of right, by a jury.[36]

2. Service of Order to Show Cause.—Ordinarily a corporation has in such a case a right to service of an order to show cause upon some officer or agent, but if its officers or agents keep themselves out of the way for the express purpose of avoiding such a service, it cannot justly complain if service on its attorney is made the equivalent of that which its agents by their wrongful acts have made impossible.[37]

ship Co., 20 Wall. 387, 22 L. Ed. 354. And see the title CONTEMPT, vol. 4, p. 531.

31. Knowledge or notice.—In re Lennon, 166 U. S. 548, 554, 41 L. Ed. 1110. See the title NOTICE.

32. Defense.—In re Coy, 127 U. S. 731, 32 L. Ed. 274; Elliott *v.* Peirsol, 1 Pet. 328, 340, 7 L. Ed. 164; Ex parte Watkins, 3 Pet. 193, 7 L. Ed. 650.

33. Statutory authority.—A motion was made, on behalf of the plaintiff, for attachments against the president of a bridge company and others, for disobedience of an injunction issued in vacation, on the 27th of June, 1854. Inasmuch as the act of congress of June 27, 1852, afforded full authority to the defendants to reconstruct the bridge, and the decree directing its alteration or abatement could not, therefore, be carried into execution after the enactment of this law, and inasmuch as the granting of an attachment for the disobedience is a question resting in the discretion of the court, the court held that, under all the circumstances of the case, the motion should be denied. Pennsylvania *v.* Wheeling, etc., Bridge Co., 18 How. 421, 436, 15 L. Ed. 435.

34. Violation of void writ.—In re Sawyer, 124 U. S. 200, 221, 31 L. Ed. 402; Ex parte Rowland, 104 U. S. 604, 26 L. Ed. 861; Ex parte Fisk, 113 U. S. 713, 28 L. Ed. 1117; In re Ayers, 123 U. S. 443, 507, 31 L. Ed. 216; Worden *v.* Searls, 121 U. S. 14, 30 L. Ed. 853; Pennsylvania *v.* Wheeling, etc., Bridge Co., 18 How. 421, 15 L. Ed. 435; Riggs *v.* Johnson County, 6 Wall. 166, 18 L. Ed. 768; United States *v.* Council, 6 Wall. 514, 518, 18 L. Ed. 933.

35. Procedure in general.—In re Debs, 158 U. S. 564, 596, 39 L. Ed. 1092. See also, United States *v.* Hudson, 7 Cranch 32, 3 L. Ed. 259; Anderson *v.* Dunn, 6 Wheat. 204, 5 L. Ed. 242; Ex parte Robinson, 19 Wall. 505, 22 L. Ed. 205; Spalding *v.* New York, 4 How. 21, 11 L. Ed. 858; Mugler *v.* Kansas, 123 U. S. 623, 672, 31 L. Ed. 205; Ex parte Terry, 128 U. S. 289, 32 L. Ed. 405; Eilenbecker *v.* Plymouth County, 134 U. S. 31, 36, 33 L. Ed. 801. See the title CONTEMPT, vol. 4, p. 531.

36. Trial by jury.—Eilenbecker *v.* Plymouth County, 134 U. S. 31, 36, 33 L. Ed. 801; Interstate Commerce Commission *v.* Brimson, 154 U. S. 447, 488, 38 L. Ed. 1047. See the title JURY.

37. Order to show cause.—Eureka Lake, etc., Canal Co. *v.* Yuba County, 116 U.

3. PUNISHMENT—OBJECT OF.—The exercise of the power to punish for contempt "has a two-fold aspect, namely; first, the proper punishment of the guilty party for his disrespect to the court or its order, and the second, to compel his performance of some act or duty required of him by the court, which he refuses to perform."[38] In punishing the guilty party for his disrespect to the court and its order, the court must judge for itself the nature and extent of the punishment with reference to the gravity of the offense.[39] But where the object is to compel him to perform some act or duty required of him by the court, which he refuses to perform, he should be fined and imprisoned until he performs the act or shows that it is not within his power to do it.[40]

INJURIES TO ANIMALS.—See the title ANIMALS, vol. 1, p. 322.

INLAND.—See note 1.

Inland Bill.—See the title BILLS, NOTES AND CHECKS, vol. 2, p. 257.

INNOCENCE.—As to presumption of innocence, see the title CRIMINAL LAW, vol. 5, p. 43.

INNOCENT PURCHASERS.—See the titles BILLS, NOTES AND CHECKS, vol. 3, p. 296; CHATTEL MORTGAGES, vol. 3, p. 717; SALES; VENDOR AND PURCHASER.

S. 410, 418, 29 L. Ed. 671. See the title SUMMONS AND PROCESS.

To deny the court the power of calling on a concealed corporation through its chosen attorney of record in a suit to appear and answer to a charge of contempt for disobeying the orders of the court duly entered in that suit, would be to deny it the power of vindicating its authority and enforcing obedience to its lawful commands against a party personally subjected to its jurisdiction. Although the proceeding may be criminal in its nature, it grows out of the suit to which the person proceeded against is a party and actually represented by an attorney. Eureka Lake, etc., Canal Co. *v.* Yuba County, 116 U. S. 410, 417, 29 L. Ed. 671.

38. **Punishment—Object of.**—Eureka Lake, etc., Canal Co. *v.* Yuba County, 116 U. S. 410, 417, 29 L. Ed. 671; In re Chiles, 22 Wall. 157, 168, 22 L. Ed. 819. See the title CONTEMPT, vol. 4, p. 531.

39. **Extent and nature.**—In re Chiles, 22 Wall. 157, 22 L. Ed. 819, citing and construing Rev. Stat., U. S., § 725.

40. **Fine and imprisonment.**—In re Chiles, 22 Wall. 157, 22 L. Ed. 819. See Spalding *v.* New York, 4 How. 21, 11 L. Ed. 858.

1. **Inland.**—"Sir William Blackstone, in his Commentaries (vol. 2, p. 467), distinguishes foreign from inland bills, by defining the former as bills drawn by a merchant residing abroad, upon his correspondent in England, or vice versa; and the latter, as those drawn by one person on another, when both drawer and drawee reside within the same kingdom." Buckner *v.* Finley, 2 Pet. 586, 590, 7 L. Ed. 528.

Inland navigation.—Navigation of the Great Lakes is not inland navigation within the meaning of the act of congress of March 3, 1851, entitled "an act to limit the liability of shipowners and for other purposes." Moore *v.* American Transp. Co., 24 How. 1, 16 L. Ed. 674.

Navigation over Long Island Sound is not inland navigation. Providence, etc., Steamship Co. *v.* Hill Mfg. Co., 109 U. S. 578, 2 L. Ed. 1038. See the title SHIPS AND SHIPPING.

Inland waters.—The seventh section of March 12, 1863 declares: "That no property seized or taken upon any of the inland waters of the United States by the naval forces thereof, shall be regarded as maritime prize." In a case involving the construction of that statute the court said: "The term inland as here used was evidently intended to apply to all waters of the United States upon which a naval force could go, other than bays and harbors on the seacoast. In most instances property of the enemy on them could be taken, if at all, by an armed force without the aid of vessels of war. These were seldom required on such waters, except when batteries or fortified places near them were to be attacked in conjunction with the army. As observed by the court in The Cotton Plant (10 Wall. 577, 19 L. Ed. 983), congress probably anticipated, in view of the state of the war when the act was passed, that most of the captures on the rivers would be made by the army. James River is an inland water in any sense which can be given to the term inland. It lies within the body of counties in Virginia. For miles below Richmond, and below the obstructions mentioned, a person can see from one of its banks what is done on the other. Rivers across which one can thus see are inland waters. It matters not that the tide may ebb and flow for miles above their mouths; that fact does not make them any part of the sea or bay into which they may flow, though they may be arms of both." Porter *v.* United States, 106 U. S. 607, 612, 27 L. Ed. 286.

INNS AND INNKEEPERS.

CROSS REFERENCES.

As to equal enjoyment of the accommodations and privileges of inns, see the title CIVIL RIGHTS, vol. 3, p. 834.

Definitions.—The word "inn" has a technical legal signification. A mere private boarding house is not an inn, nor is its keeper subject to the responsibilities, or entitled to the privileges, of a common innkeeper. "To constitute one an innkeeper, within the legal force of that term, he must keep a house of entertainment or lodging for all travelers or wayfarers who might choose to accept the same, being of good character or conduct."[1]

Liability of Innkeeper for Lost or Stolen Goods.—If a guest applies for a room in an inn, for a purpose of business distinct from his accommodation as a guest, the particular responsibility imposed by the common law does not extend to goods lost or stolen from that room.[2]

Where Statute Requires Written Notice to Be Given Innkeeper.—Where a state statute requires that the innkeeper must be given written notice, in regard to his guest's property, in order to hold him responsible for loss, such notice must be given.[3]

Where Loss Is Result of Guest's Negligence.—A hotel keeper is not liable for a loss occasioned by the personal negligence of the guest himself.[4]

1. Civil Rights Cases, 109 U. S. 3, 40, 27 L. Ed. 835, Harlan, J., in dissenting opinion.

2. **Liability of innkeeper for lost or stolen goods.**—Fisher *v.* Kelsey, 121 U. S. 383, 385, 30 L. Ed. 930.

"Although Fisher was received by the defendants into their hotel, as a guest, with knowledge that his trunks contained articles having no connection with his comfort or convenience as a mere traveler or wayfarer, but which, at his request, were to be placed on exhibition or for sale, in a room assigned to him for that purpose, they would not, under the doctrines of the common law, be held to the same degree of care and responsibility, in respect to the safety of such articles, as is required in reference to baggage or other personal property carried by travelers. He was entitled, as a traveler, to a room for lodging, but he could not, of right, demand to be supplied with apartments in which to conduct his business as a salesman or merchant. The defendants being the owners or managers of the hotel, were at liberty to permit the use by Fisher of one of their rooms for such business purposes, but they would not, for that reason and without other circumstances, be held to have had his goods in their custody, or to have undertaken to well and safely keep them as constituting part of the property which he had with him in his capacity as guest." Fisher *v.* Kelsey, 121 U. S. 383, 385, 30 L. Ed. 930.

3. **Where statute requires written notice to be given innkeeper.**—Fisher *v.* Kelsey, 121 U. S. 383, 30 L. Ed. 930.

A statute of Missouri provided that "No innkeeper in this state shall be liable * * * for the loss of any merchandise for sale or sample belonging to a guest, unless the guest shall have given written notice of having such merchandise for sale or sample in his possession after entering the inn." Held, that under this statute, the innkeeper is not liable for the loss of the guest's property where he was not given written notice, even though he knows that such guest has articles for sale and lets one of his rooms for the purpose of allowing him to display the articles for sale. Fisher *v.* Kelsey, 121 U. S. 383, 384, 30 L. Ed. 930.

4. **Where loss is result of guest's negligence.**—Elcox *v.* Hill, 98 U. S. 218, 25 L. Ed. 103.

A. brought an action against the keeper of a public hotel in Illinois to recover the value of a stock of jewelry, worth $6,300, which he had in his traveling bags at the hotel while he was there as a guest. One of them was not locked, and both were left by him overnight in the coat room of the hotel, he taking from the boy in charge a check therefor. The next morning, A. discovered that the jewelry had been taken from the bag which was unlocked. The other bag could not be found. A. had informed no one connected with the hotel of their contents, although there was a safe there for the custody of such property, and notice of the fact given, as required by the statute of that state. Held, that in the absence of proof that the loss was occasioned by the hand or through the

INNUENDO.—See the title LIBEL AND SLANDER.

IN NULLO EST ERRATUM.—See the title EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL, vol. 6, p. 10.

IN PAIS.—As to estoppel in pais, see the title ESTOPPEL, vol. 5, p. 937.

IN PARI DELICTO.—See the title ILLEGAL CONTRACTS, ante, p. 737.

INQUEST OF OFFICE.—See the title ESCHEAT, vol. 5, p. 897. "Blackstone defines an inquest of office as 'an inquiry made by the king's officer, his sheriff, coroner or escheator, virtute officii, or by writ to them sent for that purpose, or by commissioners specially appointed, concerning any matter that entitles the king to the possession of lands or tenements, goods or chattels. This is done by a jury of no determinate number; being either twelve, or less, or more. * * * These inquests of office were devised by law, as an authentic means to give the king his right by solemn matter of record; without which he, in general, can neither take nor part from anything.' "[1]

INQUESTS AND INQUIRIES.

CROSS REFERENCES.

See the titles APPEAL AND ERROR, vol. 1, p. 33; BILLS, NOTES AND CHECKS, vol. 3, p. 257; DEBT, THE ACTION OF, vol. 5, p. 205; EXECUTIONS, ante, p. 84; INTEREST; JURY.

As to estate for life being sold without an inquest upon its value, see the title EXECUTIONS, ante, p. 92. In an action of debt upon a judgment in Louisiana, see the title INTEREST. See, also, the title DEBT, THE ACTION OF, vol. 5, p. 211. As to whether an inquest of office is a "trial" within the sixth section of the Pennsylvania bill of rights, see the title JURY. As to when assessment of damages may be made by court, see the title JURY. As to production of promissory notes, see the title BILLS, NOTES AND CHECKS, vol. 3, p. 362. As to appeal to the supreme court from an order of the circuit court of the District of Columbia, quashing an inquisition in the nature of a writ ad quod damnum, see the title APPEAL AND ERROR, vol. 1, p. 504. As to order quashing inquisition in condemnation proceeding, see the title APPEAL AND ERROR, vol. 1, p. 942. As to jurisdiction of the circuit court of the District of Columbia, upon motion to quash an inquisition, see the title COURTS, vol. 4, pp. 1164, 1165.

Distinction between Trial by Jury and Inquest of Office.—The distinction between trial by jury and inquest of office is so familiar to every mind as to leave no sufficient ground for extending to the latter that inviolability which could have been intended only for the former. The one appertains to a mere remedy for the recovery of money, which may be altered at any time, without any danger to private security; the other is justly regarded, in every state in the Union, as among the most inestimable privileges of a freeman.[1a]

Writ of Inquiry Regular Mode of Procedure.—The court cannot assess damages; a writ of inquiry is the regular mode of procedure.[2]

Presumption of Sufficient Grounds for an Inquest.—The verdicts of

negligence of the hotel keeper, or by a clerk or servant employed by him in the hotel, A. was not entitled to recover. Elcox *v.* Hill, 98 U. S. 218, 25 L. Ed. 103.

In Illinois where a safe for the keeping of money, jewels, and the like is provided by the hotel keeper, and the notice given as required by the statute, a loser failing to take the benefit of the protection thus furnished him must bear his own loss. To this rule the statute makes one exception. If the loss occurs "by the hand or through the negligence of the landlord, or by a clerk or servant employed by him in such hotel or inn," the liability remains. Elcox *v.* Hill, 98 U. S. 218, 224, 25 L. Ed. 103.

1. Atlantic, etc., R. Co. *v.* Mingus, 165 U. S. 413, 431, 41 L. Ed. 770.

1a. **Trial by jury and inquest of office distinguished.**—Livingston *v.* Moore, 7 Pet. 469, 552, 8 L. Ed. 751.

2. **Writ of inquiry regular mode of procedure.**—Armstrong *v.* Carson, 2 Dall. 302, 1 L. Ed. 391.

As to assessment of damages by the court, see the title JURY.

juries of inquiry will not be set aside upon frivolous grounds. Nor will the effect of any particular piece of evidence upon the minds of the jury be examined; for, unless it appears, that there was no proper evidence before them, it must be presumed that they had sufficient grounds for their inquest.[3]

Right to Offer Evidence to Jury of Inquiry.—"After a judgment by default, the defendant has a right to offer his evidence to the jury of inquiry, to combat the plaintiff's proofs; and * * * where the sheriff refuses to hear the evidence on both sides, the court will direct a new writ of inquiry."[4]

Insufficient Reason for Setting Aside Inquisition.—"The refusal to admit the defendant in a foreign attachment to produce his evidence before the jury of inquiry, is not a sufficient reason for setting aside the inquisition."[5]

Inquisition Quashed for Irregularity.—This is treated in the footnotes.[6]

IN REM.—See PROCEEDINGS IN REM AND IN PERSONAM. See the titles ADMIRALTY, vol. 1, p. 130; DIVORCE AND ALIMONY, vol. 5, p. 425; FOREIGN JUDGMENTS, RECORDS AND JUDICIAL PROCEEDINGS, ante, p. 335.

3. **Presumption of sufficient grounds for inquest.**—Leib *v.* Bolton, 1 Dall. 82, 1 L. Ed. 46.

4. **Right to offer evidence to jury of inquiry.**—McClenachan *v.* McCarty, 1 Dall. 375, 377, 1 L. Ed. 183.

5. McClenachan *v.* McCarty, 1 Dall. 375, 377, 1 L. Ed. 183.

6. **Inquisition quashed for irregularity.**—In an early Pennsylvania case, it was held that an inquisition being quashed for irregularity became a nullity, and leaves the case just as if none had been taken. Weaver *v.* Lawrence, 1 Dall. 379, 1 L. Ed. 185.

INSANITY.

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CROSS REFERENCES.

See the titles DRUNKENNESS, vol. 5, p. 496; REASONABLE DOUBT; UNDUE INFLUENCE.

As to expert and opinion evidence upon the question of insanity, see the title EXPERT AND OPINION EVIDENCE, ante, p. 200. As to bringing habeas corpus by one committed after acquittal for homicide because of insanity, see the title HABEAS CORPUS, ante, p. 610. As to effect of insanity upon insurance policy providing that the policy will be void in case insured kills himself, see the title INSURANCE. As to insanity as an excuse for failure to comply with a condition of an insurance policy, see the title INSURANCE. As to insane persons as witnesses, see the title WITNESSES.

I. Academic Discussion.

A. In General.—Insanity is a disease of the mind.[1] When a brain is dis-

1. **In general.**—Connecticut Mut. Life Ins. Co. *v.* Lathrop, 111 U. S. 612, 620, 28 L. Ed. 536.

Instruction defining insanity.—In Davis *v.* United States, 165 U. S. 373, 378, 41 L. Ed. 750, the court held that the trial court committed no prejudicial error in instructing the jury upon insanity as follows: "The term 'insanity' as used in this defense means such a perverted and deranged condition of the mental and moral faculties as to render a person incapable of distinguishing between right and wrong, or unconscious at the time of the nature of the act he is committing, or where, though conscious of it and able to distinguish be-

eased or injured, its functions are impaired or destroyed.[2]

B. Causes of.—The causes of insanity are as varied as the varying circumstances of man.[3]

C. Forms of.—Insanity assumes as many and various forms as there are shades of difference in the human character.[4]

Emotional Insanity or Mania Transitoria.—"What is called emotional insanity, or mania transitoria, is the case of one in the possession of his ordinary reasoning faculties, who allows his passions to convert him into a temporary maniac, and while in this condition, commits the act in question."[5]

Impulsive Insanity.—Impulsive insanity is that by which a person is irresistibly impelled to the commission of an act.[6]

D. Protection of.—Legislative.—The legislature has the power of parens patriæ in reference to insane persons.[7]

Courts.—A lunatic is under the protection of courts of law as well as courts of equity.[8]

II. The Inquisition.

A. Notice.—In lunacy proceedings one is not denied due process of law by being refused an opportunity to defend, when, in fact, actual notice was served upon him of the proceedings, and when, if he had chosen to do so, he was at liberty to make such defense as he deemed advisable.[9]

B. Jury Trial.—In Georgia, if, after a regular conviction and sentence, a suggestion of a then existing insanity is made, it is not necessary, in order to constitute due process of law, that the question so presented should be tried by a jury in a judicial proceeding surrounded by all the safeguards and requirements of a common-law jury trial, and even although by the state law full and adequate administrative and quasi judicial process is created for the purpose of investigating the suggestion.[10]

tween right and wrong and know that the act is wrong, yet his will, by which I mean the governing power of his mind, has been otherwise than voluntarily so completely destroyed that his actions are not subject to it, but are beyond his control."

"This was substantially what had been held by this court in previous cases. Life Ins. Co. *v.* Terry, 15 Wall. 580, 21 L. Ed. 236; Bigelow *v.* Berkshire Life Ins. Co., 93 U. S. 284, 23 L. Ed. 918; Insurance Co. *v.* Rodel, 95 U. S. 232, 24 L. Ed. 433; Manhattan Life Ins. Co. *v.* Broughton, 109 U. S. 121, 27 L. Ed. 878; Connecticut Mut. Life Ins. Co. *v.* Lathrop, 111 U. S. 612, 28 L. Ed. 536; Accident Ins. Co. *v.* Crandal, 120 U. S. 527, 30 L. Ed. 740." Ritter *v.* Mutual Life Ins. Co., 169 U. S. 139, 42 L. Ed. 693.

2. **"Mental" condition.**—"When we speak of the 'mental' condition of a person, we refer to his senses, his perceptions, his consciousness, his ideas. If his mental condition is perfect, his will, his memory, his understanding are perfect, and connected with a healthy bodily organization. If these do not concur, his mental condition is diseased or defective." Life Ins. Co. *v.* Terry, 15 Wall. 580, 588, 21 L. Ed. 236.

"The intellect and intelligence of man are manifested through the organs of the brain, and from these, consciousness, will, memory, judgment, thought, volition, and passion, the functions of the mind, do proceed. Without the brain these cannot exist. With an injured or diseased brain, their powers are impaired or diminished." Life Ins. Co. *v.* Terry, 15 Wall. 580, 589, 21 L. Ed. 236.

3. **Causes of insanity.**—Life Ins. Co. *v.* Terry, 15 Wall. 580, 588, 21 L. Ed. 236.

4. **Forms of.**—Connecticut Mut. Life Ins. Co. *v.* Lathrop, 111 U. S. 612, 620, 28 L. Ed. 536.

5. **Emotional insanity or mania transitoria.**—Life Ins. Co. *v.* Terry, 15 Wall. 580, 584, 21 L. E. 236.

6. **Impulsive insanity.**—Life Ins. Co. *v.* Terry, 15 Wall. 580, 590, 21 L. Ed. 236.

7. **Legislative protection.**—Mormon Church *v.* United States, 136 U. S. 1, 58, 34 L. Ed. 481.

8. **Protection of courts.**—Dexter *v.* Hall, 15 Wall. 9, 21, 21 L. Ed. 73.

9. **Notice.**—Simon *v.* Craft, 182 U. S. 427, 436, 45 L. Ed. 1165. See the title DUE PROCESS OF LAW, vol. 5, p. 664.

10. **Jury trial.**—Nobles *v.* Georgia, 168 U. S. 398, 405, 42 L. Ed. 515. See the title DUE PROCESS OF LAW, vol. 5, p. 659.

"It being demonstrated by reason and authority that at common law a suggestion made after verdict and sentence of insanity did not give rise to an absolute right on the part of the convict to have such issue tried before the court and to a jury, but addressed itself to the discretion of the judge, it follows that the manner in which such question should be determined was purely a matter of legislative regulation. It was, therefore, a subject

III. Guardian.

A. Of Infant of Unsound Mind.—An ordinary guardian is all the custodian of either his person or estate that is required for an infant of unsound mind. It is only after he becomes of age, and the power and functions of the guardian cease, that a committee to take charge of his person and estate is needed.[11]

B. Sale of Real Property.—As against the lunatic, a license to sell his real property, under the statute of Wisconsin, is not invalid for insufficient publication of notice of the hearing, the same being required only for the protection of other parties interested in the estate. So far as the rights of the lunatic are concerned, the jurisdiction of the court attaches upon filing the guardian's petition setting forth the facts required by the statute.[12]

IV. Testamentary Capacity.

This subject is treated under its specific title.[13]

V. Civil Relations.

A. Capacity to Contract—1. In General.—Both minds must meet in a contract; and if one is so weak, unsound, and diseased that the party is incapable of understanding the nature and quality of the act to be performed, or its consequences, he is incompetent to assent to the terms and conditions of the contract, whether that state of his mind was produced by mental or physical disease, and whether it resulted from ordinary sickness, or from accident, or from debauchery, or from habitual and protracted intemperance.[14]

2. Partial Insanity or Weak Understanding.—Partial insanity[15] or mere weakness of understanding is not of itself any objection to the validity of a

within the control of the state of Georgia. Because we have confined our opinion exclusively to the question before us, that is, the right arising on a suggestion of insanity after sentence, we must not be understood as implying that a different rule would prevail after verdict and up to and including sentence, or as passing upon the question whether, under the fourteenth amendment, a state is without power to relegate the decision of a question of insanity, when raised before conviction, to such apt and special tribunal as the law might deem best." Nobles *v.* Georgia, 168 U. S. 398, 408, 42 L. Ed. 515.

11. Guardian.—Francklyn *v.* Sprague, 121 U. S. 215, 229, 30 L. Ed. 936.

12. Sale of real property.—Mohr *v.* Manierre, 101 U. S. 417, 424, 25 L. Ed. 1052.

13. Testamentary capacity.—See the title TESTAMENTARY CAPACITY.

14. Capacity to contract in general.—Johnson *v.* Harmon, 94 U. S. 371, 373, 24 L. Ed. 271. See the title CONTRACTS, vol. 4, p. 552.

"The fundamental idea of a contract is that it requires the assent of two minds. But a lunatic, or a person non compos mentis, has nothing which the law recognizes as a mind, and it would seem, therefore, upon principle, that he cannot make a contract which may have any efficacy as such." Dexter *v.* Hall, 15 Wall. 9, 20, 21 L. Ed. 73.

"Why, then, should one who has obtained from him that which purports to be a contract be permitted to hold him bound by its provisions, even until he may choose to avoid it? If this may be, efficacy is given to a form to which there has been no mental assent. A contract is made without any agreement of minds. And as it plainly requires the possession and exercise of reason quite as much to avoid a contract as to make it, the contract of a person without mind has the same effect as it would have had he been in full possession of ordinary understanding. While he continues insane he cannot avoid it; and if, therefore, it is operative until avoided, the law affords a lunatic no protection against himself." Dexter *v.* Hall, 15 Wall. 9, 21, 21 L. Ed. 73.

Confirmed insanity which deprives a person of mental capacity to distinguish between the right and wrong, in respect to the act in question, renders the person irresponsible for such an act, and disqualifies him to enter into a contract or to execute a valid instrument to convey real or personal estate. Johnson *v.* Harmon, 94 U. S. 371, 372, 24 L. Ed. 271, concurring opinion of Clifford, J.

"When it appears that a contractor or grantor has not strength of mind and reason sufficient to understand the nature and consequences of his act in making a contract or in executing a deed, the instrument may be avoided, on the ground of the mental incapacity of the party to contract, or to execute the conveyance." Concurring opinion of Clifford, J., in Johnson *v.* Harmon, 94 U. S. 371, 373, 24 L. Ed. 271.

15. Partial insanity.—"The existence of partial insanity does not unfit individuals

contract, if the capacity remains to see things in their true relations, and to form correct conclusions in respect to the subject matter of the contract. Men of such understanding may make valid contracts.[16] But the weakness of intellect may be sufficient ground for setting aside a contract when made upon a nominal or grossly inadequate consideration.[17]

3. Effect of Contracts Made While Insane—a. *Deed.*—"The deed of an insane person is not absolutely void; it is only voidable; that is, it may be confirmed or set aside."[18]

b. *Power of Attorney.*—"A power of attorney executed by an insane person, or one of unsound mind, is absolutely void."[19]

4. Avoidance of Contract.—Under the civil code of Louisiana in order to have a contract declared null and void for the insanity of one of the parties, before such party is interdicted, it is necessary to allege in the petition that he was incapable in law of making a binding contract, and that the people at the time who were acquainted with him and conversed with him knew of his condition,

so affected for the transaction of business on all subjects, nor from giving a perfectly accurate and lucid statement of what they have seen or heard." District of Columbia *v.* Armes, 107 U. S. 519, 521, 27 L. Ed. 618.

One may be insane to the extent of being dangerous if set at liberty, and yet may have sufficient mental capacity to make a will, to enter into contracts, transact business and be a witness. Keely *v.* Moore, 196 U. S. 38, 46, 49 L. Ed. 379.

"The books are full of cases where persons showing mental derangement on some subjects evince a high degree of intelligence and wisdom on others." District of Columbia *v.* Armes, 107 U. S. 519, 521, 27 L. Ed. 618.

16. Concurring opinion of Clifford, J., in Johnson *v.* Harmon, 94 U. S. 371, 372, 24 L. Ed. 271.

"Imbecility of mind is not of itself sufficient to set aside a contract, when there is not an essential privation of the reasoning faculties or an incapacity of understanding and acting with discretion in the ordinary affairs of life. Weakness of understanding may be a material circumstance in every case where the charge is that one of the contracting parties has taken undue advantage of the other, or has been guilty of unfair practice or imposition." Johnson *v.* Harmon, 94 U. S. 371, 379, 24 L. Ed. 271.

It was held in Dent *v.* Ferguson, 132 U. S. 50, 58, 33 L. Ed. 242, that the evidence failed to show any imbecility, dotage or loss of mental capacity on the part of F. in 1869, when the contract was made. About fifteen witnesses produced by the complainants were questioned as to the character and condition of his mind, three, and perhaps four, of whom, speak of him as being weak, ignorant and childish; but the general tenor of the testimony of the others, who had any opinions to express, was directly the reverse. The combined effect of this testimony, taken as a whole, putting out of view the evidence on behalf of the defendants, leaves on the mind a decided impression that F., though to a certain extent illiterate, was a man of good, sound sense, of large experience in business and capable of transacting his own affairs.

17. "Extreme weakness of intellect, even when not amounting to insanity, in the person executing a conveyance, may be sufficient ground for setting it aside when made upon a nominal or grossly inadequate consideration." Conley *v.* Nailor, 118 U. S. 127, 133, 30 L. Ed. 112, citing Harding *v.* Handy, 11 Wheat. 103, 6 L. Ed. 429, and Allore *v.* Jewell, 94 U. S. 506, 24 L. Ed. 260.

"Whenever there is great weakness of mind in a person executing a conveyance of land, arising from age, sickness, or any other cause, though not amounting to absolute disqualification, and the consideration given for the property is grossly inadequate, a court of equity will, upon proper and seasonable application of the injured party, or his representative or heirs, interfere and set the conveyance aside." Griffith *v.* Godey, 113 U. S. 89, 95, 28 L. Ed. 934; Allore *v.* Jewell, 94 U. S. 506, 24 L. Ed. 260.

When a person, from infirmity and mental weakness, is likely to be easily influenced by others, transactions entered into by such person without independent advice will be set aside, if there is any unfairness in them. The principle upon which courts act in such cases, applied to a conveyance of land obtained from a woman advanced in years, of doubtful sanity, living entirely by herself, without friends to take care of her, and confined to her house by sickness. Allore *v.* Jewell, 94 U. S. 506, 24 L. Ed. 260.

18. Deed.—Luhrs *v.* Hancock, 181 U. S. 567, 574, 45 L. Ed. 1005. But see Dexter *v.* Hall, 15 Wall. 9, 21 L. Ed. 73, where the court, after an elaborate discussion of the early authorities, comes to the conclusion that the deed of an insane person is absolutely void.

19. Power of attorney.—Dexter *v.* Hall, 15 Wall. 9, 26, 21 L. Ed. 73. Compare, Luhrs *v.* Hancock, 181 U. S. 567, 572, 45 L. Ed. 1005.

and that the party contracting with him knew of his incapacity.[20]

5. Conclusiveness of Verdict as to Sanity.—The verdict of a jury as to the sanity of the grantor at the time of executing a conveyance, is not conclusive, the court being competent to determine for itself the degree of weakness, or of imposition, which will induce it to set aside the instrument.[21]

B. Statute of Limitations.—See the title Limitation of Actions and Adverse Possession.

VI. Criminal Responsibility of Insane Persons.

A. In General.—A lunatic or a person non compos mentis, is not amenable to the criminal laws, because he is incapable of discriminating between that which is right and that which is wrong.[22] The government does not hold him responsible for acts injurious to itself.[23]

B. Instructions.—A charge to the jury is correct which states in substance that if defendant knew the nature and quality of his act when he committed a homicide, and that it was wrong and a violation of the law of the land, for which he would be punished, that he was responsible for the act he committed.[24]

20. Avoidance of contract.—Stockmeyer *v.* Tobin, 139 U. S. 176, 187, 35 L. Ed. 123.

21. Conclusiveness of verdict as to sanity.—Harding *v.* Handy, 11 Wheat. 103, 6 L. Ed. 429.

22. Criminal responsibility in general.—Dexter *v.* Hall, 15 Wall. 9, 20, 21 L. Ed. 73. See, generally, the title CRIMINAL LAW, vol. 5, p. 43.

Confirmed insanity which deprives a person of mental capacity to distinguish between the right and wrong, in respect to the act in question, renders the person irresponsible for such an act, though criminal. Clifford, J., in Johnson *v.* Harmon, 94 U. S. 371, 372, 24 L. Ed. 271.

"One who takes human life cannot be said to be actuated by malice aforethought, or to have deliberately intended to take life, or to have 'a wicked, depraved, and malignant heart,' or a heart 'regardless of society duty and fatally bent on mischief,' unless at the time he had sufficient mind to comprehend the criminality or the right and wrong of such an act. Although the killing of one human being by another human being with a deadly weapon is presumed to be malicious until the contrary appears, yet, 'in order to constitute a crime, a person must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers are either so deficient that he has no will, no conscience, or controlling mental power, or if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts.'" Davis *v.* United States, 160 U. S. 469, 485, 40 L. Ed. 499.

It is of the very essence of the heinous crime of murder that it be committed by a person of "sound memory and discretion." Davis *v.* United States, 160 U. S. 469, 484, 40 L. Ed. 499.

"The crime of murder necessarily involves the possession by the accused of such mental capacity as will render him criminally responsible for his acts." Davis *v.* United States, 160 U. S. 469, 485, 40 L. Ed. 499.

23. Not held responsible by government.—Dexter *v.* Hall, 15 Wall. 9, 20, 21 L. Ed. 73.

24. Instructions.—Hotema *v.* United States, 186 U. S. 413, 420, 46 L. Ed. 1225. See ante, "In General," I, A.

In Hotema *v.* United States, 186 U. S. 413, 421, 46 L. Ed. 1225, one accused of homicide defended on the ground of insanity because he thought the person he killed was a witch, and the trial court instructed that if he believed in witches and his right to kill them were the product of a diseased brain, he was irresponsible, and if the jury had a reasonable doubt on that question, it should acquit. If his belief were not the product of an insane delusion but simply an erroneous conclusion of a sane mind, he was responsible. The supreme court said: "The court, by the portions of the charge above adverted to, directed the attention of the jury to the distinction between a mere erroneous opinion and an insane delusion, the product of a diseased mind or brain. The subject is somewhat difficult and the line of distinction not always easily drawn, but it exists, and we think that in this case the condition of mind which would render the defendant irresponsible was sufficiently and properly indicated by the court in its charge. It assumed that defendant might have formed an erroneous opinion regarding witches and witchcraft, and yet might not have been insane within the legal definition, and therefore, although possessing such erroneous ideas and acting on them, he might still be responsible criminally for his actions. And on the other hand, if his opinion on the subject were the result of insane delusions, and he acted on them, he was irresponsible, and responsibility must be proved beyond a reasonable doubt. We

C. Evidence.—Burden of Proof.—The burden of proving that the accused belongs to a class capable of committing crime rests upon those who affirm that he has committed the crime for which he is indicted. That burden is not fully discharged, nor is there any legal right to take the life of the accused, until guilt is made to appear from all the evidence in the case.[25] The accused is entitled to an acquittal of the specific crime charged, if, upon all the evidence, there is reasonable doubt whether he was capable in law of committing crime.[26]

think this was all the defendant could require."

An instruction to the jury that they should acquit the defendant of the charge of murder, if they found he was not able to know that the act of taking life was wrongful, and was not able to comprehend and understand the consequences of such act, is not erroneous where they were also instructed that, to enable them to find him guilty, they must find that, at the time he committed the homicide, he knew and understood that it was wrong to do so, and was able to comprehend and understand the consequences of the act. Queenan *v.* Oklahoma, 190 U. S. 548, 550, 47 L. Ed. 1175.

25. Burden of proof.—Davis *v.* United States, 160 U. S. 469, 485, 40 L. Ed. 499. See, generally, the title PRESUMPTIONS AND BURDEN OF PROOF.

"The law presumes that every one charged with crime is sane, and thus supplies in the first instance the required proof of capacity to commit crime. It authorizes the jury to assume at the outset that the accused is criminally responsible for his acts. But that is not a conclusive presumption, which the law upon grounds of public policy forbids to be overthrown or impaired by opposing proof. It is a disputable, or, as it is often designated, a rebuttal presumption. * * * Strictly speaking, the burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial and applies to every element necessary to constitute the crime. Giving to the prosecution, where the defense is insanity, the benefit in the way of proof of the presumption in favor of sanity, the vital question from the time a plea of not guilty is entered until the return of the verdict, is whether upon all the evidence, by whatever side adduced, guilt is established beyond reasonable doubt." Davis *v.* United States, 160 U. S. 469, 486, 487, 40 L. Ed. 499. See, also, the title REASONABLE DOUBT.

Evidence.—See, generally, the titles EVIDENCE, vol. 5, p. 1004; EXPERT AND OPINION EVIDENCE, ante, p. 200.

26. Davis *v.* United States, 160 U. S. 469, 484, 40 L. Ed. 499.

In a prosecution for murder, the defense being insanity, and the fact of the killing with a deadly weapon being clearly established, it is the duty of the jury to acquit where the evidence is equally balanced on the issue as to the sanity of the accused at the time of the killing. Davis *v.* United States. 160 U. S. 469, 484, 40 L. Ed. 499.

Upon a trial for murder if it appears that the deceased was killed by the accused under circumstances which—nothing else appearing—made a case of murder, the jury cannot properly return a verdict of guilty of the offense charged if upon the whole evidence from whatever side it comes they have a reasonable doubt whether at the time of killing the accused was mentally competent to distinguish between right and wrong or to understand the nature of the act he was committing. Davis *v.* United States, 160 U. S. 469, 478, 40 L. Ed. 499.

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